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2	INTRODUCED BY(Primary Sponsor)
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4	A BILL FOR AN ACT ENTITLED: "AN ACT REVISING CRITERIA FOR DETERMINING IF WATER IS
5	AVAILABLE FOR A NEW APPROPRIATION OR A CHANGE OF A WATER RIGHT; REVISING STATE
6	WATER STORAGE POLICY; PROVIDING RULEMAKING AUTHORITY; AND AMENDING SECTIONS 85-1-
7	703, 85-2-154, 85-2-311, 85-2-313, 85-2-402, AND 85-2-708, MCA."
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9	BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:
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11	Section 1. Section 85-1-703, MCA, is amended to read:
12	"85-1-703. Water storage policy. (1) The legislature recognizes that water resource needs are
13	growing, existing water facilities are aging and in need of repair, and new water storage projects have become
14	more difficult to complete. Other types of action will be needed to solve many emerging problems, but if water
15	storage is the best way to meet growing water needs and solve problems, then it should be actively pursued.
16	(2) In determining the best solution for a particular water management problem, the state shall:
17	(a) carefully define the problem;
18	(b) identify all options to solve the problem, including water storage;
19	(c) determine whether water is physically and legally available to solve the problem; and
20	(d) select the option that best meets the following criteria:
21	(i) technical feasibility;
22	(ii) financial feasibility;
23	(iii) economic feasibility;
24	(iv) political feasibility;
25	(v) legal feasibility; and
26	(vi) environmental feasibility."
27	
28	Section 2. Section 85-2-154, MCA, is amended to read:



1	"85-2-154. (Temporary) Policy considerations. (1) Article IX, section 3(3), of the Montana
2	constitution declares that all surface, underground, flood, and atmospheric waters within the boundaries of the
3	state are the property of the state for the use of its people and are subject to appropriation for beneficial uses
4	as provided by law.
5	(2) The legal appropriation of water requires that the water be legally and physically available for
6	appropriation that new appropriations not adversely affect the water rights of a prior appropriator under an
7	existing water right, a certificate, a permit, or a state water reservation.
8	(3) Measurement and monitoring of streamflow supports the state's ability to determine when water is
9	physically and legally available to meet new demands while protecting existing water rights.
10	(4) The effective management and distribution of water depends on accurate real-time measurement
11	of streamflow. (Terminates June 30, 2023sec. 7, Ch. 298, L. 2019.)"
12	
13	Section 3. Section 85-2-311, MCA, is amended to read:
14	"85-2-311. Criteria for issuance of permit. (1) A permit may be issued under this part prior to the
15	adjudication of existing water rights in a source of supply. In a permit proceeding under this part, there is no
16	presumption that an applicant for a permit cannot meet the statutory criteria of this section prior to the
17	adjudication of existing water rights pursuant to this chapter. In making a determination under this section, the
18	department may not alter the terms and conditions of an existing water right or an issued certificate, permit, or
19	state water reservation. Except as provided in subsections (3) and (4), the department shall issue a permit if the
20	applicant proves by a preponderance of evidence that the following criteria are met:
21	(a) (i) there is water physically available at the proposed point of diversion in the amount that the
22	applicant seeks to appropriate; and
23	(ii) water can reasonably be considered legally available during the period in which the applicant seeks
24	to appropriate, in the amount requested, based on the records of the department and other evidence provided
25	to the department. Legal availability is determined using an analysis involving the following factors:
26	(A) identification of physical water availability;
27	(B) identification of existing legal demands on the source of supply throughout the area of potential
28	impact by the proposed use; and



1	(C)	analysis of the evidence on physical water availability and the existing legal demands, including
2	but not limite	ed to a comparison of the physical water supply at the proposed point of diversion with the existing
3	legal deman	ds on the supply of water.
4	(b)	the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a
5	state water r	eservation will not be adversely affected. In this subsection (1)(b), adverse effect must be
6	determined b	based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that
7	the applicant	t's use of the water will be controlled so the water right of a prior appropriator will be satisfied. [The
8	applicant is r	not required to prove a lack of adverse effect for any water right identified in a written consent to
9	approval file	d pursuant to subsection (9) in connection with a permit application.]
10	(c)	the proposed means of diversion, construction, and operation of the appropriation works are
11	adequate;	
12	(d)	the proposed use of water is a beneficial use;
13	(e)	the applicant has a possessory interest or the written consent of the person with the possessory
14	interest in th	e property where the water is to be put to beneficial use, or if the proposed use has a point of
15	diversion, co	prveyance, or place of use on national forest system lands, the applicant has any written special
16	use authoriz	ation required by federal law to occupy, use, or traverse national forest system lands for the
17	purpose of d	liversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the
18	permit;	
19	(f)	the water quality of a prior appropriator will not be adversely affected;
20	(g)	the proposed use will be substantially in accordance with the classification of water set for the
21	source of su	pply pursuant to 75-5-301(1); and
22	(h)	the ability of a discharge permitholder to satisfy effluent limitations of a permit issued in
23	accordance	with Title 75, chapter 5, part 4, will not be adversely affected.
24	(2)	The applicant is required to prove that the criteria in subsections (1)(f) through (1)(h) have been
25	met only if a	valid objection is filed. A valid objection must contain substantial credible information establishing
26	to the satisfa	action of the department that the criteria in subsection (1)(f), (1)(g), or (1)(h), as applicable, may not
27	be met. For	the criteria set forth in subsection (1)(g), only the department of environmental quality or a local
28	water quality	district established under Title 7, chapter 13, part 45, may file a valid objection.



