

**TESTIMONY OF DNRC
WATER RESOURCES DIVISION ADMINISTRATOR TIM DAVIS
IN OPPOSITION TO SB 330
BEFORE THE SENATE NATURAL RESOURCES COMMITTEE**

As explained more fully below, the Department of Natural Resources and Conservation (DNRC) opposes SB 330 for the following reasons:

1. The current adjudication process is not complete and will not be complete for many years. The target deadline for “enforceable” decrees (not final decrees) in the adjudication is 2020. A second Water Court Judge was recently added because of the adjudication workload. At present only five of the 85 Water Court Basins have final decrees.
2. The Montana Water Court (Water Court) does not have expertise in applying the specific statutory criteria of 85-2-311 and 85-2-402, MCA, including legal availability and lack of adverse effect. These criteria have been within the exclusive jurisdiction of the DNRC since the passage of the Water Use Act in 1973. This is particularly important with respect to the analysis of groundwater-surface water interaction, as mandated by the Legislature under HB 831 (2007) and the decision Montana Trout Unlimited v. DNRC, et al., 2006 MT 72.
3. The proposed review standard is *de novo*, meaning anew as if heard for the first time. DNRC would be the only agency, of which DNRC is aware, following the Montana Administrative Procedure Act (MAPA) which would not receive the deferential review of MAPA under 2-4-704, MCA, recognizing agency expertise in its subject matter.
4. The *de novo* standard will likely increase agency appeals because it is a retrial of the facts.
5. It removes the judicial review of the proposed new action from the local district court where the applicant resides. District courts have been reviewing DNRC decisions for over 40 years.

Background

The Montana Water Use Act was effective July 1, 1973. After that time, if one seeks a new water right or a change of an existing water right, one must seek approval of the DNRC. Generally “existing water rights” are those water rights as they were perfected under the laws prior to July 1, 1973. In 1979, the Legislature passed HB76 which provided a judicial process for adjudicating Montana’s existing water rights. The Water Court is responsible for adjudicating pre-July 1, 1973, water rights.

In the adjudication, the Water Court determines the elements of those water rights. These elements include priority date, flow rate, purpose, place of use, period of diversion, ownership, etc.

In its role, the DNRC evaluates an applicant’s proof of specific statutory criteria as applied to a proposed new water use or change in water use. For a new water right permit, these criteria are found in 85-2-311, MCA, including legal availability and lack of adverse effect to other appropriators. Applicants for groundwater appropriations in closed basins must also comply with the groundwater-surface water requirements in 85-2-360 through 85-2-363, MCA, also known as HB 831 (2007). For a change in an existing water right, an applicant must prove the criteria in 85-2-402, MCA, including lack of adverse effect to junior and senior appropriators.

Issues

- 1. The current adjudication process is not complete and will not be complete for many years. The target deadline for enforceable decrees in the adjudication is 2020. A second Water Court Judge was recently added because of the adjudication workload. At present only five of the 85 Water Court Basins have final decrees.**

Until the adjudication is almost complete, a discussion of expanding the Water Court's jurisdiction is premature. The target date for "enforceable" decrees from the Water Court is 2020. Enforceable decrees are not "final" decrees, which would follow after the 2020 deadline. It is the DNRC's understanding that enforceable decrees in all basins by 2020, will be challenging at best. The Water Court's resources should be focused on completing the adjudication.

In addition, the Water Court lacks technical staff such as hydrologists, to properly inform any *de novo* review of a DNRC decision. The Water Court's technical expertise in its adjudication function currently comes from the DNRC Water Resources Division Adjudication Bureau.

- 2. The Water Court does not have expertise in applying the specific statutory criteria of 85-2-311 and 85-2-402, MCA, including legal availability and lack of adverse effect.**

These criteria have been within the exclusive jurisdiction of the DNRC since the passage of the Water Use Act in 1973. The Water Court does not assess legal availability of water on a source in the adjudication or whether one water right can create adverse effect to another water right.

For example, this is particularly important with respect to the analysis of groundwater-surface water interaction, as mandated by the Legislature under HB 831 (2007) and the decision in Montana Trout Unlimited v. DNRC, et al., 2006 MT 72. DNRC routinely assesses the effect of proposed new groundwater withdrawals on surface water. This can include proposed groundwater withdrawals that capture groundwater before it reaches a surface water source to become part of the surface water supply, and it can include groundwater pumping that actually pulls water from the surface water source. The DNRC has a staff of hydrologists that evaluate these potential impacts.

