

HOUSE BILL NO. 515

INTRODUCED BY G. GUTSCHE

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4 A BILL FOR AN ACT ENTITLED: "AN ACT ALLOWING THE DEPARTMENT OF FISH, WILDLIFE, AND PARKS
5 TO CHANGE WATER RIGHTS THAT IT HOLDS IN FEE SIMPLE TO INSTREAM FLOW PURPOSES TO
6 PROTECT, MAINTAIN, OR ENHANCE STREAMFLOW TO BENEFIT FISHERY RESOURCES; REPEALING
7 THE TERMINATION DATE ON LEASING BY THE DEPARTMENT FOR THE PURPOSE OF INSTREAM
8 FLOWS; SPECIFYING, AMENDING, AND CLARIFYING REQUIREMENTS THAT MUST BE MET AND
9 PROCEDURES THAT MUST BE FOLLOWED TO CHANGE AN APPROPRIATION RIGHT OR LEASED
10 WATER RIGHT TO INSTREAM FLOW PURPOSES AND TO ENSURE THAT A CHANGE IN APPROPRIATION
11 RIGHT WILL NOT ADVERSELY AFFECT OTHER WATER RIGHT HOLDERS; AMENDING SECTIONS
12 85-2-102, 85-2-402, 85-2-436, AND 87-1-257, MCA; REPEALING SECTIONS 85-2-437 AND 85-2-438, MCA,
13 SECTION 11, CHAPTER 658, LAWS OF 1989, SECTIONS 4 AND 7, CHAPTER 740, LAWS OF 1991, AND
14 SECTIONS 5, 6, 7, AND 9, CHAPTER 123, LAWS OF 1999; AND PROVIDING AN IMMEDIATE EFFECTIVE
15 DATE."

16

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

18

19 **Section 1.** Section 85-2-102, MCA, is amended to read:

20 **"85-2-102. (Temporary) Definitions.** Unless the context requires otherwise, in this chapter, the
21 following definitions apply:

22 (1) "Appropriate" means:

23 (a) to divert, impound, or withdraw₁ (including by stock for stock water)₁ a quantity of water for a
24 beneficial use;

25 (b) in the case of a public agency, to reserve water in accordance with 85-2-316;

26 (c) in the case of the department of fish, wildlife, and parks, to ~~lease water~~ change an appropriation right
27 for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource in accordance with
28 85-2-436; or

29 (d) in the Upper Clark Fork River basin, to maintain and enhance streamflows to benefit the fishery
30 resource in accordance with 85-2-439.

1 (2) "Beneficial use", unless otherwise provided, means:

2 (a) a use of water for the benefit of the appropriator, other persons, or the public, including but not
3 limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal,
4 power, and recreational uses;

5 (b) a use of water appropriated by the department for the state water leasing program under 85-2-141
6 and of water leased under a valid lease issued by the department under 85-2-141;

7 (c) a use of water by the department of fish, wildlife, and parks through a change in appropriation right
8 for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource pursuant to a lease
9 authorized under 85-2-436; or

10 (d) a use of water to maintain and enhance streamflows to benefit the fishery resource in the Upper
11 Clark Fork River basin as part of the Upper Clark Fork River basin instream flow pilot program authorized under
12 85-2-439.

13 (3) "Certificate" means a certificate of water right issued by the department.

14 (4) "Change in appropriation right" means a change in the place of diversion, the place of use, the
15 purpose of use, or the place of storage.

16 (5) "Commission" means the fish, wildlife, and parks commission provided for in 2-15-3402.

17 (6) "Correct and complete" means that the information required to be submitted conforms to the
18 standard of substantial credible information and that all of the necessary parts of the form requiring the
19 information have been filled in with the required information.

20 (7) "Declaration" means the declaration of an existing right filed with the department under section 8,
21 Chapter 452, Laws of 1973.

22 (8) "Department" means the department of natural resources and conservation provided for in Title 2,
23 chapter 15, part 33.

24 (9) "Developed spring" means any artificial opening or excavation in the ground, however made,
25 including any physical alteration at the point of discharge regardless of whether it results in any increase in the
26 yield of ground water, from which ground water is sought or can be obtained or through which it flows under
27 natural pressures or is artificially withdrawn.

28 (10) "Existing right" or "existing water right" means a right to the use of water that would be protected
29 under the law as it existed prior to July 1, 1973. The term includes federal non-Indian and Indian reserved water
30 rights created under federal law and water rights created under state law.

1 (11) "Ground water" means any water that is beneath the ground surface.

2 (12) "Late claim" means a claim to an existing right forfeited pursuant to the conclusive presumption of
3 abandonment under 85-2-226.

4 (13) "Permit" means the permit to appropriate issued by the department under 85-2-301 through
5 85-2-303 and 85-2-306 through 85-2-314.

6 (14) "Person" means an individual, association, partnership, corporation, state agency, political
7 subdivision, the United States or any agency of the United States, or any other entity.

8 (15) "Political subdivision" means any county, incorporated city or town, public corporation, or district
9 created pursuant to state law or other public body of the state empowered to appropriate water. The term does
10 not mean a private corporation, association, or group.

11 (16) "Salvage" means to make water available for beneficial use from an existing valid appropriation
12 through application of water-saving methods.

13 (17) "State water reservation" means a water right created under state law after July 1, 1973, that
14 reserves water for existing or future beneficial uses or that maintains a minimum flow, level, or quality of water
15 throughout the year or at periods or for defined lengths of time.