1	(3)	The department may not issue a permit for an appropriation of 4,000 or more acre-feet of water a
2	year and 5.5	or more cubic feet per second of water unless the applicant proves by clear and convincing
3	evidence that	at:
4	(a)	the criteria in subsection (1) are met;
5	(b)	the proposed appropriation is a reasonable use. A finding must be based on a consideration of the
6	following:	
7	(i)	the existing demands on the state water supply, as well as projected demands, such as
8	reservations	of water for future beneficial purposes, including municipal water supplies, irrigation systems, and
9	minimum sti	reamflows for the protection of existing water rights and aquatic life;
10	(ii)	the benefits to the applicant and the state;
11	(iii)	the effects on the quantity and quality of water for existing beneficial uses in the source of supply;
12	(iv)	the availability and feasibility of using low-quality water for the purpose for which application has
13	been made;	
14	(v)	the effects on private property rights by any creation of or contribution to saline seep; and
15	(vi)	the probable significant adverse environmental impacts of the proposed use of water as
16	determined	by the department pursuant to Title 75, chapter 1, or Title 75, chapter 20.
17	(4)	(a) The state of Montana has long recognized the importance of conserving its public waters and
18	the necessit	y to maintain adequate water supplies for the state's water requirements, including requirements for
19	federal non-	Indian and Indian reserved water rights held by the United States for federal reserved lands and in
20	trust for the	various Indian tribes within the state's boundaries. Although the state of Montana also recognizes
21	that, under a	appropriate conditions, the out-of-state transportation and use of its public waters are not in conflict
22	with the pub	lic welfare of its citizens or the conservation of its waters, the criteria in this subsection (4) must be
23	met before o	put-of-state use may occur.
24	(b)	The department may not issue a permit for the appropriation of water for withdrawal and
25	transportatio	on for use outside the state unless the applicant proves by clear and convincing evidence that:
26	(i)	depending on the volume of water diverted or consumed, the applicable criteria and procedures of
27	subsection (1) or (3) are met;
28	(ii)	the proposed out-of-state use of water is not contrary to water conservation in Montana; and



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28	85-2-336, 8	5-2-341, 85-2-343, or 85-2-344, the applicant shall comply with the provisions of 85-2-360 i	n
27	(8)	For an application for ground water in a basin closed pursuant to 85-2-319, 85-2-321, 85-	2-330,
26	(7)	The department may adopt rules to implement the provisions of this section.	
25	restrain or c	ontrol waters within the boundaries of this state except in accordance with this section.	
24	personally c	or through an agent, officer, or employee, attempt to appropriate, divert, impound, use, or of	therwise
23	diversion, in	npoundment, use, or other restraint. A person or corporation may not, directly or indirectly,	
22	employee o	f the state may not knowingly permit, aid, or assist in any manner an unauthorized appropri	ation,
21	impoundme	nt, use, or restraint contrary to the provisions of this section is invalid. An officer, agent, age	ency, or
20	(6)	An appropriation, diversion, impoundment, use, restraint, or attempted appropriation, dive	ersion,
19	resources c	onservation service and other specific field studies.	
18	information	developed by the applicant, the department, the U.S. geological survey, or the U.S. natural	
17	submit hydr	ologic or other evidence, including but not limited to water supply data, field reports, and ot	her
16	applicant, ir	addition to other evidence demonstrating that the criteria of subsection (1) have been met	, shall
15	(5)	Subject to 85-2-360, to meet the preponderance of evidence standard in this section, the	
14	lease, and u	use of water.	
13	the applicar	it shall submit to and comply with the laws of the state of Montana governing the appropriat	tion,
12	(d)	When applying for a permit or a lease to withdraw and transport water for use outside the	state,
11	water.		
10	(iv)	the demands placed on the applicant's supply in the state where the applicant intends to u	se the
9	to use the w		
8		the supply and sources of water available to the applicant in the state where the applicant	intends
7		ages within the state of Montana;	
6		whether the water that is the subject of the application could feasibly be transported to alle	viate
5	(i)	whether there are present or projected water shortages within the state of Montana;	
4		is of subsections (4)(b)(ii) and (4)(b)(iii) are met, the department shall consider the following	
2	(C)	In determining whether the applicant has proved by clear and convincing evidence that th	۵
1 2	citizens of N	the proposed out-of-state use of water is not otherwise detrimental to the public welfare of	the
1	(iii)	the proposed out-of-state use of water is not otherwise detrimental to the public welfare of	tho

