

1 SENATE BILL NO. 406

2 INTRODUCED BY B. BROWN

3

4 A BILL FOR AN ACT ENTITLED: "AN ACT REVISING THE VOLUME OF WATER ALLOWED FOR A
5 GROUND WATER APPROPRIATION EXEMPT FROM PERMITTING; REQUIRING A PROCESSING FEE;
6 AND AMENDING SECTIONS 85-2-306 AND 85-2-402, MCA."

7

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

9

10 **Section 1.** Section 85-2-306, MCA, is amended to read:

11 **"85-2-306. Exceptions to permit requirements.** (1) (a) Except as provided in subsection (1)(b),
12 ground water may be appropriated only by a person who has a possessory interest in the property where the
13 water is to be put to beneficial use and exclusive property rights in the ground water development works.

14 (b) If another person has rights in the ground water development works, water may be appropriated
15 with the written consent of the person with those property rights or, if the ground water development works are
16 on national forest system lands, with any prior written special use authorization required by federal law to
17 occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage,
18 transportation, withdrawal, use, or distribution of water under the certificate.

19 (c) If the person does not have a possessory interest in the real property from which the ground water
20 may be appropriated, the person shall provide to the owner of the real property written notification of the works
21 and the person's intent to appropriate ground water from the works. The written notification must be provided to
22 the landowner at least 30 days prior to constructing any associated works or, if no new or expanded works are
23 proposed, 30 days prior to appropriating the water. The written notification under this subsection is a notice
24 requirement only and does not create an easement in or over the real property where the ground water
25 development works are located.

26 (2) Inside the boundaries of a controlled ground water area, ground water may be appropriated only:

27 (a) according to a permit received pursuant to 85-2-508; or

28 (b) according to the requirements of a rule promulgated pursuant to 85-2-506.

1 (3) (a) Outside the boundaries of a controlled ground water area, a permit is not required before
2 appropriating ground water by means of a well or developed spring:

3 (i) when the appropriation is made by a local governmental fire agency organized under Title 7,
4 chapter 33, and the appropriation is used only for emergency fire protection, emergency fire training, and
5 emergency fire-related operations, which may include enclosed storage;

6 (ii) when a maximum appropriation of 350 gallons a minute or less is used in nonconsumptive
7 geothermal heating or cooling exchange applications, all of the water extracted is returned without delay to the
8 same source aquifer, and the distance between the extraction well and both the nearest existing well and the
9 hydraulically connected surface waters is more than twice the distance between the extraction well and the
10 injection well;

11 (iii) when the appropriation is outside a stream depletion zone, is 35 gallons a minute or less, and does
12 not exceed ~~40~~5 acre-feet a year, except that a combined appropriation from the same source by two or more
13 wells or developed springs exceeding ~~40~~5 acre-feet, regardless of the flow rate, requires a permit; or

14 (iv) when the appropriation is within a stream depletion zone, is 20 gallons a minute or less, and does
15 not exceed 2 acre-feet a year, except that a combined appropriation from the same source by two or more wells
16 or developed springs exceeding this limitation requires a permit.

17 (b) (i) Within 60 days of completion of the well or developed spring and appropriation of the ground
18 water for beneficial use, the appropriator shall file a notice of completion with the department on a form
19 provided by the department through its offices. The notice of completion must be accompanied by a \$10
20 processing fee.

21 (ii) Upon receipt of the notice, the department shall review the notice and may, before issuing a
22 certificate of water right, return a defective notice for correction or completion, together with the reasons for
23 returning it. A notice does not lose priority of filing because of defects if the notice is corrected, completed, and
24 refiled with the department within 30 days of notification of defects or within a further time as the department
25 may allow, not to exceed 6 months.

26 (iii) If a notice is not corrected and completed within the time allowed, the priority date of appropriation
27 is the date of refiling a correct and complete notice with the department.

28 (c) A certificate of water right may not be issued until a correct and complete notice has been filed

1 with the department, including proof of landowner notification or a written federal special use authorization as
2 necessary under subsection (1). The original of the certificate must be sent to the appropriator. The department
3 shall keep a copy of the certificate in its office in Helena. The date of filing of the notice of completion is the date
4 of priority of the right.

5 (4) An appropriator of ground water by means of a well or developed spring first put to beneficial use
6 between January 1, 1962, and July 1, 1973, who did not file a notice of completion, as required by laws in force
7 prior to April 14, 1981, with the county clerk and recorder shall file a notice of completion, as provided in
8 subsection (3), with the department to perfect the water right. The filing of a claim pursuant to 85-2-221 is
9 sufficient notice of completion under this subsection. The priority date of the appropriation is the date of the
10 filing of a notice, as provided in subsection (3), or the date of the filing of the claim of existing water right.