16 (18) "Substantial credible information" means probable, believable facts sufficient to support a
17 reasonable legal theory upon which the department should proceed with the action requested by the person
18 providing the information.

19 (19) "Waste" means the unreasonable loss of water through the design or negligent operation of an
20 appropriation or water distribution facility or the application of water to anything but a beneficial use.

21 (20) "Water" means all water of the state, surface and subsurface, regardless of its character or manner
22 of occurrence, including but not limited to geothermal water, diffuse surface water, and sewage effluent.

23 (21) "Water division" means a drainage basin as defined in 3-7-102.

24 (22) "Water judge" means a judge as provided for in Title 3, chapter 7.

25 (23) "Water master" means a master as provided for in Title 3, chapter 7.

26 (24) "Watercourse" means any naturally occurring stream or river from which water is diverted for
27 beneficial uses. It does not include ditches, culverts, or other constructed waterways.

28 (25) "Well" means any artificial opening or excavation in the ground, however made, by which ground
29 water is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn.
30 (Terminates June 30, 2005--sec. 14, Ch. 487, L. 1995.)

1 **85-2-102. (Effective July 1, 2005) Definitions.** Unless the context requires otherwise, in this chapter,
2 the following definitions apply:

3 (1) "Appropriate" means:

4 (a) to divert, impound, or withdraw, ~~{including by stock for stock water}~~, a quantity of water for a
5 beneficial use;

6 (b) in the case of a public agency, to reserve water in accordance with 85-2-316; or

7 (c) in the case of the department of fish, wildlife, and parks, to ~~lease water~~ change an appropriation right
8 for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource in accordance with
9 85-2-436.

10 (2) "Beneficial use", unless otherwise provided, means:

11 (a) a use of water for the benefit of the appropriator, other persons, or the public, including but not
12 limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal,
13 power, and recreational uses;

14 (b) a use of water appropriated by the department for the state water leasing program under 85-2-141
15 and of water leased under a valid lease issued by the department under 85-2-141; and

16 (c) a use of water by the department of fish, wildlife, and parks through a change in appropriation right
17 for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource pursuant to ~~a lease~~
18 ~~authorized under~~ 85-2-436.

19 (3) "Certificate" means a certificate of water right issued by the department.

20 (4) "Change in appropriation right" means a change in the place of diversion, the place of use, the
21 purpose of use, or the place of storage.

22 (5) "Commission" means the fish, wildlife, and parks commission provided for in 2-15-3402.

23 (6) "Correct and complete" means that the information required to be submitted conforms to the
24 standard of substantial credible information and that all of the necessary parts of the form requiring the
25 information have been filled in with the required information.

26 (7) "Declaration" means the declaration of an existing right filed with the department under section 8,
27 Chapter 452, Laws of 1973.

28 (8) "Department" means the department of natural resources and conservation provided for in Title 2,
29 chapter 15, part 33.

30 (9) "Developed spring" means any artificial opening or excavation in the ground, however made,

1 including any physical alteration at the point of discharge regardless of whether it results in any increase in the
2 yield of ground water, from which ground water is sought or can be obtained or through which it flows under
3 natural pressures or is artificially withdrawn.

4 (10) "Existing right" or "existing water right" means a right to the use of water that would be protected
5 under the law as it existed prior to July 1, 1973. The term includes federal non-Indian and Indian reserved water
6 rights created under federal law and water rights created under state law.

7 (11) "Ground water" means any water that is beneath the ground surface.

8 (12) "Late claim" means a claim to an existing right forfeited pursuant to the conclusive presumption of
9 abandonment under 85-2-226.

10 (13) "Permit" means the permit to appropriate issued by the department under 85-2-301 through
11 85-2-303 and 85-2-306 through 85-2-314.

12 (14) "Person" means an individual, association, partnership, corporation, state agency, political
13 subdivision, the United States or any agency of the United States, or any other entity.

14 (15) "Political subdivision" means any county, incorporated city or town, public corporation, or district
15 created pursuant to state law or other public body of the state empowered to appropriate water. The term does
16 not mean a private corporation, association, or group.

17 (16) "Salvage" means to make water available for beneficial use from an existing valid appropriation
18 through application of water-saving methods.

19 (17) "State water reservation" means a water right created under state law after July 1, 1973, that
20 reserves water for existing or future beneficial uses or that maintains a minimum flow, level, or quality of water
21 throughout the year or at periods or for defined lengths of time.

22 (18) "Substantial credible information" means probable, believable facts sufficient to support a
23 reasonable legal theory upon which the department should proceed with the action requested by the person
24 providing the information.

25 (19) "Waste" means the unreasonable loss of water through the design or negligent operation of an
26 appropriation or water distribution facility or the application of water to anything but a beneficial use.

27 (20) "Water" means all water of the state, surface and subsurface, regardless of its character or manner
28 of occurrence, including but not limited to geothermal water, diffuse surface water, and sewage effluent.

29 (21) "Water division" means a drainage basin as defined in 3-7-102.

30 (22) "Water judge" means a judge as provided for in Title 3, chapter 7.

1 (23) "Water master" means a master as provided for in Title 3, chapter 7.

2 (24) "Watercourse" means any naturally occurring stream or river from which water is diverted for
3 beneficial uses. It does not include ditches, culverts, or other constructed waterways.