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1 addition to the requirements of this section.

[(9) The department may not conduct an adverse effects analysis on a water right if the water right
holder files a written consent to approval of an application for a permit.] (Bracketed language in subsections
(1)(b) and (9) terminates September 30, 2023--sec. 8, Ch. 243, L. 2017.)"

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Section 4. Section 85-2-313, MCA, is amended to read:

7 "85-2-313. Provisional permit. A permit issued prior to a final determination of existing water rights is 8 provisional and is subject to that final determination. Upon petition, the amount of the appropriation granted in a 9 provisional permit must be reduced, modified, or revoked by the department following a show cause hearing in 10 which it is determined that reduction, modification, or revocation is necessary to protect and guarantee existing 11 water rights determined in the final decree. Because a provisional permit is issued on a reasonable 12 determination of legal-availability under 85-2-311(1)(b), in a show cause hearing under this section, legal 13 availability must be determined on a consideration of the final decree in the affected basin or subbasin. A 14 person may not obtain any vested right to an appropriation obtained under a provisional permit by virtue of 15 construction of diversion works, purchase of equipment to apply water, planting of crops, or other action where 16 the permit would have been denied or modified if the final decree had been available to the department."

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

19 **"85-2-402.** Changes in appropriation rights -- definition. (1) (a) The right to make a change in 20 appropriation right subject to the provisions of this section in an existing water right, a permit, or a state water 21 reservation is recognized and confirmed. In a change in appropriation right proceeding under this section, there 22 is no presumption that an applicant for a change in appropriation right cannot establish lack of adverse effect 23 prior to the adjudication of other rights in the source of supply pursuant to this chapter. Except as provided in 24 85-2-410 and subsections (15) and (16) of this section, an appropriator may not make a change in an 25 appropriation right without the approval of the department or, if applicable, of the legislature. An applicant shall 26 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



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1 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.

4 [(c) The applicant is not required to prove a lack of adverse effect for any water right identified on a 5 written consent to approval filed pursuant to subsection (19) in connection with an application.]

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

9 (a) The proposed change in appropriation right will not adversely affect the use of the existing water 10 rights of other persons or other perfected or planned uses or developments for which a permit or certificate has 11 been issued or for which a state water reservation has been issued under part 3. For purposes of this section, 12 adverse effects analysis is specific to the proposed change in appropriation right and a determination that water

13 is not legally available pursuant to 85-2-311 does not necessarily mean that an adverse effect will occur.

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

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

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

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

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(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:

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

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

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



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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 permitholder to satisfy effluent limitations of a permit issued in
5	accordance	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
7	only if a vali	d 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 r	nore acre-feet of water a year and 5.5 or more cubic feet per second of water unless the
11	appropriator	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 or	a consideration of:
15	(i)	the existing demands on the state water supply, as well as projected demands for water for future
16	beneficial pu	urposes, including municipal water supplies, irrigation systems, and minimum streamflows for the
17	protection of	f 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
24	determined	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 4,0	000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water being
27	consumed u	inless:
28	(a)	the applicant proves by clear and convincing evidence and the department finds that the criteria in

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1 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.

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

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

25 (ii) whether the water that is the subject of the proposed change in appropriation might feasibly be

26 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 intendsto use the water; and



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

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

6 (7) For any application for a change in appropriation right involving 4,000 or more acre-feet of water a 7 year and 5.5 or more cubic feet per second of water, the department shall give notice of the proposed change 8 in appropriation right in accordance with 85-2-307 and shall hold one or more hearings in accordance with 85-2-9 309 prior to its approval or denial of the proposed change in appropriation right. The department shall provide 10 notice and may hold one or more hearings upon any other proposed change in appropriation right if it 11 determines that the proposed change in appropriation right might adversely affect the rights of other persons, 12 except for any right for which a written consent to approval has been filed pursuant to subsection (19) in 13 connection with the application].

