

SENATE BILL NO. 190

INTRODUCED BY D. HARVEY, W. GALT, W. CURDY, B. GILLESPIE, K. WALSH, R. MINER, J. COHENOUR

A BILL FOR AN ACT ENTITLED: "AN ACT ALLOWING WATER RIGHT HOLDERS TO CONSENT TO WAIVE ADVERSE EFFECTS ANALYSIS IN WATER RIGHT PERMIT OR CHANGE APPLICATIONS; AND AMENDING SECTIONS 85-2-311, 85-2-320, 85-2-360, 85-2-402, 85-2-407, AND 85-2-408, MCA."

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

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

**"85-2-311. Criteria for issuance of permit.** (1) A permit may be issued under this part prior to the adjudication of existing water rights in a source of supply. In a permit proceeding under this part, there is no presumption that an applicant for a permit cannot meet the statutory criteria of this section prior to the adjudication of existing water rights pursuant to this chapter. In making a determination under this section, the department may not alter the terms and conditions of an existing water right or an issued certificate, permit, or state water reservation. Except as provided in subsections (3) and (4), the department shall issue a permit if the applicant proves by a preponderance of evidence that the following criteria are met:

(a) (i) there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; and

(ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:

(A) identification of physical water availability;

(B) identification of existing legal demands of water rights on the source of supply throughout the area of potential impact by the proposed use; and

(C) analysis of the evidence on physical water availability and the existing legal demands of water rights, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands of water rights on the supply of water.

1 (b) the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a  
2 state water reservation will not be adversely affected. In this subsection (1)(b), adverse effect must be  
3 determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that  
4 the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied. An  
5 applicant is not required to prove a lack of adverse effect for any water right identified in a written consent to  
6 approval filed pursuant to subsection (9) in connection with a permit application.

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

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

10 (e) the applicant has a possessory interest or the written consent of the person with the  
11 possessory interest in the property where the water is to be put to beneficial use, or if the proposed use has a  
12 point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written  
13 special use authorization required by federal law to occupy, use, or traverse national forest system lands for the  
14 purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the  
15 permit;

16 (f) the water quality of a prior appropriator will not be adversely affected;

17 (g) the proposed use will be substantially in accordance with the classification of water set for the  
18 source of supply pursuant to 75-5-301(1); and

19 (h) the ability of a discharge permit holder to satisfy effluent limitations of a permit issued in  
20 accordance with Title 75, chapter 5, part 4, will not be adversely affected.

21 (2) The applicant is required to prove that the criteria in subsections (1)(f) through (1)(h) have been  
22 met only if a valid objection is filed. A valid objection must contain substantial credible information establishing  
23 to the satisfaction of the department that the criteria in subsection (1)(f), (1)(g), or (1)(h), as applicable, may not  
24 be met. For the criteria set forth in subsection (1)(g), only the department of environmental quality or a local  
25 water quality district established under Title 7, chapter 13, part 45, may file a valid objection.

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

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

2 (b) the proposed appropriation is a reasonable use. A finding must be based on a consideration of  
3 the following:

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

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

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

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

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

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

16 (4) (a) The state of Montana has long recognized the importance of conserving its public waters  
17 and the necessity to maintain adequate water supplies for the state's water requirements, including  
18 requirements for federal non-Indian and Indian reserved water rights held by the United States for federal  
19 reserved lands and in trust for the various Indian tribes within the state's boundaries. Although the state of  
20 Montana also recognizes that, under appropriate conditions, the out-of-state transportation and use of its public  
21 waters are not in conflict with the public welfare of its citizens or the conservation of its waters, the criteria in  
22 this subsection (4) must be met before out-of-state use may occur.

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

25 (i) depending on the volume of water diverted or consumed, the applicable criteria and  
26 procedures of subsection (1) or (3) are met;

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

28 (iii) the proposed out-of-state use of water is not otherwise detrimental to the public welfare of the

1 citizens of Montana.