4 (25) "Well" means any artificial opening or excavation in the ground, however made, by which ground
5 water is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn.
6 (~~Terminates June 30, 2009--sec. 9, Ch. 123, L. 1999.~~)

7 ~~85-2-102. (Effective July 1, 2009) Definitions. Unless the context requires otherwise, in this chapter,
8 the following definitions apply:~~

9 ~~———— (1) "Appropriate" means:~~

10 ~~———— (a) to divert, impound, or withdraw (including by stock for stock water) a quantity of water; or~~

11 ~~———— (b) in the case of a public agency, to reserve water in accordance with 85-2-316.~~

12 ~~———— (2) "Beneficial use", unless otherwise provided, means:~~

13 ~~———— (a) a use of water for the benefit of the appropriator, other persons, or the public, including but not
14 limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal,
15 power, and recreational uses; or~~

16 ~~———— (b) a use of water appropriated by the department for the state water leasing program under 85-2-141
17 and of water leased under a valid lease issued by the department under 85-2-141.~~

18 ~~———— (3) "Certificate" means a certificate of water right issued by the department.~~

19 ~~———— (4) "Change in appropriation right" means a change in the place of diversion, the place of use, the
20 purpose of use, or the place of storage.~~

21 ~~———— (5) "Correct and complete" means that the information required to be submitted conforms to the
22 standard of substantial credible information and that all of the necessary parts of the form requiring the
23 information have been filled in with the required information.~~

24 ~~———— (6) "Declaration" means the declaration of an existing right filed with the department under section 8,
25 Chapter 452, Laws of 1973.~~

26 ~~———— (7) "Department" means the department of natural resources and conservation provided for in Title 2,
27 chapter 15, part 33.~~

28 ~~———— (8) "Developed spring" means any artificial opening or excavation in the ground, however made,
29 including any physical alteration at the point of discharge regardless of whether it results in any increase in the
30 yield of ground water, from which ground water is sought or can be obtained or through which it flows under~~

- 1 ~~natural pressures or is artificially withdrawn.~~
- 2 ~~———(9) "Existing right" or "existing water right" means a right to the use of water that would be protected~~
3 ~~under the law as it existed prior to July 1, 1973. The term includes federal non-Indian and Indian reserved water~~
4 ~~rights created under federal law and water rights created under state law.~~
- 5 ~~———(10) "Ground water" means any water that is beneath the ground surface.~~
- 6 ~~———(11) "Late claim" means a claim to an existing right forfeited pursuant to the conclusive presumption of~~
7 ~~abandonment under 85-2-226.~~
- 8 ~~———(12) "Permit" means the permit to appropriate issued by the department under 85-2-301 through~~
9 ~~85-2-303 and 85-2-306 through 85-2-314.~~
- 10 ~~———(13) "Person" means an individual, association, partnership, corporation, state agency, political~~
11 ~~subdivision, the United States or any agency of the United States, or any other entity.~~
- 12 ~~———(14) "Political subdivision" means any county, incorporated city or town, public corporation, or district~~
13 ~~created pursuant to state law or other public body of the state empowered to appropriate water. The term does~~
14 ~~not mean a private corporation, association, or group.~~
- 15 ~~———(15) "Salvage" means to make water available for beneficial use from an existing valid appropriation~~
16 ~~through application of water-saving methods.~~
- 17 ~~———(16) "State water reservation" means a water right created under state law after July 1, 1973, that~~
18 ~~reserves water for existing or future beneficial uses or that maintains a minimum flow, level, or quality of water~~
19 ~~throughout the year or at periods or for defined lengths of time.~~
- 20 ~~———(17) "Substantial credible information" means probable, believable facts sufficient to support a~~
21 ~~reasonable legal theory upon which the department should proceed with the action requested by the person~~
22 ~~providing the information.~~
- 23 ~~———(18) "Waste" means the unreasonable loss of water through the design or negligent operation of an~~
24 ~~appropriation or water distribution facility or the application of water to anything but a beneficial use.~~
- 25 ~~———(19) "Water" means all water of the state, surface and subsurface, regardless of its character or manner~~
26 ~~of occurrence, including but not limited to geothermal water, diffuse surface water, and sewage effluent.~~
- 27 ~~———(20) "Water division" means a drainage basin as defined in 3-7-102.~~
- 28 ~~———(21) "Water judge" means a judge as provided for in Title 3, chapter 7.~~
- 29 ~~———(22) "Water master" means a master as provided for in Title 3, chapter 7.~~
- 30 ~~———(23) "Watercourse" means any naturally occurring stream or river from which water is diverted for~~

1 ~~beneficial uses. It does not include ditches, culverts, or other constructed waterways.~~

2 ~~——— (24) "Well" means any artificial opening or excavation in the ground, however made, by which ground~~
 3 ~~water is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn."~~

4

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

6 **"85-2-402. (Temporary) Changes in appropriation rights.** (1) The right to make a change in
 7 appropriation right subject to the provisions of this section in an existing water right, a permit, or a state water
 8 reservation is recognized and confirmed. In a change in appropriation right proceeding under this section, there
 9 is no presumption that an applicant for a change in appropriation right cannot establish lack of adverse effect
 10 prior to the adjudication of other rights in the source of supply pursuant to this chapter. Except as provided in
 11 85-2-410 and subsections (15) and (16) of this section, an appropriator may not make a change in an
 12 appropriation right without the approval of the department or, if applicable, of the legislature. An applicant shall
 13 submit a correct and complete application.

