

1 HOUSE BILL NO. 129

2 INTRODUCED BY K. BALES

3 BY REQUEST OF THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

4

5 A BILL FOR AN ACT ENTITLED: "AN ACT EXEMPTING CERTAIN REPLACEMENT WELLS FROM CERTAIN
6 PROCEDURES AND CRITERIA APPLICABLE TO CHANGES IN WATER RIGHTS; AMENDING SECTION
7 85-2-402, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

8

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

10

11 **Section 1.** Section 85-2-402, MCA, is amended to read:

12 **"85-2-402. (Temporary) Changes in appropriation rights.** (1) The right to make a change subject
13 to the provisions of this section in an existing water right, a permit, or a state water reservation is
14 recognized and confirmed. In a change proceeding under this section, there is no presumption that an
15 applicant for a change in appropriation right cannot establish lack of adverse effect prior to the adjudication
16 of other rights in the source of supply pursuant to this chapter. ~~An~~ Except as provided in subsection (15),
17 an appropriator may not make a change in an appropriation right ~~except, as permitted under this section,~~
18 ~~by applying for and receiving~~ without the approval of the department or, if applicable, of the legislature.
19 An applicant shall submit a correct and complete application.

20 (2) Except as provided in subsections (4) through (6) and (15), the department shall approve a
21 change in appropriation right if the appropriator proves by a preponderance of evidence that the following
22 criteria are met:

23 (a) The proposed change in appropriation right will not adversely affect the use of the existing
24 water rights of other persons or other perfected or planned uses or developments for which a permit or
25 certificate has been issued or for which a state water reservation has been issued under part 3.

26 (b) Except for a lease authorization pursuant to 85-2-436, a temporary change authorization for
27 instream use to benefit the fishery resource pursuant to 85-2-408, or water use pursuant to 85-2-439
28 when authorization does not require appropriation works, the proposed means of diversion, construction,
29 and operation of the appropriation works are adequate.

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

1 (d) Except for a lease authorization pursuant to 85-2-436 or a temporary change authorization
2 pursuant to 85-2-408 or 85-2-439 for instream flow to benefit the fishery resource, the applicant has a
3 possessory interest, or the written consent of the person with the possessory interest, in the property
4 where the water is to be put to beneficial use.

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

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

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

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

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

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

18 (b) the proposed change is a reasonable use. A finding of reasonable use must be based on a
19 consideration of:

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

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

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

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

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

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

30 (5) The department may not approve a change in purpose of use or place of use for a diversion

1 that results in 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water
2 being consumed unless:

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

5 (b) for the withdrawal and transportation of appropriated water for out-of-state use, the
6 department then petitions the legislature and the legislature affirms the decision of the department after
7 one or more public hearings.

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

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

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

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

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

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

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

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

30 (iii) the supply and sources of water available to the applicant in the state where the applicant

1 intends to use the water; and

2 (iv) the demands placed on the applicant's supply in the state where the applicant intends to use
3 the water.

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

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

13 (8) The department or the legislature, if applicable, may approve a change subject to the terms,
14 conditions, restrictions, and limitations ~~as that~~ it considers necessary to satisfy the criteria of this section,
15 including limitations on the time for completion of the change. The department may extend time limits
16 specified in the change approval under the applicable criteria and procedures of 85-2-312(3).

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

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

28 (12) A person holding an issued permit or change approval that has not been perfected may change
29 the place of diversion, place of use, purpose of use, or place of storage by filing an application for change
30 pursuant to this section.

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

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

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

9 (i) the appropriation right is for:

10 (A) ground water outside the boundaries of a controlled ground water area; OR

11 (B) GROUND WATER INSIDE THE BOUNDARIES OF A CONTROLLED GROUND WATER AREA AND IF THE PROVISIONS
12 OF THE ORDER DECLARING THE CONTROLLED GROUND WATER AREA DO NOT RESTRICT SUCH A CHANGE;

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

15 (iii) the rate and volume of the appropriation from the replacement well are equal to or less than
16 that of the well being replaced and do not exceed 35 gallons a minute and 10 acre-feet a year;

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

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

21 (b) (i) ~~Within 60 days of~~ AFTER completion of a replacement well and appropriation of ground
22 water for a beneficial use, the appropriator shall file a notice of replacement well with the department on
23 a form provided by the department.

24 (ii) The department shall review the notice of replacement well and shall issue an authorization of
25 a change in an appropriation right if all of the criteria in subsection (15)(a) have been met and the notice
26 is correct and complete.

27 (iii) The department may not issue an authorization of a change in appropriation right until a
28 correct and complete notice of replacement well has been filed with the department. The department shall
29 return a defective notice to the appropriator, along with a description of defects in the notice. The
30 appropriator shall refile a corrected and completed notice of replacement well within 30 days of notification

1 of defects or within a further time as the department may allow, not to exceed 6 months.

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

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

4 and

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

7 (C) THE PROVISIONS OF THIS SUBSECTION (15) DO NOT APPLY TO AN APPROPRIATION RIGHT ABANDONED UNDER
8 85-2-404.