2 (c) In determining whether the applicant has proved by clear and convincing evidence that the  
3 requirements of subsections (4)(b)(ii) and (4)(b)(iii) are met, the department shall consider the following factors:

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

5 (ii) whether the water that is the subject of the application could feasibly be transported to alleviate  
6 water shortages within the state of Montana;

7 (iii) the supply and sources of water available to the applicant in the state where the applicant  
8 intends to use the water; and

9 (iv) the existing legal demands of water rights placed on the applicant's supply in the state where  
10 the applicant intends to use the water.

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

14 (5) Subject to 85-2-360, to meet the preponderance of evidence standard in this section, the  
15 applicant, in addition to other evidence demonstrating that the criteria of subsection (1) have been met, shall  
16 submit hydrologic or other evidence, including but not limited to water supply data, field reports, and other  
17 information developed by the applicant, the department, the U.S. geological survey, or the U.S. natural  
18 resources conservation service and other specific field studies.

19 (6) An appropriation, diversion, impoundment, use, restraint, or attempted appropriation, diversion,  
20 impoundment, use, or restraint contrary to the provisions of this section is invalid. An officer, agent, agency, or  
21 employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized appropriation,  
22 diversion, impoundment, use, or other restraint. A person or corporation may not, directly or indirectly,  
23 personally or through an agent, officer, or employee, attempt to appropriate, divert, impound, use, or otherwise  
24 restrain or control waters within the boundaries of this state except in accordance with this section.

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

26 (8) For an application for ground water in a basin closed pursuant to 85-2-319, 85-2-321, 85-2-  
27 330, 85-2-336, 85-2-341, 85-2-343, or 85-2-344, the applicant shall comply with the provisions of 85-2-360 in  
28 addition to the requirements of this section.

1           (9) The department may not conduct an adverse effects analysis on a water right if the water right  
2 holder files a written consent to approval of an application for a permit."

3

4           **Section 2.** Section 85-2-320, MCA, is amended to read:

5           **"85-2-320. Change in appropriation right authorization for instream flow -- United States**

6 **department of agriculture, forest service.** (1) (a) The department shall accept and process an application by  
7 the United States department of agriculture, forest service for a change in appropriation right under the  
8 provisions of 85-2-402 and this section to protect, maintain, or enhance streamflows to benefit the fishery or  
9 other resources on national forest system lands.

10           (b) To change an appropriation right, the United States department of agriculture, forest service  
11 must own the appropriation right that it seeks to change to an instream flow right, the diversion or withdrawal  
12 that is to be changed to instream flow must be located within or immediately adjacent to the exterior boundaries  
13 of national forest system lands on the date provided in 85-20-1401, Article IV.B.2., and the stream reach in  
14 which the streamflow is to be protected, maintained, or enhanced must be located within or immediately  
15 adjacent to the exterior boundaries of national forest system lands as of the date provided in 85-20-1401,  
16 Article IV.B.2. The application for a change in appropriation right must:

17           (i) include specific information on the length and location of the stream reach in which the  
18 streamflow is to be protected, maintained, or enhanced; and

19           (ii) provide a detailed streamflow measuring plan that describes the point where and the manner in  
20 which the streamflow must be measured.

21           (2) In addition to the requirements of 85-2-402, when applying for a change in appropriation right  
22 pursuant to this section, the United States department of agriculture, forest service, shall prove by a  
23 preponderance of the evidence that:

24           (a) the change in appropriation right authorization to protect, maintain, or enhance streamflows to  
25 benefit the fishery or other resources, as measured at a specific point, will not adversely affect the water rights  
26 of other persons, except for a water right identified in a written consent to approval filed pursuant to 85-2-402 in  
27 connection with the change in appropriation right; and

28           (b) the amount of water for the proposed instream flow use is needed to protect, maintain, or

1 enhance streamflows to benefit the fishery or other resources.

2 (3) The proposed method of measurement of the water to protect, maintain, or enhance  
3 streamflows to benefit the fishery or other resources must be approved by the department before a change in  
4 appropriation right may be approved.