14 (2) Except as provided in subsections (4) through (6), (15), and (16), the department shall approve a
 15 change in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria
 16 are met:

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

20 (b) Except for a ~~lease authorization~~ change in appropriation right for instream flow to protect, maintain,
 21 or enhance streamflows to benefit the fishery resource pursuant to 85-2-436, a temporary change in
 22 appropriation right authorization for instream use to benefit the fishery resource pursuant to 85-2-408, or water
 23 use pursuant to 85-2-439 when authorization does not require appropriation works, the proposed means of
 24 diversion, construction, and operation of the appropriation works are adequate.

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

26 (d) Except for a ~~lease authorization pursuant to 85-2-436~~ change in appropriation right for instream flow
 27 to protect, maintain, or enhance streamflows to benefit the fishery resource pursuant to 85-2-436 or a temporary
 28 change in appropriation right authorization pursuant to 85-2-408 or 85-2-439 for instream flow to benefit the
 29 fishery resource, the applicant has a possessory interest, or the written consent of the person with the
 30 possessory interest, in the property where the water is to be put to beneficial use.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 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 the
4 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 right
11 for the withdrawal and transportation of appropriated water for use outside the state unless the appropriator
12 proves by clear and convincing evidence and, if applicable, the legislature approves after one or more public
13 hearings that:

14 (i) depending on the volume of water diverted or consumed, the applicable criteria and procedures of
15 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 intends
26 to use the water; and

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

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

1 appropriation and use of water.

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

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

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

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

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

24 (12) A person holding an issued permit or change in appropriation right approval that has not been
25 perfected may change in appropriation right the place of diversion, place of use, purpose of use, or place of
26 storage by filing an application for change in appropriation right pursuant to this section.

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

- 1 (14) The department may adopt rules to implement the provisions of this section.
- 2 (15) (a) An appropriator may change an appropriation right for a replacement well without the prior
3 approval of the department if:
- 4 (i) the appropriation right is for:
- 5 (A) ground water outside the boundaries of a controlled ground water area; or
- 6 (B) ground water inside the boundaries of a controlled ground water area and if the provisions of the
7 order declaring the controlled ground water area do not restrict such a change in appropriation right;
- 8 (ii) the change in appropriation right is to replace an existing well and the existing well will no longer be
9 used;
- 10 (iii) the rate and volume of the appropriation from the replacement well are equal to or less than that of
11 the well being replaced and do not exceed:
- 12 (A) 450 gallons a minute for a municipal well; or
- 13 (B) 35 gallons a minute and 10 acre-feet a year for all other wells;
- 14 (iv) the water from the replacement well is appropriated from the same aquifer as the water appropriated
15 from the well being replaced; and
- 16 (v) a timely, correct and complete notice of replacement well is submitted to the department as provided
17 in subsection (15)(b).
- 18 (b) (i) After completion of a replacement well and appropriation of ground water for a beneficial use, the
19 appropriator shall file a notice of replacement well with the department on a form provided by the department.
- 20 (ii) The department shall review the notice of replacement well and shall issue an authorization of a
21 change in an appropriation right if all of the criteria in subsection (15)(a) have been met and the notice is correct
22 and complete.
- 23 (iii) The department may not issue an authorization of a change in appropriation right until a correct and
24 complete notice of replacement well has been filed with the department. The department shall return a defective
25 notice to the appropriator, along with a description of defects in the notice. The appropriator shall refile a
26 corrected and completed notice of replacement well within 30 days of notification of defects or within a further
27 time as the department may allow, not to exceed 6 months.
- 28 (iv) If a notice of replacement well is not completed within the time allowed, the appropriator shall:
- 29 (A) cease appropriation of water from the replacement well pending approval by the department; and
- 30 (B) submit an application for a change in appropriation right to the department pursuant to subsections

1 (1) through (3).

2 (c) The provisions of this subsection (15) do not apply to an appropriation right abandoned under
3 85-2-404.

4 (d) For each well that is replaced under this subsection (15), the appropriator shall follow the well
5 abandonment procedures, standards, and rules adopted by the board of water well contractors pursuant to
6 37-43-202.

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

9 (16) (a) An appropriator may change an appropriation right without the prior approval of the department
10 for the purpose of constructing a redundant water supply well in a public water supply system, as defined in
11 75-6-102, if the redundant water supply well:

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

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

14 (b) The priority date of the redundant water supply well is the same as the priority date of the original
15 well. Only one well may be used at one time.

16 (c) Within 60 days of completion of a redundant water supply well, the appropriator shall file a notice
17 of construction of the well with the department on a form provided by the department. The department may
18 return a defective notice of construction to the appropriator for correction and completion.

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

21 (17) The department shall accept and process an application for a change in appropriation right for
22 instream flow to protect, maintain, and enhance streamflows to benefit the fishery resource pursuant to 85-2-407,
23 85-2-408, and 85-2-436. (Terminates June 30, 2005--sec. 6, Ch. 322, L. 1995; sec. 14, Ch. 487, L. 1995.)

24 **85-2-402. (Effective July 1, 2005) Changes in appropriation rights.** (1) The right to make a change
25 in appropriation right subject to the provisions of this section in an existing water right, a permit, or a state water
26 reservation is recognized and confirmed. In a change in appropriation right proceeding under this section, there
27 is no presumption that an applicant for a change in appropriation right cannot establish lack of adverse effect
28 prior to the adjudication of other rights in the source of supply pursuant to this chapter. Except as provided in
29 85-2-410 and subsections (15) and (16) of this section, an appropriator may not make a change in an
30 appropriation right without the approval of the department or, if applicable, of the legislature. An applicant shall

1 submit a correct and complete application.