14 (8) The department or the legislature, if applicable, may approve a change in appropriation right 15 subject to the terms, conditions, restrictions, and limitations that it considers necessary to satisfy the criteria of 16 this section, including limitations on the time for completion of the change in appropriation right. The department 17 may extend time limits specified in the change in appropriation right approval under the applicable criteria and 18 procedures of 85-2-312.

(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

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1	the applicant, and a duplicate must be kept in the office of the department in Helena.
2	(12) A person holding an issued permit or change in appropriation right approval that has not been
3	perfected may change the place of diversion, place of use, purpose of use, or place of storage by filing an
4	application for change in appropriation right pursuant to this section.
5	(13) A change in appropriation right contrary to the provisions of this section is invalid. An officer,
6	agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized
7	change in appropriation right. A person or corporation may not, directly or indirectly, personally or through an
8	agent, officer, or employee, attempt to change an appropriation right except in accordance with this section.
9	(14) The department may adopt rules to implement the provisions of this section.
10	(15) (a) An appropriator may change an appropriation right for a replacement well without the prior
11	approval of the department if:
12	(i) the appropriation right is for:
13	(A) ground water outside the boundaries of a controlled ground water area; or
14	(B) ground water inside the boundaries of a controlled ground water area and if the provisions of the
15	rule establishing the controlled ground water area do not restrict a change in appropriation right;
16	(ii) the change in appropriation right is to replace an existing well and the existing well will no longer be
17	used;
18	(iii) the rate and volume of the appropriation from the replacement well are equal to or less than that of
19	the well being replaced and do not exceed:
20	(A) 450 gallons a minute for a municipal well; or
21	(B) 35 gallons a minute and 10 acre-feet a year for all other wells;
22	(iv) the water from the replacement well is appropriated from the same aquifer as the water
23	appropriated from the well being replaced; and
24	(v) a timely, correct and complete notice of replacement well is submitted to the department as
25	provided in subsection (15)(b).
26	(b) (i) After completion of a replacement well and appropriation of ground water for a beneficial use,
27	the appropriator shall file a notice of replacement well with the department on a form provided by the
28	department.



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1	(ii) (A) The department shall review the notice of replacement well and shall issue an authorization of
2	a change in an appropriation right if all of the criteria in subsection (15)(a) have been met and the notice is
3	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.

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

16 subsections (1) through (3).

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(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 3743-202.

(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).

24 (16) (a) An appropriator may change an appropriation right without the prior approval of the

25 department for the purpose of constructing a redundant water supply well in a public water supply system, as

26 defined in 75-6-102, if the redundant water supply well:

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

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

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(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:

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

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

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

20 (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 waterright 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;



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28	(e) (i) An appropriator may file a correct and complete objection with the department alleging that the	
27	that meets the requirements of subsection (18)(a).	
26	(d) The provisions of subsections (2), (3), (9), and (10) do not apply to a change in appropriation right	
25	2-404.	
24	(c) The provisions of this subsection (18) do not apply to an appropriation right abandoned under 85-	
23	subsections (1) through (3).	
22	(B) submit an application for a change in appropriation right to the department pursuant to	
21	department; and	
20	(A) cease appropriation of water from the replacement point of diversion pending approval by the	
19	the department determines the criteria under subsection (18)(a) have not been met, the appropriator shall:	
18	(iv) If a notice of replacement point of diversion is not filed and completed within the time allowed or if	
17	defects or within a further time as the department may allow, not to exceed 6 months.	
16	shall refile a corrected and completed notice of replacement point of diversion within 30 days of notification of	
15	return a defective notice to the appropriator, along with a description of defects in the notice. The appropriator	
14	and complete notice of replacement point of diversion has been filed with the department. The department shall	
13	(iii) The department may not issue an authorization of a change in appropriation right until a correct	
12	notice of the authorization in the same manner as required in 85-2-307 for applications.	
11	right for a replacement point of diversion, the department shall prepare a notice of the authorization and provide	
10	subsection (18)(a) have been met. If the department issues an authorization of a change in an appropriation	
9	the notice is correct and complete. The department may inspect the diversion to confirm that the criteria under	
8	authorization of a change in an appropriation right if all of the criteria in subsection (18)(a) have been met and	
7	(ii) The department shall review the notice of replacement point of diversion and shall issue an	
6	notice of replacement point of diversion with the department on a form provided by the department.	
5	(b) (i) Within 60 days after completion of a replacement point of diversion, the appropriator shall file a	
4	department as provided in subsection (18)(b).	
3	(ix) a timely, correct and complete notice of replacement point of diversion is submitted to the	
2	method of irrigation, if applicable, or increase the amount of water diverted, used, or consumed; and	
1	(viii) the appropriator can show the change will not increase access to water availability, change the	

