

1 _____ BILL NO. _____

2 INTRODUCED BY _____
3 (Primary Sponsor)

4 A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING AN EXEMPTION FOR MUNICIPALITIES TO CLARIFY
5 THE PLACE OF USE FOR A WATER RIGHT UNDER CERTAIN CONDITIONS; ALLOWING OBJECTIONS;
6 PROVIDING RULEMAKING AUTHORITY; AND AMENDING SECTIONS 85-2-307, 85-2-308, 85-2-309,
7 85-2-310, AND 85-2-402, MCA."

8
9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

10
11 NEW SECTION. **Section 1. Exemption for change in municipal water right.** (1) A municipality that
12 holds an appropriation right for municipal use that was filed in accordance with Title 85, chapter 2, part 2, may
13 apply to the department for a change pursuant to this section to clarify the place of use.

14 (2) Each appropriation right changed pursuant to this section:

15 (a) must list a place of use consistent with the city boundaries and the area within a growth policy adopted
16 pursuant to Title 76, chapter 1, as those areas exist on [the effective date of this act]; and

17 (b) must have been used within 5 years prior to the application date.

18 (3) Neither the point of diversion nor the flow rate for the appropriation right may be changed.

19 (4) Storage may not be added to the leased appropriation right at the point of diversion or the original
20 place of use.

21 (5) Water used pursuant to this section must be measured at the point of diversion by a meter approved
22 by the department. The municipality shall report the amount of water measured at the end of the year or upon
23 request of the department.

24 (6) A municipality proposing to change an appropriation right pursuant to this section shall submit a
25 correct and complete application on a form provided by the department and a fee as established by rule. The
26 application must include:

27 (a) the name of all owners of each appropriation right;

28 (b) the number of each appropriation right;

29 (c) the source of water to be appropriated;

30 (d) the proposed diversion flow rate and volume of water;

- 1 (e) evidence that the appropriation right has been used within the last 5 years; and
2 (f) an analysis of potential adverse effects and a description of planned actions to mitigate potential
3 adverse effects.

4 (7) Within 30 days of receiving the application, the department shall approve or deny the application. An
5 approved application must be correct and complete and meet the requirements of this section. The department
6 may approve an application with conditions.

7 (8) After approval, the department shall provide notice of the proposed change that includes the
8 information in subsection (6). The department shall:

9 (a) mail individual notice to potentially affected appropriators identified by the department in the area of
10 the point of diversion; and

11 (b) post the notice on the department's website.

12 (9) (a) For 60 days from the date that notice is mailed pursuant to subsection (8), the department shall
13 accept correct and complete objections to the proposed change from any person whose property, water rights,
14 or interests would be adversely affected by the proposed change. The objection must be made on a form
15 provided by the department.

16 (b) The department shall determine if an objection is valid. A valid objection contains facts indicating that
17 the rights of other appropriators would be adversely affected by the change of the appropriation right. If the
18 department determines that an objection is valid, the approval for the change of the appropriation right is
19 canceled.

20 (c) A municipality with a canceled approval under subsection (9)(b) may request a hearing on the
21 objection pursuant to 2-4-604 within 15 days of notice of the cancellation. The department shall issue an order
22 reinstating approval for the change if the applicant proves by a preponderance of the evidence that the water
23 rights of other appropriators will not be adversely affected by the change.

24 (10) Violations of this section are subject to the provisions of 85-2-114 and 85-2-122.

25 (11) The department shall adopt rules to implement this section.

26

27 **Section 2.** Section 85-2-307, MCA, is amended to read:

28 **"85-2-307. Notice of application for permit or change in appropriation right.** (1) Upon receipt of an
29 application for a permit or a change in appropriation right, the department shall publish notice of receipt of the
30 application on the department's website.

1 (2) (a) Within 120 days of the receipt of a correct and complete application for a permit or change in
2 appropriation right, the department:

3 (i) may meet informally with the applicant, the persons listed in subsection (2)(d), and persons who may
4 claim standing pursuant to 85-2-308 to discuss the application;

5 (ii) shall make a written preliminary determination as to whether or not the application satisfies the
6 applicable criteria for issuance of a permit or change in appropriation right; and

7 (iii) may include conditions in the written preliminary determination to satisfy applicable criteria for
8 issuance of a permit or change in appropriation right.