2 (2) Except as provided in subsections (4) through (6), (15), and (16), the department shall approve a
3 change in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria
4 are met:

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

8 (b) Except for a ~~lease authorization~~ change in appropriation right for instream flow to protect, maintain,
9 or enhance streamflows to benefit the fishery resource pursuant to 85-2-436 that does not require appropriation
10 works, the proposed means of diversion, construction, and operation of the appropriation works are adequate.

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

12 (d) ~~The~~ Except for a change in appropriation right for instream flow to protect, maintain, or enhance
13 streamflows to benefit the fishery resource pursuant to 85-2-436, the applicant has a possessory interest, or the
14 written consent of the person with the possessory interest, in the property where the water is to be put to
15 beneficial use.

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

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

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

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

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

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

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

30 (i) the existing demands on the state water supply, as well as projected demands for water for future

1 beneficial purposes, including municipal water supplies, irrigation systems, and minimum streamflows for the
2 protection of existing water rights and aquatic life;

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

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

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

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

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

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

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

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

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

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

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

- 1 (ii) the proposed out-of-state use of water is not contrary to water conservation in Montana; and
2 (iii) the proposed out-of-state use of water is not otherwise detrimental to the public welfare of the
3 citizens of Montana.
- 4 (b) In determining whether the appropriator has proved by clear and convincing evidence that the
5 requirements of subsections (6)(a)(ii) and (6)(a)(iii) will be met, the department and, if applicable, the legislature
6 shall consider the following factors:
- 7 (i) whether there are present or projected water shortages within the state of Montana;
8 (ii) whether the water that is the subject of the proposed change in appropriation might feasibly be
9 transported to alleviate water shortages within the state of Montana;
10 (iii) the supply and sources of water available to the applicant in the state where the applicant intends
11 to use the water; and
12 (iv) the demands placed on the applicant's supply in the state where the applicant intends to use the
13 water.
- 14 (c) When applying for a change in appropriation right to withdraw and transport water for use outside
15 the state, the applicant shall submit to and comply with the laws of the state of Montana governing the
16 appropriation and use of water.
- 17 (7) For any application for a change in appropriation right involving 4,000 or more acre-feet of water a
18 year and 5.5 or more cubic feet per second of water, the department shall give notice of the proposed change
19 in appropriation right in accordance with 85-2-307 and shall hold one or more hearings in accordance with
20 85-2-309 prior to its approval or denial of the proposed change in appropriation right. The department shall
21 provide notice and may hold one or more hearings upon any other proposed change in appropriation right if it
22 determines that the proposed change in appropriation right might adversely affect the rights of other persons.
- 23 (8) The department or the legislature, if applicable, may approve a change in appropriation right subject
24 to the terms, conditions, restrictions, and limitations that it considers necessary to satisfy the criteria of this
25 section, including limitations on the time for completion of the change in appropriation right. The department may
26 extend time limits specified in the change in appropriation right approval under the applicable criteria and
27 procedures of 85-2-312(3).
- 28 (9) Upon actual application of water to the proposed beneficial use within the time allowed, the
29 appropriator shall notify the department that the appropriation has been completed. The notification must contain
30 a certified statement by a person with experience in the design, construction, or operation of appropriation works

1 describing how the appropriation was completed.

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

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

9 (12) A person holding an issued permit or change in appropriation right approval that has not been
10 perfected may change the place of diversion, place of use, purpose of use, or place of storage by filing an
11 application for change in appropriation right pursuant to this section.

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

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

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

19 (i) the appropriation right is for:

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

21 (B) ground water inside the boundaries of a controlled ground water area and if the provisions of the
22 order declaring the controlled ground water area do not restrict such a change in appropriation right;

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

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

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

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

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

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

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

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

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

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

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

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

17 (c) The provisions of this subsection (15) do not apply to an appropriation right abandoned under
18 85-2-404.

19 (d) For each well that is replaced under this subsection (15), the appropriator shall follow the well
20 abandonment procedures, standards, and rules adopted by the board of water well contractors pursuant to
21 37-43-202.

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

24 (16) (a) An appropriator may change an appropriation right without the prior approval of the department
25 for the purpose of constructing a redundant water supply well in a public water supply system, as defined in
26 75-6-102, if the redundant water supply well:

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

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

29 (b) The priority date of the redundant water supply well is the same as the priority date of the original
30 well. Only one well may be used at one time.

1 (c) Within 60 days of completion of a redundant water supply well, the appropriator shall file a notice
 2 of construction of the well with the department on a form provided by the department. The department may
 3 return a defective notice of construction to the appropriator for correction and completion.

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

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

8 ~~(Terminates June 30, 2009--sec. 9, Ch. 123, L. 1999.)~~

9 ~~———— **85-2-402. (Effective July 1, 2009) Changes in appropriation rights.** (1) The right to make a change~~
 10 ~~subject to the provisions of this section in an existing water right, a permit, or a state water reservation is~~
 11 ~~recognized and confirmed. In a change proceeding under this section, there is no presumption that an applicant~~
 12 ~~for a change in appropriation right cannot establish lack of adverse effect prior to the adjudication of other rights~~
 13 ~~in the source of supply pursuant to this chapter. Except as provided in 85-2-410 and subsections (15) and (16)~~
 14 ~~of this section, an appropriator may not make a change in an appropriation right without the approval of the~~
 15 ~~department or, if applicable, of the legislature. An applicant shall submit a correct and complete application.~~

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

19 ~~———— (a) The proposed change in appropriation right will not adversely affect the use of the existing water~~
 20 ~~rights of other persons or other perfected or planned uses or developments for which a permit or certificate has~~
 21 ~~been issued or for which a state water reservation has been issued under part 3:~~

22 ~~———— (b) The proposed means of diversion, construction, and operation of the appropriation works are~~
 23 ~~adequate:~~

24 ~~———— (c) The proposed use of water is a beneficial use:~~

25 ~~———— (d) The applicant has a possessory interest, or the written consent of the person with the possessory~~
 26 ~~interest, in the property where the water is to be put to beneficial use:~~

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

29 ~~———— (f) The water quality of an appropriator will not be adversely affected:~~

30 ~~———— (g) The ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance~~

1 with Title 75, chapter 5, part 4, will not be adversely affected.