11 (5) An appropriation under subsection (4) is an existing right, and a permit is not required. However,
12 the department shall acknowledge the receipt of a correct and complete filing of a notice of completion, except
13 that for an appropriation of 35 gallons a minute or less, not to exceed ~~40~~5 acre-feet a year, the department
14 shall issue a certificate of water right. If a certificate is issued under this section, a certificate need not be issued
15 under the adjudication proceedings provided for in 85-2-236.

16 (6) A permit is not required before constructing an impoundment or pit and appropriating water for use
17 by livestock if:

18 (a) the maximum capacity of the impoundment or pit is less than 15 acre-feet;

19 (b) the appropriation is less than 30 acre-feet a year;

20 (c) the appropriation is from an ephemeral stream, an intermittent stream, or another source other
21 than a perennial flowing stream; and

22 (d) the impoundment or pit is to be constructed on and will be accessible to a parcel of land that is
23 owned or under the control of the applicant and that is 40 acres or larger.

24 (7) (a) Within 60 days after constructing an impoundment or pit, the appropriator shall apply for a
25 permit as prescribed by this part. Subject to subsection (7)(b), upon receipt of a correct and complete
26 application for a stock water provisional permit, the department shall automatically issue a provisional permit. If
27 the department determines after a hearing that the rights of other appropriators have been or will be adversely
28 affected, it may revoke the permit or require the permittee to modify the impoundment or pit and may then make

1 the permit subject to terms, conditions, restrictions, or limitations that it considers necessary to protect the rights
2 of other appropriators. [For purposes of an adverse effects determination under this subsection, the department
3 may not consider adverse effects on any water right identified in a written consent to approval filed pursuant to
4 85-2-311.]

5 (b) If the impoundment or pit is on national forest system lands, an application is not correct and
6 complete under this section until the applicant has submitted proof of any written special use authorization
7 required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion,
8 impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit.

9 (8) A person may also appropriate water without applying for or prior to receiving a permit under rules
10 adopted by the department under 85-2-113.

11 (9) Pursuant to 85-20-1902, the provisions of this section do not apply within the exterior boundaries
12 of the Flathead Indian reservation. (Bracketed language in subsection (7)(a) terminates September 30, 2023--
13 sec. 8, Ch. 243, L. 2017.)"

14

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

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

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

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

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

6 (a) The proposed change in appropriation right will not adversely affect the use of the existing water
7 rights of other persons or other perfected or planned uses or developments for which a permit or certificate has
8 been issued or for which a state water reservation has been issued under part 3. For purposes of this section,
9 adverse effects analysis is specific to the proposed change in appropriation right and a determination that water
10 is not legally available pursuant to 85-2-311 does not necessarily mean that an adverse effect will occur.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 hearings.

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

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

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

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

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

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

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

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

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

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

28 (c) When applying for a change in appropriation right to withdraw and transport water for use outside

1 the state, the applicant shall submit to and comply with the laws of the state of Montana governing the
2 appropriation and use of water.

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

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

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

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

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

27 (12) A person holding an issued permit or change in appropriation right approval that has not been
28 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,
3 agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized
4 change in appropriation right. A person or corporation may not, directly or indirectly, personally or through an
5 agent, 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
12 rule 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, except for an appropriation of
19 ground water by means of a well or a developed spring certified pursuant to 85-2-306(3) made after [the
20 effective date of this act];

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

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

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

28 (ii) (A) The department shall review the notice of replacement well and shall issue an authorization of

1 a change in an appropriation right if all of the criteria in subsection (15)(a) have been met and the notice is
2 correct and complete.

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

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

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

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

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

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

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

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

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

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

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

28 (b) The priority date of the redundant water supply well is the same as the priority date of the original

1 well. Only one well may be used at one time.

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

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

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

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

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

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

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

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

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

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

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

28 (viii) the appropriator can show the change will not increase access to water availability, change the

1 method of irrigation, if applicable, or increase the amount of water diverted, used, or consumed; and

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

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

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

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

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

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

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

23 (c) The provisions of this subsection (18) do not apply to an appropriation right abandoned under 85-
24 2-404.

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

27 (e) (i) An appropriator may file a correct and complete objection with the department alleging that the
28 change in appropriation right for a replacement point of diversion will adversely affect the use of the existing

1 water rights of other persons or other perfected or planned uses or developments for which a permit or
2 certificate has been issued or for which a state water reservation has been issued under Title 85, chapter 2,
3 part 3.

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

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

10 [(19) The department may not conduct an adverse effects analysis on a water right if the water right
11 holder files a written consent to approval of an application for a change in appropriation right.] (Bracketed
12 language in subsections (1)(c), (2), (7), and (19) terminates September 30, 2023--sec. 8, Ch. 243, L. 2017.)"

13 - END -