

1 SENATE BILL NO. 416

2 INTRODUCED BY G. BARKUS

3
4 A BILL FOR AN ACT ENTITLED: "AN ACT SUSPENDING WATER USE PERMIT AND CHANGE PROVISIONS
5 OF THE WATER USE LAWS IN EACH BASIN OR PART OF A BASIN WHERE A COURT OF COMPETENT
6 JURISDICTION HAS HELD THAT THE DEPARTMENT LACKS EXCLUSIVE AUTHORITY TO ISSUE NEW
7 WATER USE PERMITS PENDING FINAL ADJUDICATION OF RESERVED WATER RIGHTS; AUTHORIZING
8 APPROPRIATION OF WATER FOR A BENEFICIAL USE AND CHANGES IN APPROPRIATION RIGHTS IN
9 ACCORDANCE WITH THE PRIOR APPROPRIATION DOCTRINE IN THESE AREAS; DEFINING TERMS;
10 AMENDING SECTIONS 85-2-302, 85-2-311, 85-2-401, 85-2-402, 85-2-403, 85-2-407, 85-2-408, AND 85-2-436,
11 MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

12

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

14

15 **NEW SECTION. Section 1. Appropriation of water in certain areas -- notice required.** (1) For the
16 purposes of this section only, the following definitions apply:

17 (a) "Appropriate" means to divert, impound, or withdraw a quantity of water. The term includes
18 withdrawal of water by stock for consumption.

19 (b) "Prior appropriation doctrine" means a common law doctrine that is based on the following principles:

20 (i) water is appropriated when it is intentionally put to a beneficial use;

21 (ii) when water is appropriated, the first appropriator in time is the first appropriator in right;

22 (iii) the right to use water is limited to the amount that can be used beneficially; and

23 (iv) priority of appropriation does not include the right to prevent changes by later appropriators in the
24 condition of water occurrence, such as the increase or decrease of streamflow or the lowering of a water table,
25 artesian pressure, or water level, if the prior appropriator can reasonably exercise the water right under the
26 changed conditions.

27 (2) The following provisions are suspended pending final adjudication of reserved water rights in each
28 basin or part of a basin where a court of competent jurisdiction has held that the department lacks exclusive
29 authority to issue new water use permits pending final adjudication of reserved water rights: 85-2-301 through
30 85-2-303, 85-2-305 through 85-2-317, 85-2-401(2), 85-2-402, and 85-2-407 through 85-2-410.

1 (3) Subject to subsection (4), water may be appropriated or a change in appropriation of water may be
2 made in a basin or part of a basin in which provisions are suspended pursuant to subsection (2) under the prior
3 appropriation doctrine that was in effect in Montana before July 1, 1973, as interpreted by a court of competent
4 jurisdiction in Montana.

5 (4) A person who appropriates water for a beneficial use or who makes a change in appropriation of
6 water shall file a notice with the department. The notice must contain the information required under 85-2-224(1).
7 Except for a change in an appropriation right, the priority date of an appropriation under this section is the date
8 the notice is filed.

9 (5) The department shall provide information to affected parties about the provisions of this section and
10 areas affected by this section.

11

12 **Section 2.** Section 85-2-302, MCA, is amended to read:

13 **"85-2-302. Application for permit.** Except as provided in [section 1] and 85-2-306, a person may not
14 appropriate water or commence construction of diversion, impoundment, withdrawal, or related distribution works
15 except by applying for and receiving a permit from the department. The application must be made on a form
16 prescribed by the department. The department shall make the forms available through its offices. The applicant
17 shall submit a correct and complete application. The department shall notify the applicant of any defects in an
18 application. An application does not lose priority of filing because of defects if the application is corrected or
19 completed within 30 days of the date of notification of the defects or within a further time as the department may
20 allow, but not to exceed 90 days from the date of notification. If an application is made correct and complete after
21 the mandated time period, but within 90 days of the date of notification of the defects, the priority date of the
22 application is the date the application is made correct and complete. An application not corrected or completed
23 within 90 days from the date of notification of the defects is terminated."

24

25 **Section 3.** Section 85-2-311, MCA, is amended to read:

26 **"85-2-311. Criteria for issuance of permit.** (1) ~~A~~ Except as provided in [section 1], a permit may be
27 issued under this part prior to the adjudication of existing water rights in a source of supply. In a permit
28 proceeding under this part there is no presumption that an applicant for a permit cannot meet the statutory
29 criteria of this section prior to the adjudication of existing water rights pursuant to this chapter. In making a
30 determination under this section, the department may not alter the terms and conditions of an existing water right

1 or an issued certificate, permit, or state water reservation. Except as provided in subsections (3) and (4), the
2 department shall issue a permit if the applicant proves by a preponderance of evidence that the following criteria
3 are met:

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

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

9 (A) identification of physical water availability;

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

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

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

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

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

22 (e) the applicant has a possessory interest, or the written consent of the person with the possessory
23 interest, in the property where the water is to be put to beneficial use;

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

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

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

29 (2) The applicant is required to prove that the criteria in subsections (1)(f) through (1)(h) have been met
30 only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the

1 satisfaction of the department that the criteria in subsection (1)(f), (1)(g), or (1)(h), as applicable, may not be met.
2 For the criteria set forth in subsection (1)(g), only the department of environmental quality or a local water quality
3 district established under Title 7, chapter 13, part 45, may file a valid objection.