5 (4) The department is not responsible for costs associated with installing devices or providing  
6 personnel to measure streamflows according to the measurement plan submitted under this section.

7 (5) If an appropriation right is changed pursuant to this section, the priority of the appropriation  
8 right remains the same as the appropriation right that was changed.

9 (6) A change in appropriation right authorization under this section does not create a right of  
10 access across private property or allow any infringement of private property rights.

11 (7) The maximum quantity of water that may be subject to a change in appropriation right  
12 authorization to protect, maintain, or enhance streamflows to benefit the fishery or other resources is the  
13 amount historically diverted. However, only the amount historically consumed or a smaller amount if specified  
14 by the department in the change in appropriation right authorization may be used to protect, maintain, or  
15 enhance streamflows to benefit the fishery or other resources below the existing point of diversion.

16 (8) The department may modify or revoke the change in appropriation right up to 10 years after it is  
17 approved if an appropriator with a priority of appropriation that is earlier than the change in appropriation right  
18 that was granted submits new evidence that was not available at the time the change in appropriation right was  
19 approved that proves by a preponderance of evidence that the appropriator's water right is adversely affected,  
20 unless the prior appropriator has filed a written consent to approval pursuant to 85-2-402 in connection with the  
21 change."

22

23 **Section 3.** Section 85-2-360, MCA, is amended to read:

24 **"85-2-360. Ground water appropriation right in closed basins.** (1) An application for a ground  
25 water appropriation right in a basin closed pursuant to 85-2-319, 85-2-321, 85-2-330, 85-2-336, 85-2-341, 85-2-  
26 343, or 85-2-344 must be accompanied by a hydrogeologic report conducted pursuant to 85-2-361, an aquifer  
27 recharge or mitigation plan if required, and an application for a change in appropriation right or rights if  
28 necessary.

1 (2) The department shall use the hydrogeologic report to determine if the proposed appropriation  
2 right could result in a net depletion of surface water.

3 (3) (a) For the purposes of 85-2-360 through 85-2-362, the prediction of net depletion does not  
4 mean that an adverse effect on a prior appropriator will occur or if an adverse effect does occur that the entire  
5 amount of net depletion is the cause of the adverse effect. A determination of whether or not there is an  
6 adverse effect on a prior appropriator as the result of a new appropriation right is a determination that must be  
7 made by the department based on the rate, location, and timing of the net depletion that causes the adverse  
8 effect relative to the historic beneficial use of the appropriation right that may be adversely affected.

9 (b) The department may not consider an adverse effect caused by the grant of an application  
10 pursuant to this section on any water right listed on a written consent to approval filed pursuant to 85-2-311.

11 ~~(b)~~(c) The department may grant a permit for a new appropriation only if the applicant proves by a  
12 preponderance of the evidence that the adverse effect would be offset through an aquifer recharge or mitigation  
13 plan that meets the requirements of 85-2-362."  
14

15 **Section 4.** Section 85-2-402, MCA, is amended to read:

16 **"85-2-402. Changes in appropriation rights -- definition.** (1) (a) The right to make a change in  
17 appropriation right subject to the provisions of this section in an existing water right, a permit, or a state water  
18 reservation is recognized and confirmed. In a change in appropriation right proceeding under this section, there  
19 is no presumption that an applicant for a change in appropriation right cannot establish lack of adverse effect  
20 prior to the adjudication of other rights in the source of supply pursuant to this chapter. Except as provided in  
21 85-2-410 and subsections (15) and (16) of this section, an appropriator may not make a change in an  
22 appropriation right without the approval of the department or, if applicable, of the legislature. An applicant shall  
23 submit a correct and complete application.

24 (b) If an application involves a change in a point of diversion, conveyance, or place of use located  
25 on national forest system lands, the application is not correct and complete until the applicant has submitted  
26 proof to the department of any written special use authorization required by federal law for the proposed  
27 change in occupancy, use, or traverse of national forest system lands for the purpose of diversion,  
28 impoundment, storage, transportation, withdrawal, use, or distribution of water.