For example, a proposed new groundwater appropriation could capture water year-around that would otherwise contribute to the flow of the Gallatin River, where surface water rights as early as the 1890s can be shutdown in July. Because of the nature and timing of the depletions from the groundwater pumping, the groundwater appropriation would not be callable to protect senior surface water rights. Thus, a 2012 groundwater appropriation could take surface water belonging to a pre-1900 Gallatin water right, if the analysis of the statutory criteria is not performed and evaluated correctly.

The Water Court has no experience in evaluating the statutory criteria applied by the DNRC. To DNRC's knowledge, the Court does not have a hydrologist.

- 3. The proposed review standard is *de novo*, meaning anew as if heard for the first time. DNRC would be the only agency, of which DNRC is aware, following MAPA which would not receive the deferential review of MAPA under 2-4-704, MCA, recognizing agency expertise in its subject matter.**

DNRC follows the Montana Administrative Procedure Act (MAPA) to process applications for new water right permits and changes in existing water rights. Review of DNRC decisions under MAPA are made to the local district court under 2-4-Part 7, MCA. The review standard for the local district court is set out in 2-4-704, MCA. This is the same standard applied to all agencies proceeding under MAPA. The standard recognizes the expertise of the agency in its subject matter. The SB 330 *de novo* standard is not the same as 2-4-704, MCA, and is a new evaluation by the Water Court of all of the evidence in a case as if it were the initial trier of fact.

The local district court courts evaluate DNRC's decisions under 2-4-704, MCA. The DNRC is confident in the ability of local district courts to review its decisions under this standard. As respect to the statutory criteria specifically applied by the DNRC, the Water Court has no more expertise at present than the local district courts.

The *de novo* review also creates confusion as to the DNRC's role in its decisions and on appeal. Decisions on review to a district court are hearing examiner decisions made after a contested case hearing is held. The hearing may include the applicant, objectors to an application and DNRC expert witnesses. DNRC is a neutral decision-maker. A petition for judicial review is on the administrative record compiled before the agency and generally includes only the applicant and the DNRC. Objectors are not required to participate. It is unclear whether the agency must now become a party to present evidence before the Water Court and how evidence and witness testimony by third parties not part of the judicial review will be presented.

4. The *de novo* standard will likely increase agency appeals because it is a retrial of the facts.

Because the standard of review is *de novo* with no deference to agency expertise, an applicant essentially get a second bite at the analysis. An applicant would be encouraged to appeal a decision. Persons who objected to the application before the agency may now have to participate in review of the DNRC decision before the Water Court, because of the Water Court's retrial of the evidence in the case.

5. It removes the judicial review of the proposed new action from the local district court where the applicant resides.

Currently petitions for judicial review can be filed in the local district court where the applicant resides or in Helena. Generally the petitions are filed where the applicant resides. In recent years, this has included Dillon, Lewistown, Bozeman, and Missoula. The local district court tends to have local knowledge of the geography and water resources involved, which makes understanding the facts at issue easier. DNRC is confident in the ability of local district courts to understand and apply the statutory criteria.

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

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

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

(A) identification of physical water availability;

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

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

(b) the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. In this subsection (1)(b), adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied;

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

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

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

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

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

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

(2) The applicant is required to prove that the criteria in subsections (1)(f) through (1)(h) have been met only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the satisfaction of the department that the criteria in subsection (1)(f), (1)(g), or (1)(h), as applicable, may not be met. For the criteria set forth in subsection (1)(g), only the department of

environmental quality or a local water quality district established under Title 7, chapter 13, part 45, may file a valid objection.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

natural resources conservation service and other specific field studies.

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

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

(8) For an application for ground water in a basin closed pursuant to 85-2-330, 85-2-336, 85-2-341, 85-2-343, or 85-2-344 or during the period of closure for any basin that is administratively closed pursuant to 85-2-319, the applicant shall comply with the provisions of 85-2-360 in addition to the requirements of this section.

History: En. Sec. 21, Ch. 452, L. 1973; amd. Sec. 1, Ch. 156, L. 1975; amd. Sec. 1, Ch. 307, L. 1977; amd. Sec. 6, Ch. 416, L. 1977; R.C.M. 1947, 89-885; amd. Sec. 4, Ch. 357, L. 1981; amd. Sec. 11, Ch. 448, L. 1983; amd. Sec. 2, Ch. 706, L. 1983; amd. Sec. 4, Ch. 573, L. 1985; amd. Sec. 2, Ch. 432, L. 1989; amd. Sec. 1, Ch. 495, L. 1989; amd. Sec. 5, Ch. 370, L. 1993; amd. Sec. 1, Ch. 460, L. 1993; (7)En. Sec. 5, Ch. 460, L. 1993; amd. Sec. 448, Ch. 418, L. 1995; amd. Sec. 7, Ch. 497, L. 1997; amd. Sec. 8, Ch. 213, L. 2007; amd. Sec. 3, Ch. 391, L. 2007.