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

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

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

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

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

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

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

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

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

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

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

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

1 (ii) the proposed out-of-state use of water is not contrary to water conservation in Montana; and
2 (iii) the proposed out-of-state use of water is not otherwise detrimental to the public welfare of the
3 citizens of Montana.

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

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

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

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

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

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

16 (5) To meet the preponderance of evidence standard in this section, the applicant, in addition to other
17 evidence demonstrating that the criteria of subsection (1) have been met, shall submit hydrologic or other
18 evidence, including but not limited to water supply data, field reports, and other information developed by the
19 applicant, the department, the U.S. geological survey, or the U.S. natural resources conservation service and
20 other specific field studies.

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

27 (7) The department may adopt rules to implement the provisions of this section."
28

29 **Section 4.** Section 85-2-401, MCA, is amended to read:

30 **"85-2-401. Priority -- recognition and confirmation of changes in appropriations issued after July**

1 **1, 1973.** (1) As between appropriators, the first in time is the first in right. Priority of appropriation does not
2 include the right to prevent changes by later appropriators in the condition of water occurrence, such as the
3 increase or decrease of streamflow or the lowering of a water table, artesian pressure, or water level, if the prior
4 appropriator can reasonably exercise the water right under the changed conditions.

5 (2) Priority of appropriation made under this chapter dates from the filing of an application for a permit
6 with the department, except as otherwise provided in [section 1], 85-2-301 through 85-2-303, 85-2-306,
7 85-2-310(3), and 85-2-313.

8 (3) Priority of appropriation perfected before July 1, 1973, must be determined as provided in part 2 of
9 this chapter.

10 (4) All changes in appropriation rights actions of the department after July 1, 1973, are recognized and
11 confirmed subject to this part and any terms, conditions, and limitations placed on a change in appropriation
12 authorization by the department."

13

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

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

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

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

28 (b) Except for a lease authorization pursuant to 85-2-436, a temporary change authorization for instream
29 use to benefit the fishery resource pursuant to 85-2-408, or water use pursuant to 85-2-439 when authorization
30 does not require appropriation works, the proposed means of diversion, construction, and operation of the

1 appropriation works are adequate.

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

3 (d) Except for a lease authorization pursuant to 85-2-436 or a temporary change authorization pursuant
4 to 85-2-408 or 85-2-439 for instream flow to benefit the fishery resource, the applicant has a possessory interest,
5 or the written consent of the person with the possessory interest, in the property where the water is to be put to
6 beneficial use.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

14 (8) The department or the legislature, if applicable, may approve a change subject to the terms,
15 conditions, restrictions, and limitations that it considers necessary to satisfy the criteria of this section, including
16 limitations on the time for completion of the change. The department may extend time limits specified in the
17 change approval under the applicable criteria and 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 is not completed as approved by the department or legislature or if the terms,
23 conditions, restrictions, and limitations of the change approval are not complied with, the department may, after
24 notice and opportunity for hearing, require the appropriator to show cause why the change approval should not
25 be modified or revoked. If the appropriator fails to show sufficient cause, the department may modify or revoke
26 the change approval.

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

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

1 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
12 order declaring the controlled ground water area do not restrict such a change;

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 35 gallons a minute and 10 acre-feet a year;

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

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

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

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

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

- 1 (iv) If a notice of replacement well is not completed within the time allowed, the appropriator shall:
- 2 (A) cease appropriation of water from the replacement well pending approval by the department; and
- 3 (B) submit an application for a change in appropriation right to the department pursuant to subsections
- 4 (1) through (3).
- 5 (c) The provisions of this subsection (15) do not apply to an appropriation right abandoned under
- 6 85-2-404.
- 7 (d) For each well that is replaced under this subsection (15), the appropriator shall follow the well
- 8 abandonment procedures, standards, and rules adopted by the board of water well contractors pursuant to
- 9 37-43-202.
- 10 (e) The provisions of subsections (2), (3), (9), and (10) do not apply to a change in appropriation right
- 11 that meets the requirements of subsection (15)(a). (Terminates June 30, 2005--sec. 6, Ch. 322, L. 1995; sec.
- 12 14, Ch. 487, L. 1995.)
- 13 **85-2-402. (Effective July 1, 2005) Changes in appropriation rights.** (1) The right to make a change
- 14 subject to the provisions of [section 1] or this section in an existing water right, a permit, or a state water
- 15 reservation is recognized and confirmed. In a change proceeding under this section, there is no presumption
- 16 that an applicant for a change in appropriation right cannot establish lack of adverse effect prior to the
- 17 adjudication of other rights in the source of supply pursuant to this chapter. Except as provided in [section 1],
- 18 85-2-410, and subsection (15) of this section, an appropriator may not make a change in an appropriation right
- 19 without the approval of the department or, if applicable, of the legislature. An applicant shall submit a correct and
- 20 complete application.
- 21 (2) Except as provided in subsections (4) through (6) and (15), the department shall approve a change
- 22 in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are
- 23 met:
- 24 (a) The proposed change in appropriation right will not adversely affect the use of the existing water
- 25 rights of other persons or other perfected or planned uses or developments for which a permit or certificate has
- 26 been issued or for which a state water reservation has been issued under part 3.
- 27 (b) Except for a lease authorization pursuant to 85-2-436 that does not require appropriation works, the
- 28 proposed means of diversion, construction, and operation of the appropriation works are adequate.
- 29 (c) The proposed use of water is a beneficial use.
- 30 (d) The applicant has a possessory interest, or the written consent of the person with the possessory