9 (D) FOR EACH WELL THAT IS REPLACED UNDER THIS SUBSECTION (15), THE APPROPRIATOR SHALL FOLLOW THE
10 WELL ABANDONMENT PROCEDURES, STANDARDS, AND RULES ADOPTED BY THE BOARD OF WATER WELL CONTRACTORS
11 PURSUANT TO 37-43-202.

12 ~~(e)~~(E) The provisions of subsections (2), (3), (9), and (10) do not apply to a change in appropriation
13 right that meets the requirements of subsection (15)(a). (Terminates June 30, 2005--sec. 6, Ch. 322, L.
14 1995; sec. 14, Ch. 487, L. 1995.)

15 **85-2-402. (Effective July 1, 2005) Changes in appropriation rights.** (1) The right to make a change
16 subject to the provisions of this section in an existing water right, a permit, or a state water reservation
17 is recognized and confirmed. In a change proceeding under this section, there is no presumption that an
18 applicant for a change in appropriation right cannot establish lack of adverse effect prior to the adjudication
19 of other rights in the source of supply pursuant to this chapter. ~~An~~ Except as provided in subsection (15),
20 an appropriator may not make a change in an appropriation right ~~except, as permitted under this section,~~
21 ~~by applying for and receiving~~ without the approval of the department or, if applicable, of the legislature.
22 An applicant shall submit a correct and complete application.

23 (2) Except as provided in subsections (4) through (6) and (15), the department shall approve a
24 change in appropriation right if the appropriator proves by a preponderance of evidence that the following
25 criteria are met:

26 (a) The proposed change in appropriation right will not adversely affect the use of the existing
27 water rights of other persons or other perfected or planned uses or developments for which a permit or
28 certificate has been issued or for which a state water reservation has been issued under part 3.

29 (b) Except for a lease authorization pursuant to 85-2-436 that does not require appropriation
30 works, the proposed means of diversion, construction, and operation of the appropriation works are

1 adequate.

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

3 (d) The applicant has a possessory interest, or the written consent of the person with the
4 possessory interest, in the property where the water is to be put to beneficial use.

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

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

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

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

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

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

18 (b) the proposed change is a reasonable use. A finding of reasonable use must be based on a
19 consideration of:

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

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

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

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

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

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

30 (5) The department may not approve a change in purpose of use or place of use for a diversion

1 that results in 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water
2 being consumed unless:

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

5 (b) for the withdrawal and transportation of appropriated water for out-of-state use, the
6 department then petitions the legislature and the legislature affirms the decision of the department after
7 one or more public hearings.

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

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

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

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

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

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

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

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

30 (iii) the supply and sources of water available to the applicant in the state where the applicant

1 intends to use the water; and

2 (iv) the demands placed on the applicant's supply in the state where the applicant intends to use
3 the water.

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

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

13 (8) The department or the legislature, if applicable, may approve a change subject to the terms,
14 conditions, restrictions, and limitations that it considers necessary to satisfy the criteria of this section,
15 including limitations on the time for completion of the change. The department may extend time limits
16 specified in the change approval under the applicable criteria and procedures of 85-2-312(3).

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

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

28 (12) A person holding an issued permit or change approval that has not been perfected may change
29 the place of diversion, place of use, purpose of use, or place of storage by filing an application for change
30 pursuant to this section.

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

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

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

9 (i) the appropriation right is for:

10 (A) ground water outside the boundaries of a controlled ground water area; OR

11 (B) GROUND WATER INSIDE THE BOUNDARIES OF A CONTROLLED GROUND WATER AREA AND IF THE PROVISIONS
12 OF THE ORDER DECLARING THE CONTROLLED GROUND WATER AREA DO NOT RESTRICT SUCH A CHANGE;

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

15 (iii) the rate and volume of the appropriation from the replacement well are equal to or less than
16 that of the well being replaced and do not exceed 35 gallons a minute and 10 acre-feet a year;

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

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

21 (b) (i) ~~Within 60 days of~~ AFTER completion of a replacement well and appropriation of ground
22 water for a beneficial use, the appropriator shall file a notice of replacement well with the department on
23 a form provided by the department.

24 (ii) The department shall review the notice of replacement well and shall issue an authorization of
25 a change in an appropriation right if all of the criteria in subsection (15)(a) have been met and the notice
26 is correct and complete.

27 (iii) The department may not issue an authorization of a change in appropriation right until a
28 correct and complete notice of replacement well has been filed with the department. The department shall
29 return a defective notice to the appropriator, along with a description of defects in the notice. The
30 appropriator shall refile a corrected and completed notice of replacement well within 30 days of notification

1 of defects or within a further time as the department may allow, not to exceed 6 months.

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

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

4 and

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

7 (C) THE PROVISIONS OF THIS SUBSECTION (15) DO NOT APPLY TO AN APPROPRIATION RIGHT ABANDONED UNDER
8 85-2-404.

9 (D) FOR EACH WELL THAT IS REPLACED UNDER THIS SUBSECTION (15), THE APPROPRIATOR SHALL FOLLOW THE
10 WELL ABANDONMENT PROCEDURES, STANDARDS, AND RULES ADOPTED BY THE BOARD OF WATER WELL CONTRACTORS
11 PURSUANT TO 37-43-202.