1           (c) The applicant is not required to prove a lack of adverse effect for any water right identified on a  
2 written consent to approval filed pursuant to subsection (19) in connection with an application.

3           (2) Except as provided in subsections (4) through (6), (15), (16), and (18) and, if applicable,  
4 subject to ~~subsection (17)~~ subsections (1)(c) and (17), the department shall approve a change in appropriation  
5 right if the appropriator proves by a preponderance of evidence that the following criteria are met:

6           (a) The proposed change in appropriation right will not adversely affect the use of the existing  
7 water rights of other persons or other perfected or planned uses or developments for which a permit or  
8 certificate has been issued or for which a state water reservation has been issued under part 3. For purposes of  
9 this section, adverse effects analysis is specific to the proposed change in appropriation right and a  
10 determination that water is not legally available pursuant to 85-2-311 does not necessarily mean that an  
11 adverse effect will occur.

12           (b) The proposed means of diversion, construction, and operation of the appropriation works are  
13 adequate, except for:

- 14           (i) a change in appropriation right for instream flow pursuant to 85-2-320 or 85-2-436;  
15           (ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or  
16           (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.

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

18           (d) The applicant has a possessory interest, or the written consent of the person with the  
19 possessory interest, in the property where the water is to be put to beneficial use or, if the proposed change  
20 involves a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any  
21 written special use authorization required by federal law to occupy, use, or traverse national forest system lands  
22 for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water.

23 This subsection (2)(d) does not apply to:

- 24           (i) a change in appropriation right for instream flow pursuant to 85-2-320 or 85-2-436;  
25           (ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or  
26           (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.

27           (e) If the change in appropriation right involves salvaged water, the proposed water-saving  
28 methods will salvage at least the amount of water asserted by the applicant.

1 (f) The water quality of an appropriator will not be adversely affected.

2 (g) The ability of a discharge permit holder to satisfy effluent limitations of a permit issued in  
3 accordance with Title 75, chapter 5, part 4, will not be adversely affected.

4 (3) The applicant is required to prove that the criteria in subsections (2)(f) and (2)(g) have been  
5 met only if a valid objection is filed. A valid objection must contain substantial credible information establishing  
6 to the satisfaction of the department that the criteria in subsection (2)(f) or (2)(g), as applicable, may not be met.

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

10 (a) the criteria in subsection (2) are met; and

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

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

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

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

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

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

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

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

26 (a) the applicant proves by clear and convincing evidence and the department finds that the  
27 criteria in subsections (2) and (4) are met; and

28 (b) for the withdrawal and transportation of appropriated water for out-of-state use, the department

1 then petitions the legislature and the legislature affirms the decision of the department after one or more public  
2 hearings.

3 (6) The state of Montana has long recognized the importance of conserving its public waters and  
4 the necessity to maintain adequate water supplies for the state's water requirements, including requirements for  
5 federal non-Indian and Indian reserved water rights held by the United States for federal reserved lands and in  
6 trust for the various Indian tribes within the state's boundaries. Although the state of Montana also recognizes  
7 that, under appropriate conditions, the out-of-state transportation and use of its public waters are not in conflict  
8 with the public welfare of its citizens or the conservation of its waters, the following criteria must be met before  
9 out-of-state use may occur:

10 (a) The department and, if applicable, the legislature may not approve a change in appropriation  
11 right for the withdrawal and transportation of appropriated water for use outside the state unless the  
12 appropriator proves by clear and convincing evidence and, if applicable, the legislature approves after one or  
13 more public hearings that:

14 (i) depending on the volume of water diverted or consumed, the applicable criteria and  
15 procedures of subsection (2) or (4) are met;

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

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

19 (b) In determining whether the appropriator has proved by clear and convincing evidence that the  
20 requirements of subsections (6)(a)(ii) and (6)(a)(iii) will be met, the department and, if applicable, the legislature  
21 shall consider the following factors:

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

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

25 (iii) the supply and sources of water available to the applicant in the state where the applicant  
26 intends to use the water; and

27 (iv) the existing legal demands of water rights placed on the applicant's supply in the state where  
28 the applicant intends to use the water.