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

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

8 ~~———(a) the criteria in subsection (2) are met; and~~

9 ~~———(b) the proposed change is a reasonable use. A finding of reasonable use must be based on a~~
10 ~~consideration of:~~

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

14 ~~———(ii) the benefits to the applicant and the state;~~

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

16 ~~———(iv) the availability and feasibility of using low-quality water for the purpose for which application has~~
17 ~~been made;~~

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

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

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

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

26 ~~———(b) for the withdrawal and transportation of appropriated water for out-of-state use, the department then~~
27 ~~petitions the legislature and the legislature affirms the decision of the department after one or more public~~
28 ~~hearings.~~

29 ~~———(6) The state of Montana has long recognized the importance of conserving its public waters and the~~
30 ~~necessity to maintain adequate water supplies for the state's water requirements, including requirements for~~

~~1 reserved water rights held by the United States for federal reserved lands and in trust for the various Indian
2 tribes within the state's boundaries. Although the state of Montana also recognizes that, under appropriate
3 conditions, the out-of-state transportation and use of its public waters are not in conflict with the public welfare
4 of its citizens or the conservation of its waters, the following criteria must be met before out-of-state use may
5 occur:~~

~~6 (a) The department and, if applicable, the legislature may not approve a change in appropriation right
7 for the withdrawal and transportation of appropriated water for use outside the state unless the appropriator
8 proves by clear and convincing evidence and, if applicable, the legislature approves after one or more public
9 hearings that:~~

~~10 (i) depending on the volume of water diverted or consumed, the applicable criteria and procedures of
11 subsection (2) or (4) are met;~~

~~12 (ii) the proposed out-of-state use of water is not contrary to water conservation in Montana; and~~

~~13 (iii) the proposed out-of-state use of water is not otherwise detrimental to the public welfare of the
14 citizens of Montana.~~

~~15 (b) In determining whether the appropriator has proved by clear and convincing evidence that the
16 requirements of subsections (6)(a)(ii) and (6)(a)(iii) will be met, the department and, if applicable, the legislature
17 shall consider the following factors:~~

~~18 (i) whether there are present or projected water shortages within the state of Montana;~~

~~19 (ii) whether the water that is the subject of the proposed change in appropriation might feasibly be
20 transported to alleviate water shortages within the state of Montana;~~

~~21 (iii) the supply and sources of water available to the applicant in the state where the applicant intends
22 to use the water; and~~

~~23 (iv) the demands placed on the applicant's supply in the state where the applicant intends to use the
24 water.~~

~~25 (c) When applying for a change in appropriation right to withdraw and transport water for use outside
26 the state, the applicant shall submit to and comply with the laws of the state of Montana governing the
27 appropriation and use of water.~~

~~28 (7) For any application for a change in appropriation right involving 4,000 or more acre-feet of water a
29 year and 5.5 or more cubic feet per second of water, the department shall give notice of the proposed change
30 in accordance with 85-2-307 and shall hold one or more hearings in accordance with 85-2-309 prior to its~~

1 approval or denial of the proposed change. The department shall provide notice and may hold one or more
2 hearings upon any other proposed change if it determines that the proposed change might adversely affect the
3 rights of other persons:

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

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

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

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

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

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

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

27 ~~———(15) (a) An appropriator may change an appropriation right for a replacement well without the prior~~
28 ~~approval of the department if:~~

29 ~~———(i) the appropriation right is for:~~

30 ~~———(A) ground water outside the boundaries of a controlled ground water area; or~~

1 ~~———(B) ground water inside the boundaries of a controlled ground water area and if the provisions of the~~
2 ~~order declaring the controlled ground water area do not restrict such a change;~~
3 ~~———(ii) the change in appropriation right is to replace an existing well and the existing well will no longer be~~
4 ~~used;~~
5 ~~———(iii) the rate and volume of the appropriation from the replacement well are equal to or less than that of~~
6 ~~the well being replaced and do not exceed:~~
7 ~~———(A) 450 gallons a minute for a municipal well; or~~
8 ~~———(B) 35 gallons a minute and 10 acre-feet a year for all other wells;~~
9 ~~———(iv) the water from the replacement well is appropriated from the same aquifer as the water appropriated~~
10 ~~from the well being replaced; and~~
11 ~~———(v) a timely, correct and complete notice of replacement well is submitted to the department as provided~~
12 ~~in subsection (15)(b):~~
13 ~~———(b) (i) After completion of a replacement well and appropriation of ground water for a beneficial use, the~~
14 ~~appropriator shall file a notice of replacement well with the department on a form provided by the department.~~
15 ~~———(ii) The department shall review the notice of replacement well and shall issue an authorization of a~~
16 ~~change in an appropriation right if all of the criteria in subsection (15)(a) have been met and the notice is correct~~
17 ~~and complete.~~
18 ~~———(iii) The department may not issue an authorization of a change in appropriation right until a correct and~~
19 ~~complete notice of replacement well has been filed with the department. The department shall return a defective~~
20 ~~notice to the appropriator, along with a description of defects in the notice. The appropriator shall refile a~~
21 ~~corrected and completed notice of replacement well within 30 days of notification of defects or within a further~~
22 ~~time as the department may allow, not to exceed 6 months.~~
23 ~~———(iv) If a notice of replacement well is not completed within the time allowed, the appropriator shall:~~
24 ~~———(A) cease appropriation of water from the replacement well pending approval by the department; and~~
25 ~~———(B) submit an application for a change in appropriation right to the department pursuant to subsections~~
26 ~~(1) through (3).~~
27 ~~———(c) The provisions of this subsection (15) do not apply to an appropriation right abandoned under~~
28 ~~85-2-404.~~
29 ~~———(d) For each well that is replaced under this subsection (15), the appropriator shall follow the well~~
30 ~~abandonment procedures, standards, and rules adopted by the board of water well contractors pursuant to~~