12 ~~(e)~~(E) The provisions of subsections (2), (3), (9), and (10) do not apply to a change in appropriation
13 right that meets the requirements of subsection (15)(a). (Terminates June 30, 2009--sec. 9, Ch. 123, L.
14 1999.)

15 **85-2-402. (Effective July 1, 2009) Changes in appropriation rights.** (1) The right to make a change
16 subject to the provisions of this section in an existing water right, a permit, or a state water reservation
17 is recognized and confirmed. In a change proceeding under this section, there is no presumption that an
18 applicant for a change in appropriation right cannot establish lack of adverse effect prior to the adjudication
19 of other rights in the source of supply pursuant to this chapter. ~~An~~ Except as provided in subsection (15),
20 an appropriator may not make a change in an appropriation right ~~except, as permitted under this section,~~
21 ~~by applying for and receiving~~ without the approval of the department or, if applicable, of the legislature.
22 An applicant shall submit a correct and complete application.

23 (2) Except as provided in subsections (4) through (6) and (15), the department shall approve a
24 change in appropriation right if the appropriator proves by a preponderance of evidence that the following
25 criteria are met:

26 (a) The proposed change in appropriation right will not adversely affect the use of the existing
27 water rights of other persons or other perfected or planned uses or developments for which a permit or
28 certificate has been issued or for which a state water reservation has been issued under part 3.

29 (b) The proposed means of diversion, construction, and operation of the appropriation works are
30 adequate.

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

2 (d) The applicant has a possessory interest, or the written consent of the person with the
3 possessory interest, in the property where the water is to be put to beneficial use.

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

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

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

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

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

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

17 (b) the proposed change is a reasonable use. A finding of reasonable use must be based on a
18 consideration of:

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

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

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

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

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

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

29 (5) The department may not approve a change in purpose of use or place of use for a diversion
30 that results in 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water

1 being consumed unless:

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

4 (b) for the withdrawal and transportation of appropriated water for out-of-state use, the
5 department then petitions the legislature and the legislature affirms the decision of the department after
6 one or more public hearings.

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

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

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

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

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

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

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

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

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

1 (iv) the demands placed on the applicant's supply in the state where the applicant intends to use
2 the water.

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

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

12 (8) The department or the legislature, if applicable, may approve a change subject to the terms,
13 conditions, restrictions, and limitations that it considers necessary to satisfy the criteria of this section,
14 including limitations on the time for completion of the change. The department may extend time limits
15 specified in the change approval under the applicable criteria and procedures of 85-2-312(3).

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

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

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

27 (12) A person holding an issued permit or change approval that has not been perfected may change
28 the place of diversion, place of use, purpose of use, or place of storage by filing an application for change
29 pursuant to this section.

30 (13) A change in appropriation right contrary to the provisions of this section is invalid. An officer,

1 agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an
2 unauthorized change in appropriation right. A person or corporation may not, directly or indirectly,
3 personally or through an agent, officer, or employee, attempt to change an appropriation right except in
4 accordance with this section.

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

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

8 (i) the appropriation right is for:

9 (A) ground water outside the boundaries of a controlled ground water area; OR

10 (B) GROUND WATER INSIDE THE BOUNDARIES OF A CONTROLLED GROUND WATER AREA AND IF THE PROVISIONS
11 OF THE ORDER DECLARING THE CONTROLLED GROUND WATER AREA DO NOT RESTRICT SUCH A CHANGE;

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

14 (iii) the rate and volume of the appropriation from the replacement well are equal to or less than
15 that of the well being replaced and do not exceed 35 gallons a minute and 10 acre-feet a year;

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

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

20 (b) (i) ~~Within 60 days of~~ AFTER completion of a replacement well and appropriation of ground
21 water for a beneficial use, the appropriator shall file a notice of replacement well with the department on
22 a form provided by the department.

23 (ii) The department shall review the notice of replacement well and shall issue an authorization of
24 a change in an appropriation right if all of the criteria in subsection (15)(a) have been met and the notice
25 is correct and complete.

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

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

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

3 and

4 (B) submit an application for a change in appropriation right to the department pursuant to

5 subsections (1) through (3).

6 (c) THE PROVISIONS OF THIS SUBSECTION (15) DO NOT APPLY TO AN APPROPRIATION RIGHT ABANDONED UNDER

7 85-2-404.

8 (D) FOR EACH WELL THAT IS REPLACED UNDER THIS SUBSECTION (15), THE APPROPRIATOR SHALL FOLLOW THE

9 WELL ABANDONMENT PROCEDURES, STANDARDS, AND RULES ADOPTED BY THE BOARD OF WATER WELL CONTRACTORS

10 PURSUANT TO 37-43-202.

11 ~~(e)~~(E) The provisions of subsections (2), (3), (9), and (10) do not apply to a change in appropriation

12 right that meets the requirements of subsection (15)(a)."

13

14 NEW SECTION. Section 2. Effective date. [This act] is effective on passage and approval.

15

- END -