1 (c) When applying for a change in appropriation right to withdraw and transport water for use  
2 outside the state, the applicant shall submit to and comply with the laws of the state of Montana governing the  
3 appropriation and use of water.

4 (7) For any application for a change in appropriation right involving 4,000 or more acre-feet of  
5 water a year and 5.5 or more cubic feet per second of water, the department shall give notice of the proposed  
6 change in appropriation right in accordance with 85-2-307 and shall hold one or more hearings in accordance  
7 with 85-2-309 prior to its approval or denial of the proposed change in appropriation right. The department shall  
8 provide notice and may hold one or more hearings upon any other proposed change in appropriation right if it  
9 determines that the proposed change in appropriation right might adversely affect the rights of other persons,  
10 except for any water right for which a written consent to approval has been filed pursuant to subsection (19) in  
11 connection with the application.

12 (8) The department or the legislature, if applicable, may approve a change in appropriation right  
13 subject to the terms, conditions, restrictions, and limitations that it considers necessary to satisfy the criteria of  
14 this section, including limitations on the time for completion of the change in appropriation right. The department  
15 may extend time limits specified in the change in appropriation right approval under the applicable criteria and  
16 procedures of 85-2-312.

17 (9) Upon actual application of water to the proposed beneficial use within the time allowed, the  
18 appropriator shall notify the department that the appropriation has been completed. The notification must  
19 contain a certified statement by a person with experience in the design, construction, or operation of  
20 appropriation works describing how the appropriation was completed.

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

26 (11) The original of a change in appropriation right approval issued by the department must be sent  
27 to the applicant, and a duplicate must be kept in the office of the department in Helena.

28 (12) A person holding an issued permit or change in appropriation right approval that has not been

1 perfected may change the place of diversion, place of use, purpose of use, or place of storage by filing an  
2 application for change in appropriation right pursuant to this section.

3 (13) A change in appropriation right contrary to the provisions of this section is invalid. An officer,  
4 agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized  
5 change in appropriation right. A person or corporation may not, directly or indirectly, personally or through an  
6 agent, officer, or employee, attempt to change an appropriation right except in accordance with this section.

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

8 (15) (a) An appropriator may change an appropriation right for a replacement well without the prior  
9 approval of the department if:

10 (i) the appropriation right is for:

11 (A) ground water outside the boundaries of a controlled ground water area; or

12 (B) ground water inside the boundaries of a controlled ground water area and if the provisions of  
13 the rule establishing the controlled ground water area do not restrict a change in appropriation right;

14 (ii) the change in appropriation right is to replace an existing well and the existing well will no  
15 longer be used;

16 (iii) the rate and volume of the appropriation from the replacement well are equal to or less than  
17 that of the well being replaced and do not exceed:

18 (A) 450 gallons a minute for a municipal well; or

19 (B) 35 gallons a minute and 10 acre-feet a year for all other wells;

20 (iv) the water from the replacement well is appropriated from the same aquifer as the water  
21 appropriated from the well being replaced; and

22 (v) a timely, correct and complete notice of replacement well is submitted to the department as  
23 provided in subsection (15)(b).

24 (b) (i) After completion of a replacement well and appropriation of ground water for a beneficial  
25 use, the appropriator shall file a notice of replacement well with the department on a form provided by the  
26 department.

27 (ii) (A) The department shall review the notice of replacement well and shall issue an authorization  
28 of a change in an appropriation right if all of the criteria in subsection (15)(a) have been met and the notice is

1 correct and complete.

2 (B) If the replacement well is located on national forest system lands, the notice is not correct and  
3 complete under this subsection (15) until the appropriator has submitted proof of any written special use  
4 authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of  
5 constructing the replacement well.