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1 change in appropriation right for a replacement point of diversion will adversely affect the use of the existing 2 water rights of other persons or other perfected or planned uses or developments for which a permit or 3 certificate has been issued or for which a state water reservation has been issued under Title 85, chapter 2, 4 part 3. 5 (ii) If the department determines after a contested case hearing between the appropriator and the 6 objector that the rights of other appropriators have been or will be adversely affected, it may revoke the change 7 or make the change subject to terms, conditions, restrictions, or limitations necessary to protect the rights of 8 other appropriators. 9 (iii) The burden of proof to prove lack of adverse effect at the hearing is on the appropriator changing 10 the point of diversion. 11 [(19) The department may not conduct an adverse effects analysis on a water right if the water right 12 holder files a written consent to approval of an application for a change in appropriation right.] (Bracketed 13 language in subsections (1)(c), (2), (7), and (19) terminates September 30, 2023--sec. 8, Ch. 243, L. 2017.)" 14 15 Section 6. Section 85-2-708, MCA, is amended to read: 16 "85-2-708. Water administration interim agreements within Indian reservations. (1) Because it 17 appears to be to the common advantage of the state and Indian tribes to cooperate in matters involving the 18 permitting and use of water within the exterior boundaries of an Indian reservation prior to the final adjudication 19 of Indian reserved water rights and because the state does not intend by enactment of this section to limit. 20 expand, alter, or waive state jurisdiction to administer water rights within the exterior boundaries of an Indian 21 reservation, pursuant to the requirements of Title 18, chapter 11, the department may negotiate and conclude 22 an interim agreement with the tribal government of any Indian tribe in Montana prior to final adjudication of 23 Indian reserved water rights for the purpose of implementing a water administration plan and a permitting 24 process for the issuance of water rights and changes in water right uses within the exterior boundaries of an 25 Indian reservation. 26 (2) Subject to subsection (4), an agreement entered into pursuant to subsection (1) must:

(a) provide for the retention of exclusive authority by the state to issue permits to applicants who are
not members of the tribe and to issue change of use authorizations;



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1	(b)	provide that any permits must be issued in accordance with the criteria established by state law;
2	and	
3	(c)	provide that permits may be only for new uses with a date of priority in compliance with state law.
4	(3)	Prior to concluding any agreement under this section, the department shall hold public meetings,
5	after proper	public notice of the meetings has been given and the proposed agreement has been made
6	available for	public review, to afford the public an opportunity to comment on the contents of the agreement.
7	(4)	The provisions of subsection (2) do not apply if a court of competent jurisdiction has held that the
8	department	lacks exclusive authority to issue new water use permits within the exterior boundaries of an Indian
9	reservation	pending final adjudication of Indian reserved water rights. In that case, the department, with the
10	approval of	the governor, may enter into an interim agreement that provides for joint tribal and state
11	administratio	on of new water uses on the reservation pending final adjudication of Indian reserved water rights.
12	Any interim	agreement entered into pursuant to this subsection (4):
13	(a)	must address how and whether new ground water uses for domestic and municipal purposes will
14	be granted.	Except for the criterion in 85-2-311(1)(a)(ii), an An interim agreement that grants new ground water
15	uses must e	establish criteria for new water uses that incorporate the criteria listed in 85-2-311.
16	(b)	must address how and whether changes in existing appropriation rights within the exterior
17	boundaries	of the reservation will be granted. An interim agreement that grants changes must establish criteria
18	for changes	in existing appropriation rights that incorporate the criteria listed in 85-2-402.
19	(C)	must address how and whether water use will be authorized under the interim agreement and how
20	the use will	be secure and valid in the event of the termination of the interim agreement, quantification of
21	reserved wa	ater rights, or termination of negotiations of reserved water rights under 85-2-704;
22	(d)	must maintain the jurisdictional claims of each party to the interim agreement;
23	(e)	must protect each party against a waiver of the right to challenge the claims of each party at any
24	time;	
25	(f)	may not prejudice the regulatory or adjudicatory jurisdiction of either party;
26	(g)	must provide that none of the activities of each party in the negotiation or implementation of an
27	interim agre	ement may be used to affect the equitable or legal position of either party in any future litigation;
28	and	



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- 1 (h) must provide that nothing in the negotiation or implementation of an interim agreement may be
- 2 considered as enlarging or diminishing the jurisdiction or authority of either party within the reservation."

3

- END -