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

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

(c) As used in this part, "national forest system lands" has the same meaning as that provided in [85-20-1401](#), Article I.

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

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

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

- (i) a change in appropriation right for instream flow pursuant to [85-2-320](#) or [85-2-436](#);
 - (ii) a temporary change in appropriation right for instream flow pursuant to [85-2-408](#); or
 - (iii) a change in appropriation right pursuant to [85-2-420](#) for mitigation or marketing for mitigation.
- (c) The proposed use of water is a beneficial use.

(d) The applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use or, if the proposed change involves a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water. This subsection (2)(d) does not apply to:

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

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

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

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

(3) The applicant is required to prove that the criteria in subsections (2)(f) and (2)(g) have been met only if a valid objection is filed. A valid objection must contain substantial credible information

establishing to the satisfaction of the department that the criteria in subsection (2)(f) or (2)(g), as applicable, may not be met.

(4) The department may not approve a change in purpose of use or place of use of an appropriation 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 proves by a preponderance of evidence that:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

water.

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

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

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

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

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

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

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

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

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

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

(i) the appropriation right is for:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(viii) the appropriator can show the change will not increase access to water availability, change the method of irrigation, if applicable, or increase the amount of water diverted, used, or consumed; and

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

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

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

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

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

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

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

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

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

(e) (i) An appropriator may file a correct and complete objection with the department alleging that the change in appropriation right for a replacement point of diversion will adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under Title 85, chapter 2, part 3.

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

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

History: En. Sec. 28, Ch. 452, L. 1973; amd. Sec. 3, Ch. 238, L. 1974; amd. Sec. 1, Ch. 338, L. 1975; amd. Sec. 8, Ch. 416, L. 1977; R.C.M. 1947, 89-892; amd. Sec. 15, Ch. 448, L. 1983; amd. Sec. 7, Ch. 573, L. 1985; amd. Sec. 8, Ch. 535, L. 1987; amd. Sec. 3, Ch. 432, L. 1989; amd. Sec. 2, Ch. 658, L. 1989; amd. Sec. 3, Ch. 308, L. 1991; amd. Sec. 9, Ch. 805, L. 1991; amd. Sec. 7, Ch. 370, L. 1993; amd. Sec. 3, Ch. 460, L. 1993; (14)En. Sec. 5, Ch. 460, L. 1993; amd. Sec. 2, Ch. 322, L. 1995; amd. Sec. 7, Ch. 487, L. 1995; amd. Sec. 3, Ch. 353, L. 1997; amd. Sec. 18, Ch. 497, L. 1997; amd. Sec. 1, Ch. 42, L. 1999; amd. Sec. 1, Ch. 132, L. 2001; amd. Sec. 3, Ch. 381, L. 2001; amd. Sec. 1, Ch. 161, L. 2003; amd. Sec. 3, Ch. 85, L. 2005; amd. Sec. 18, Ch. 213, L. 2007; amd. Sec. 3, Ch. 448, L. 2007; amd. Sec. 2, Ch. 86, L. 2009; amd. Sec. 1, Ch. 424, L. 2009; amd. Sec. 4, Ch. 29, L. 2011.

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2-4-704. Standards of review. (1) The review must be conducted by the court without a jury and must be confined to the record. In cases of alleged irregularities in procedure before the agency not shown in the record, proof of the irregularities may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.

(2) The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because:

(a) the administrative findings, inferences, conclusions, or decisions are:

(i) in violation of constitutional or statutory provisions;

(ii) in excess of the statutory authority of the agency;

(iii) made upon unlawful procedure;

(iv) affected by other error of law;

(v) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;

(vi) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or

(b) findings of fact, upon issues essential to the decision, were not made although requested.

(3) If a petition for review is filed challenging a licensing or permitting decision made pursuant to Title 75 or Title 82 on the grounds of unconstitutionality, as provided in subsection (2)(a)(i), the petitioner shall first establish the unconstitutionality of the underlying statute.

History: En. Sec. 16, Ch. 2, Ex. L. 1971; amd. Sec. 17, Ch. 285, L. 1977; R.C.M. 1947, 82-4216(6), (7); amd. Sec. 2, Ch. 83, L. 1989; amd. Sec. 3, Ch. 361, L. 2003.

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