6 (iii) The department may not issue an authorization of a change in appropriation right until a correct  
7 and complete notice of replacement well has been filed with the department. The department shall return a  
8 defective notice to the appropriator, along with a description of defects in the notice. The appropriator shall  
9 refile a corrected and completed notice of replacement well within 30 days of notification of defects or within a  
10 further time as the department may allow, not to exceed 6 months.

11 (iv) If a notice of replacement well is not completed within the time allowed, the appropriator shall:

12 (A) cease appropriation of water from the replacement well pending approval by the department;  
13 and

14 (B) submit an application for a change in appropriation right to the department pursuant to  
15 subsections (1) through (3).

16 (c) The provisions of this subsection (15) do not apply to an appropriation right abandoned under  
17 85-2-404.

18 (d) For each well that is replaced under this subsection (15), the appropriator shall follow the well  
19 abandonment procedures, standards, and rules adopted by the board of water well contractors pursuant to 37-  
20 43-202.

21 (e) The provisions of subsections (2), (3), (9), and (10) do not apply to a change in appropriation  
22 right that meets the requirements of subsection (15)(a).

23 (16) (a) An appropriator may change an appropriation right without the prior approval of the  
24 department for the purpose of constructing a redundant water supply well in a public water supply system, as  
25 defined in 75-6-102, if the redundant water supply well:

26 (i) withdraws water from the same ground water source as the original well; and

27 (ii) is required by a state or federal agency.

28 (b) The priority date of the redundant water supply well is the same as the priority date of the

1 original well. Only one well may be used at one time.

2 (c) Within 60 days of completion of a redundant water supply well, the appropriator shall file a  
3 notice of construction of the well with the department on a form provided by the department. The department  
4 may return a defective notice of construction to the appropriator for correction and completion. If the redundant  
5 water supply well is located on national forest system lands, the notice is not correct and complete under this  
6 subsection until the appropriator has submitted proof of any written special use authorization required by  
7 federal law to occupy, use, or traverse national forest system lands for the purpose of constructing the  
8 redundant water supply well.

9 (d) The provisions of subsections (9) and (10) do not apply to a change in appropriation right that  
10 meets the requirements of this subsection (16).

11 (17) The department shall accept and process an application for a change in appropriation right for  
12 instream flow to protect, maintain, or enhance streamflows pursuant to 85-2-320 and this section and to benefit  
13 the fishery resource pursuant to 85-2-436 and this section.

14 (18) (a) An appropriator may change an appropriation right for a replacement point of diversion  
15 without the prior approval of the department if:

16 (i) the existing point of diversion is inoperable due to natural causes or deteriorated infrastructure;

17 (ii) there are no other changes to the water right;

18 (iii) the capacity of the diversion is not increased;

19 (iv) there are no points of diversion or intervening water rights between the existing point of  
20 diversion and the replacement point of diversion or the appropriator obtains written waivers from all intervening  
21 water right holders;

22 (v) the replacement point of diversion is on the same surface water source and is located as close  
23 as reasonably practicable to the existing point of diversion;

24 (vi) the replacement point of diversion replaces an existing point of diversion and the existing point  
25 of diversion will no longer be used;

26 (vii) the appropriator can show that the existing point of diversion has been used in the 10 years  
27 prior to the notice for change of appropriation right for a replacement point of diversion;

28 (viii) the appropriator can show the change will not increase access to water availability, change the

1 method of irrigation, if applicable, or increase the amount of water diverted, used, or consumed; and

2 (ix) a timely, correct and complete notice of replacement point of diversion is submitted to the  
3 department as provided in subsection (18)(b).

4 (b) (i) Within 60 days after completion of a replacement point of diversion, the appropriator shall file  
5 a notice of replacement point of diversion with the department on a form provided by the department.