9 (b) If the preliminary determination proposes to grant an application, the department shall prepare a
10 notice containing the facts pertinent to the application, including the summary of the preliminary determination
11 and any conditions, and shall publish the notice once in a newspaper of general circulation in the area of the
12 source.

13 (c) If the preliminary determination proposes to deny an application, the process provided in 85-2-310
14 must be followed.

15 (d) Before the date of publication, the department shall also serve the notice by first-class mail upon:

16 (i) an appropriator of water or applicant for or holder of a permit who, according to the records of the
17 department, may be affected by the proposed appropriation;

18 (ii) any purchaser under contract for deed, as defined in 70-20-115, of property that, according to the
19 records of the department, may be affected by the proposed appropriation; and

20 (iii) any public agency that has reserved waters in the source under 85-2-316.

21 (e) The department may, in its discretion, also serve notice upon any state agency or other person the
22 department feels may be interested in or affected by the proposed appropriation.

23 (f) The department shall file in its records proof of service by affidavit of the publisher in the case of
24 notice by publication and by its own affidavit in the case of service by mail.

25 (3) The notice must state that by a date set by the department, not less than 15 days or more than 60
26 days after the date of publication, persons may file with the department written objections to the application.

27 (4) The requirements of subsections (2) and (3) do not apply if the department finds, on the basis of
28 information reasonably available to it, that the appropriation as proposed in the application will not adversely affect
29 the rights of other persons.

30 (5) The provisions of this section do not apply to applications filed pursuant to [section 1]."

1

2 **Section 3.** Section 85-2-308, MCA, is amended to read:

3 **"85-2-308. Objections.** (1) (a) An objection to an application under this chapter must be filed by the date
4 specified by the department under 85-2-307(3).

5 (b) The objection to an application for a permit must state the name and address of the objector and facts
6 indicating that one or more of the criteria in 85-2-311 are not met.

7 (2) For an application for a change in appropriation rights, the objection must state the name and
8 address of the objector and facts indicating that one or more of the criteria in 85-2-320, if applicable, 85-2-402,
9 85-2-407, 85-2-408, and 85-2-436, if applicable, are not met.

10 (3) A person has standing to file an objection under this section if the property, water rights, or interests
11 of the objector would be adversely affected by the proposed appropriation.

12 (4) For an application for a reservation of water, the objection must state the name and address of the
13 objector and facts indicating that one or more of the criteria in 85-2-316 are not met.

14 (5) An objector to an application under this chapter shall file a correct and complete objection on a form
15 prescribed by the department within the time period stated on the public notice associated with the application.
16 In order to assist both applicants and objectors, the department shall adopt rules in accordance with this chapter
17 delineating the components of a correct and complete objection. For instream flow water rights for fish, wildlife,
18 and recreation, the rules must require the objector to describe the reach or portion of the reach of the stream or
19 river subject to the instream flow water right and the beneficial use that is adversely affected and to identify the
20 point or points where the instream flow water right is measured and monitored. The department shall notify the
21 objector of any defects in an objection. An objection not corrected or completed within 15 days from the date of
22 notification of the defects is terminated.

23 (6) An objection is valid if the objector has standing pursuant to subsection (3), has filed a correct and
24 complete objection within the prescribed time period, and has stated the applicable information required under
25 this section and rules of the department.

26 (7) The provisions of this section do not apply to applications filed pursuant to [section 1]."

27

28 **Section 4.** Section 85-2-309, MCA, is amended to read:

29 **"85-2-309. Hearings on objections -- jurisdiction.** (1) Except as provided in [section 1], if the
30 department determines that an objection to an application for a permit under 85-2-311 or change in appropriation

1 right under 85-2-402 states a valid objection, it shall hold a contested case hearing, pursuant to Title 2, chapter
 2 4, part 6, on the objection within 90 days from the date set by the department for the filing of objections after
 3 serving notice of the hearing by first-class mail upon the applicant and the objector, unless the department
 4 certifies an issue to the district court for determination by a water judge under subsection (2). The department
 5 may consolidate hearings if more than one objection is filed to an application. The department may extend the
 6 90-day deadline for good cause shown or upon request of the applicant and all objectors. The department shall
 7 file in its records proof of the service by affidavit of the department.