1 ~~37-43-202.~~

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

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

7 ~~—— (i) withdraws water from the same ground water source as the original well; and~~

8 ~~—— (ii) is required by a state or federal agency.~~

9 ~~—— (b) The priority date of the redundant water supply well is the same as the priority date of the original~~
 10 ~~well. Only one well may be used at one time.~~

11 ~~—— (c) Within 60 days of completion of a redundant water supply well, the appropriator shall file a notice~~
 12 ~~of construction of the well with the department on a form provided by the department. The department may~~
 13 ~~return a defective notice of construction to the appropriator for correction and completion.~~

14 ~~—— (d) The provisions of subsections (9) and (10) do not apply to a change in appropriation right that meets~~
 15 ~~the requirements of this section."~~

16

17 **Section 3.** Section 85-2-436, MCA, is amended to read:

18 **"85-2-436. ~~(Temporary) Water leasing study~~ Instream flow to protect, maintain, or enhance**
 19 **streamflows to benefit fishery resource -- change in appropriation rights by department of fish, wildlife,**
 20 **and parks.** (1) The department of fish, wildlife, and parks and the department, in consultation with the

21 environmental quality council, shall conduct and coordinate a study that, at a minimum:

22 ~~—— (a) provides the following data for each designated stream reach and each pilot lease entered into under~~
 23 ~~subsection (2):~~

24 ~~—— (i) the length of the stream reach and how it is determined;~~

25 ~~—— (ii) technical methods and data used to determine critical streamflow or volume needed to preserve~~
 26 ~~fisheries;~~

27 ~~—— (iii) legal standards and technical data used to determine and substantiate the amount of water available~~
 28 ~~for instream flows through leasing of existing rights;~~

29 ~~—— (iv) contractual parameters, conditions, and other steps taken to ensure that each lease in no way harms~~
 30 ~~other appropriators, particularly if the stream is one that experiences natural dewatering; and~~

- 1 ~~—— (v) methods and technical means used to monitor use of water under each lease;~~
2 ~~—— (b) based on the data provided under subsection (1)(a), develops a complete model of a water lease~~
3 ~~and lease authorization that includes a step-by-step explanation of the process from initiation to completion.~~
4 (1) The department of fish, wildlife, and parks may change an appropriation right, which it either holds in fee
5 simple or leases, to an instream flow purpose and a defined place of use to protect, maintain, or enhance
6 streamflows to benefit the fishery resource.
7 (2) The change in purpose or place of use must meet all of the criteria and process of 85-2-307 through
8 85-2-309 and 85-2-401 and 85-2-402 and the additional criteria and process in subsection (3) of this section to
9 protect the rights of other appropriators from adverse impacts.
10 ~~(2)(3)~~ (a) For purposes of undertaking the study described in subsection (1) and as authorized by law,
11 the department of fish, wildlife, and parks and the department may engage in the activities described in this
12 subsection (2). Except as provided in 85-2-439, for purposes of this study, this This section is the exclusive
13 means by which the department of fish, wildlife, and parks may seek to change an appropriation right to an
14 instream flow purpose.
15 (b) The department of fish, wildlife, and parks, with the consent of the commission, may hold, purchase,
16 or lease existing rights for the purpose of protecting, maintaining, or enhancing streamflows for the benefit of
17 fisheries ~~in stream reaches determined eligible by the department pursuant to 85-2-437.~~
18 (c) Upon receipt of a correct and complete application for a lease change in purpose or place of use
19 from the department of fish, wildlife, and parks, the department shall publish notice of the application as provided
20 in 85-2-307. Parties who believe that they may be adversely affected by the proposed lease change in
21 appropriation right may file an objection as provided in 85-2-308. A lease change in appropriation right may not
22 be approved until all objections are resolved. After resolving all objections filed under 85-2-308, the department
23 shall authorize a lease change of an existing appropriation right for the purpose of protecting, maintaining, or
24 enhancing streamflows for the benefit of fisheries if the applicant submits a correct and complete application and
25 meets the requirements of 85-2-402.
26 (d) The application for a lease change in appropriation right authorization must include specific
27 information on the length and location of the stream reach in which the streamflow must be protected,
28 maintained, or enhanced and must provide a detailed streamflow measuring plan that describes the points
29 where and the manner in which the streamflow must be measured.
30 (e) The maximum quantity of water that may be leased subject to a change in appropriation right is the

1 amount historically diverted by the lessor. However, only the amount historically consumed, or a smaller amount
2 if specified by the department in the lease change in appropriation right authorization, may be used to protect,
3 maintain, or enhance streamflows below the ~~lessor's~~ point of diversion that existed prior to the change in
4 appropriation right.