6 (ii) The department shall review the notice of replacement point of diversion and shall issue an  
7 authorization of a change in an appropriation right if all of the criteria in subsection (18)(a) have been met and  
8 the notice is correct and complete. The department may inspect the diversion to confirm that the criteria under  
9 subsection (18)(a) have been met. If the department issues an authorization of a change in an appropriation  
10 right for a replacement point of diversion, the department shall prepare a notice of the authorization and provide  
11 notice of the authorization in the same manner as required in 85-2-307 for applications.

12 (iii) The department may not issue an authorization of a change in appropriation right until a correct  
13 and complete notice of replacement point of diversion has been filed with the department. The department shall  
14 return a defective notice to the appropriator, along with a description of defects in the notice. The appropriator  
15 shall refile a corrected and completed notice of replacement point of diversion within 30 days of notification of  
16 defects or within a further time as the department may allow, not to exceed 6 months.

17 (iv) If a notice of replacement point of diversion is not filed and completed within the time allowed or  
18 if the department determines the criteria under subsection (18)(a) have not been met, the appropriator shall:

19 (A) cease appropriation of water from the replacement point of diversion pending approval by the  
20 department; and

21 (B) submit an application for a change in appropriation right to the department pursuant to  
22 subsections (1) through (3).

23 (c) The provisions of this subsection (18) do not apply to an appropriation right abandoned under  
24 85-2-404.

25 (d) The provisions of subsections (2), (3), (9), and (10) do not apply to a change in appropriation  
26 right that meets the requirements of subsection (18)(a).

27 (e) (i) An appropriator may file a correct and complete objection with the department alleging that  
28 the change in appropriation right for a replacement point of diversion will adversely affect the use of the existing

1 water rights of other persons or other perfected or planned uses or developments for which a permit or  
2 certificate has been issued or for which a state water reservation has been issued under Title 85, chapter 2,  
3 part 3.

4 (ii) If the department determines after a contested case hearing between the appropriator and the  
5 objector that the rights of other appropriators have been or will be adversely affected, it may revoke the change  
6 or make the change subject to terms, conditions, restrictions, or limitations necessary to protect the rights of  
7 other appropriators.

8 (iii) The burden of proof to prove lack of adverse effect at the hearing is on the appropriator  
9 changing the point of diversion.

10 (19) The department may not conduct an adverse effects analysis on a water right if the water right  
11 holder files a written consent to approval of an application for a change in appropriation right."

12

13 **Section 5.** Section 85-2-407, MCA, is amended to read:

14 **"85-2-407. Temporary changes in appropriation right.** (1) Except as provided in 85-2-410, an  
15 appropriator may not make a temporary change in appropriation right for the appropriator's use or another's use  
16 except with department approval in accordance with 85-2-402 and this section.

17 (2) Except as provided in subsection (9), a temporary change in appropriation right may be  
18 approved for a period not to exceed 10 years. A temporary change in appropriation right may be approved for  
19 consecutive or intermittent use.

20 (3) An authorization for a temporary change in appropriation right may be renewed by the  
21 department for a period not to exceed 10 years. There is no limitation on the number of renewals the  
22 appropriator may seek. Renewal of an authorization for a temporary change in appropriation right requires  
23 notice to the department by the appropriator. Upon receipt of the notice, the department shall notify other  
24 appropriators potentially affected by the renewal and shall allow 90 days for submission of new evidence of  
25 adverse effects to other water rights. A temporary change authorization may not be renewed by the department  
26 if it determines that the right of an appropriator, ~~other than an appropriator described in subsection (7), is~~  
27 adversely affected, except for an appropriator described in subsection (7) or a water right identified in a written  
28 consent to approval filed pursuant to 85-2-402 in connection with a temporary change.

1           (4)     (a) During the term of the original temporary change authorization, the department may modify  
2 or revoke its authorization for a temporary change if it determines that the right of an appropriator, ~~other than an~~  
3 ~~appropriator described in subsection (7)~~, is adversely affected, except for an appropriator described in  
4 subsection (7) or a water right identified in a written consent to approval filed pursuant to 85-2-402 in  
5 connection with a temporary change.