8 (2) (a) At any time prior to commencement or before the conclusion of a hearing as provided in
 9 subsection (1), the department may in its discretion certify to the district court all factual and legal issues involving
 10 the adjudication or determination of the water rights at issue in the hearing, including but not limited to issues of
 11 abandonment, quantification, or relative priority dates. Certified controversies must be given priority by a water
 12 judge over all other adjudication matters.

13 (b) If the department fails to certify an issue as provided in this section after a timely request by a party
 14 to the hearing, the department shall include its denial to certify as part of the record of the hearing.

15 (c) Upon determination of the issues certified to it by the department, the court shall remand the matter
 16 to the department for further processing of the application under this chapter.

17 (3) Subsection (2) does not apply in the case of a matter considered at a hearing under this section
 18 pursuant to 85-2-316 or 85-2-322."

19

20 **Section 5.** Section 85-2-310, MCA, is amended to read:

21 **"85-2-310. Action on application for permit or change in appropriation right.** (1) (a) If the
 22 department proposes to deny an application for a permit or a change in appropriation right under 85-2-307, unless
 23 the applicant withdraws the application, the department shall hold a hearing pursuant to 2-4-604 after serving
 24 notice of the hearing by first-class mail upon the applicant for the applicant to show cause by a preponderance
 25 of the evidence as to why the permit or change in appropriation right should not be denied.

26 (b) (i) Upon request from the applicant, the department shall appoint a hearing examiner who did not
 27 participate in the preliminary determination.

28 (ii) The applicant may make only one request pursuant to this subsection (1)(b) for a different hearing
 29 examiner.

30 (2) A proposal to grant a permit or change in appropriation right with or without conditions following a

1 hearing on a proposal to deny the application must proceed as if the department proposed to grant the permit
2 or change in appropriation right in its preliminary determination pursuant to 85-2-307.

3 (3) If valid objections are not received on an application or if valid objections are unconditionally
4 withdrawn and the department preliminarily determined to grant the permit or change in appropriation right, the
5 department shall grant the permit or change in appropriation right as proposed in the preliminary determination
6 pursuant to 85-2-307.

7 (4) If valid objections to an application are received and withdrawn with conditions stipulated with the
8 applicant and the department preliminarily determined to grant the permit or change in appropriation right, the
9 department shall grant the permit or change in appropriation right subject to conditions as necessary to satisfy
10 applicable criteria.

11 (5) The department shall deny or grant with or without conditions a permit under 85-2-311 or a change
12 in appropriation right under 85-2-402 within 90 days after the administrative record is closed.

13 (6) If an application is to appropriate water with a point of diversion, conveyance, or place of use on
14 national forest system lands, any application approved by the department is subject to any written special use
15 authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of
16 diversion, impoundment, storage, transportation, withdrawal, use, or distribution of the water applied for and any
17 terms, conditions, and limitations related to the use of water contained in any special use authorization required
18 by federal law.

19 (7) (a) Except as provided in subsection (6), if the department proposes to grant a permit or change in
20 appropriation right in modified form, the applicant must be given an opportunity to be heard. The addition of
21 conditions or changes to conditions required for approval does not constitute a modification of the application.

22 (b) The department shall serve notice of a preliminary determination to grant a permit or change in
23 appropriation right in a modified form by first-class mail upon the applicant, with a notice that the applicant may
24 obtain a hearing pursuant to 2-4-604 to show cause by a preponderance of the evidence as to why the permit
25 or change in appropriation right should not be preliminarily determined to be granted in the modified form by filing
26 a request within 30 days after the notice is mailed. The notice must state that the permit or change in
27 appropriation right will be preliminarily determined to be granted as modified unless a hearing is requested.

28 (8) The department may cease action upon an application for a permit or change in appropriation right
29 and return it to the applicant when it finds that the application is not in good faith or does not show a bona fide
30 intent to appropriate water for a beneficial use. An application returned for either of these reasons must be

1 accompanied by a statement of the reasons for which it was returned, and for a permit application there is not
2 a right to a priority date based upon the filing of the application. Returning an application pursuant to this
3 subsection is a final decision of the department.