5 (f) ~~The~~ A lease for instream flow purposes may ~~not~~ be issued for a term of ~~more than 10~~ any number
6 of years, but and it may be renewed ~~once for up to 10 years,~~ except that a lease of water made available from
7 the development of a water conservation or storage project ~~is restricted to~~ may be for a term equal to the
8 ~~expected~~ life of the project ~~but to not more than 30 years.~~ Upon receiving notice of a lease renewal, the
9 department shall notify other appropriators potentially affected by the lease and shall allow 30 days for
10 submission of new evidence of adverse effects to other water rights. A lease change in appropriation right
11 authorization is not required for a renewal unless an appropriator other than an appropriator described in
12 subsection ~~(2)(f)~~ (3)(i) submits evidence of adverse effects to the appropriator's rights that has not been
13 considered previously. If new evidence is submitted, a lease change in appropriation right authorization must
14 be obtained according to the requirements of 85-2-402.

15 (g) ~~During the term of the lease, the~~ The department may modify or revoke the lease change in
16 appropriation right authorization if an appropriator other than an appropriator described in subsection ~~(2)(f)~~ (3)(i)
17 proves by a preponderance of evidence that the appropriator's water right is adversely affected.

18 (h) The priority of appropriation for a lease or change in appropriation right under this section is the
19 same as the priority of appropriation of the right that is ~~leased~~ changed to an instream purpose.

20 (i) Neither a change in appropriation right nor any other authorization is required for the reversion of ~~the~~
21 a leased appropriation right to the lessor's previous use.

22 (j) A person issued a water use permit with a priority of appropriation after the date of filing of an
23 application for a lease change in appropriation right authorization under this section may not object to the
24 exercise of the lease changed water right according to its terms or the reversion of ~~the~~ a leased appropriation
25 right to the lessor according to the lessor's previous use.

26 (k) The department of fish, wildlife, and parks shall pay all costs associated with installing devices or
27 providing personnel to measure streamflows according to the measuring plan ~~submitted~~ required under this
28 section.

29 ~~(3)~~(4) (a) The department of fish, wildlife, and parks shall complete and submit to the department,
30 commission, and environmental quality council an annual study progress report by December 1 of each year.

1 This report must include ~~the applicable information listed in subsection (1) for each lease, a summary of stream~~
 2 ~~reach designation activity under 85-2-437, and a summary of leasing activity on all designated streams. If the~~
 3 ~~department of fish, wildlife, and parks has not leased additional water rights under this section by December 1~~
 4 ~~of any year, the department of fish, wildlife, and parks shall provide compelling justification for that fact in the~~
 5 ~~study progress report~~ a summary of all appropriation rights and leases changed to an instream flow purpose in
 6 the last year. The report must address for each change in appropriation right to an instream flow purpose:

7 (i) the length of the stream reach and how it was determined;

8 (ii) technical methods and data used to determine critical streamflow or volume needed to protect,
 9 maintain, or enhance streamflow to benefit the fishery resource;

10 (iii) legal standards and technical data used to determine and substantiate the amount of water available
 11 for instream flows through the existing change in appropriation right;

12 (iv) contractual parameters, conditions, and other steps taken to ensure that each change in
 13 appropriation right in no way harms other appropriators, particularly if the stream is one that experiences natural
 14 dewatering; and

15 (v) methods and technical means used to monitor use of water under each change in appropriation
 16 right.

17 (b) A final study report must be adopted by the department and commission and submitted to the
 18 environmental quality council, which shall complete the final report by ~~December 1~~ September 15, 2008, and
 19 a final report for each 10-year interval after September 15, 2008.

20 ~~(4)(5)~~ This section does not create the right for a person to bring suit to compel the renewal of a lease
 21 that has expired. ~~(Terminates June 30, 2009--sec. 9, Ch. 123, L. 1999.)"~~

22

23 **Section 4.** Section 87-1-257, MCA, is amended to read:

24 **"87-1-257. River restoration program.** (1) The department shall administer a river restoration program.

25 (2) The program may consist of physical projects to improve rivers and their associated lands in order
 26 to conserve and enhance fish and wildlife habitat, including but not limited to ~~the~~ a change in appropriation right
 27 or leasing of water rights under 85-2-436.

28 (3) The department shall work cooperatively with individuals, conservation districts, and state, local,
 29 private, tribal, and federal organizations to achieve the goals of the program and may contract with private
 30 organizations to implement specific river restoration projects.

1 (4) The department shall present projects to the local conservation district for review and
2 recommendations and obtain any applicable permits.

3 (5) The department shall receive the consent of the landowner or lessee of any associated lands before
4 initiating physical projects on these lands.

5 (6) A project conducted under the program may not restrict or interfere with the exercise of any water
6 right."

7

8 NEW SECTION. Section 5. Repealer. (1) Sections 85-2-437 and 85-2-438, MCA, are repealed.

9 (2) Section 11, Chapter 658, Laws of 1989, sections 4 and 7, Chapter 740, Laws of 1991, and sections
10 5, 6, 7, and 9, Chapter 123, Laws of 1999, are repealed.

11

12 NEW SECTION. Section 6. Effective date. [This act] is effective on passage and approval.

13

- END -