6           (b)     An appropriator, other than an appropriator identified in subsection (7), may object:

7           (i)     during the initial temporary change application process;

8           (ii)    during the temporary change renewal process; and

9           (iii)   once during the term of the temporary change permit.

10          (5)     The priority of appropriation for a temporary change in appropriation right is the same as the  
11 priority of appropriation of the right that is temporarily changed.

12          (6)     Neither a change in appropriation right nor any other authorization right is required for reversion  
13 of the appropriation right to the permanent purpose, place of use, point of diversion, or place of storage after  
14 the period for which a temporary change was authorized expires.

15          (7)     A person issued a water use permit with a priority of appropriation after the date of filing of an  
16 application for a temporary change in appropriation right under this section may not object to the exercise of the  
17 temporary change according to its terms, the renewal of the authorization for the temporary change, or the  
18 reversion of the appropriation right to its permanent purpose, place of use, point of diversion, or place of  
19 storage. Persons described in this subsection must be notified of the existence of any temporary change  
20 authorizations from the same source of supply.

21          (8)     If a water right for which a temporary change in appropriation right has been approved is  
22 transferred as an appurtenance of real property, the temporary change remains in effect unless another change  
23 in appropriation right is authorized by the department.

24          (9)     If the quantity of water that is subject to a temporary change in appropriation right is made  
25 available from the development of a new water conservation or storage project, a temporary change in  
26 appropriation right may be approved for a period not to exceed 30 years unless a renewal is obtained pursuant  
27 to subsection (3)."

28

1           **Section 6.** Section 85-2-408, MCA, is amended to read:

2           **"85-2-408. Temporary change authorization for instream flow -- additional requirements. (1)**

3           The department shall accept and process an application for a temporary change in appropriation rights to  
4           maintain or enhance instream flow to benefit the fishery resource under the provisions of 85-2-402, 85-2-407,  
5           and this section. The application must:

6           (a)       include specific information on the length and location of the stream reach in which the  
7           streamflow is to be maintained or enhanced; and

8           (b)       provide a detailed streamflow measuring plan that describes the point where and the manner in  
9           which the streamflow must be measured.

10          (2)       (a) A temporary change authorization under the provisions of this section is allowable only if the  
11          owner of the water right voluntarily agrees to:

12          (i)       change the purpose of a consumptive use water right to instream flow for the benefit of the  
13          fishery resource; or

14          (ii)       lease a consumptive use water right to another person for instream flow to benefit the fishery  
15          resource.

16          (b)       For the purpose of this subsection (2), "person" means and is limited to an individual,  
17          association, partnership, or corporation.

18          (3)       In addition to the requirements of 85-2-402 and 85-2-407, an applicant for a change  
19          authorization under this section shall prove by a preponderance of evidence that:

20          (a)       the temporary change authorization for water to maintain and enhance instream flow to benefit  
21          the fishery resource, as measured at a specific point, will not adversely affect the water rights of other persons;  
22          and

23          (b)       the amount of water for the proposed use is needed to maintain or enhance instream flows to  
24          benefit the fishery resource.

25          (4)       The applicant is not required to prove a lack of adverse effect for any water right identified in a  
26          written consent to approval filed pursuant to 85-2-402 in connection with a change application.

27          (4)(5)     The department shall approve the method of measurement of the water to maintain and  
28          enhance instream flow to benefit the fishery resource through a temporary change authorization as provided in

1 this section.

2 ~~(5)~~(6) Only the owner of the water right may seek enforcement of the temporary change authorization  
3 or object under 85-2-308.

4 ~~(6)~~(7) A temporary change authorization under this section does not create a right of access across  
5 private property or allow any infringement of private property rights.

6 ~~(7)~~(8) The maximum quantity of water that may be changed to maintain and enhance streamflows to  
7 benefit the fishery resource is the amount historically diverted. However, only the amount historically  
8 consumed, or a smaller amount if specified by the department in the lease authorization, may be used to  
9 maintain or enhance streamflows to benefit the fishery resource below the existing point of diversion."

10 - END -