4 (9) For all applications filed after July 1, 1973, the department shall find that an application is not in good
5 faith or does not show a bona fide intent to appropriate water for a beneficial use if:

6 (a) an application is not corrected and completed as required by 85-2-302;

7 (b) the appropriate filing fee is not paid;

8 (c) the application does not document:

9 (i) a beneficial use of water;

10 (ii) the proposed place of use of all water applied for;

11 (iii) for an appropriation of 4,000 acre-feet a year or more and 5.5 cubic feet per second or more, a
12 detailed project plan describing when and how much water will be put to a beneficial use. The project plan must
13 include a reasonable timeline for the completion of the project and the actual application of the water to a
14 beneficial use.

15 (iv) for appropriations not covered in subsection (9)(c)(iii), a general project plan stating when and how
16 much water will be put to a beneficial use; and

17 (v) except as provided in subsection (10), if the water applied for is to be appropriated above that which
18 will be used solely by the applicant or if it will be marketed by the applicant to other users, information detailing:

19 (A) each person who will use the water and the amount of water each person will use;

20 (B) the proposed place of use of all water by each person;

21 (C) the nature of the relationship between the applicant and each person using the water; and

22 (D) each firm contractual agreement for the specified amount of water for each person using the water;

23 or

24 (d) the appropriate environmental impact statement costs or fees, if any, are not paid as required by
25 85-2-124.

26 (10) If water applied for is to be marketed by the applicant to other users for the purpose of aquifer
27 recharge or mitigation, the applicant is exempt from the provisions of subsection (9)(c)(v). The applicant must
28 provide information detailing the proposed place of use.

29 (11) The provisions of this section do not apply to applications filed pursuant to [section 1].

30

1 **Section 6.** Section 85-2-402, MCA, is amended to read:

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

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

15 (2) Except as provided in subsections (4) through (6), (15), (16), ~~and (18)~~, and (19) and, if applicable,
16 subject to subsection (17), the department shall approve a change in appropriation right if the appropriator proves
17 by a preponderance of evidence that the following criteria are met:

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

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

23 (i) a change in appropriation right for instream flow pursuant to 85-2-320 or 85-2-436;

24 (ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or

25 (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.

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

27 (d) The applicant has a possessory interest, or the written consent of the person with the possessory
28 interest, in the property where the water is to be put to beneficial use or, if the proposed change involves a point
29 of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special
30 use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose

1 of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water. This subsection (2)(d)
2 does not apply to:

3 (i) a change in appropriation right for instream flow pursuant to 85-2-320 or 85-2-436;

4 (ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or

5 (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 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
2 unless:

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

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

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

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

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

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

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

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

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

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

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

1 use the water; and

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

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

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

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

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

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

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

29 (12) A person holding an issued permit or change in appropriation right approval that has not been
30 perfected may change the place of diversion, place of use, purpose of use, or place of storage by filing an

1 application for change in appropriation right pursuant to this section.

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

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

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

9 (i) the appropriation right is for:

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

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

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

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

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

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

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

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

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

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

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

1 constructing the replacement well.

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

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

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

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

11 (c) The provisions of this subsection (15) do not apply to an appropriation right abandoned under
12 85-2-404.

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

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

18 (16) (a) An appropriator may change an appropriation right without the prior approval of the department
19 for the purpose of constructing a redundant water supply well in a public water supply system, as defined in
20 75-6-102, if the redundant water supply well:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

26 (ii) The department shall review the notice of replacement point of diversion and shall issue an
27 authorization of a change in an appropriation right if all of the criteria in subsection (18)(a) have been met and
28 the notice is correct and complete. The department may inspect the diversion to confirm that the criteria under
29 subsection (18)(a) have been met. If the department issues an authorization of a change in an appropriation right
30 for a replacement point of diversion, the department shall prepare a notice of the authorization and provide notice

1 of the authorization in the same manner as required in 85-2-307 for applications.

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

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

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

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

13 (c) The provisions of this subsection (18) do not apply to an appropriation right abandoned under
14 85-2-404.

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

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

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

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

27 (19) A municipality that applies to the department to clarify the place of use for an appropriation right is
28 subject to the provisions of [section 1]."

29

30 NEW SECTION. Section 7. Codification instruction. [Section 1] is intended to be codified as an

1 integral part of Title 85, chapter 2, part 4, and the provisions of Title 85, chapter 2, part 4, apply to [section 1].

2 - END -