1 interest, in the property where the water is to be put to beneficial use.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

30 (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 accordance with 85-2-307 and shall hold one or more hearings in accordance with 85-2-309 prior to its
6 approval or denial of the proposed change. The department shall provide notice and may hold one or more
7 hearings upon any other proposed change if it determines that the proposed change might adversely affect the
8 rights of other persons.

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

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

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

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

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

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

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

1 85-2-404.

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

5 (e) The provisions of subsections (2), (3), (9), and (10) do not apply to a change in appropriation right
6 that meets the requirements of subsection (15)(a). (Terminates June 30, 2009--sec. 9, Ch. 123, L. 1999.)

7 **85-2-402. (Effective July 1, 2009) Changes in appropriation rights.** (1) The right to make a change
8 subject to the provisions of section 1 and this section in an existing water right, a permit, or a state water
9 reservation is recognized and confirmed. In a change proceeding under this section, there is no presumption
10 that an applicant for a change in appropriation right cannot establish lack of adverse effect prior to the
11 adjudication of other rights in the source of supply pursuant to this chapter. Except as provided in section 1,
12 85-2-410, and subsection (15) of this section, an appropriator may not make a change in an appropriation right
13 without the approval of the department or, if applicable, of the legislature. An applicant shall submit a correct and
14 complete application.

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

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

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

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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

28 (6) The state of Montana has long recognized the importance of conserving its public waters and the
29 necessity to maintain adequate water supplies for the state's water requirements, including requirements for
30 reserved water rights held by the United States for federal reserved lands and in trust for the various Indian

1 tribes within the state's boundaries. Although the state of Montana also recognizes that, under appropriate
2 conditions, the out-of-state transportation and use of its public waters are not in conflict with the public welfare
3 of its citizens or the conservation of its waters, the following criteria must be met before out-of-state use may
4 occur:

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

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

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

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

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

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

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

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

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

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

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

1 hearings upon any other proposed change if it determines that the proposed change might adversely affect the
2 rights of other persons.

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

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

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

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

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

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

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

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

28 (i) the appropriation right is for:

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

30 (B) ground water inside the boundaries of a controlled ground water area and if the provisions of the

1 order declaring the controlled ground water area do not restrict such a change;

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

4 (iii) the rate and volume of the appropriation from the replacement well are equal to or less than that of
5 the well being replaced and do not exceed 35 gallons a minute and 10 acre-feet a year;

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

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

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

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

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

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

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

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

24 (c) The provisions of this subsection (15) do not apply to an appropriation right abandoned under
25 85-2-404.

26 (d) For each well that is replaced under this subsection (15), the appropriator shall follow the well
27 abandonment procedures, standards, and rules adopted by the board of water well contractors pursuant to
28 37-43-202.

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

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Section 6. Section 85-2-403, MCA, is amended to read:

"85-2-403. Transfer of appropriation right. (1) The right to use water ~~shall pass~~ passes with a conveyance of the land or transfer by operation of law, unless specifically exempted therefrom. All transfers of interests in appropriation rights ~~shall~~ must be without loss of priority.

(2) Failure to comply with the provisions of 85-2-402 does not render a conveyance or reservation of a water right void, but except as provided in [section 1], the right may not be used until the department has approved the change. This subsection applies retroactively, within the meaning of 1-2-109, to a conveyance or reservation made after July 1, 1973."

Section 7. Section 85-2-407, MCA, is amended to read:

"85-2-407. (Temporary) Temporary changes in appropriation right. (1) Except as provided in [section 1] and 85-2-410, an appropriator may not make a temporary change in appropriation right for the appropriator's use or another's use except with department approval in accordance with 85-2-402 and this section.

(2) Except as provided in subsection (9), a temporary change in appropriation right may be approved for a period not to exceed 10 years. A temporary change in appropriation right may be approved for consecutive or intermittent use.

(3) An authorization for a temporary change in appropriation right may be renewed by the department for a period not to exceed 10 years. Renewal of an authorization for a temporary change in appropriation right requires application to the department by the appropriator. Upon application, the department shall notify other appropriators potentially affected by the renewal and shall allow 30 days for submission of new evidence of adverse effects to other water rights. A temporary change authorization may not be renewed by the department if it determines that the right of an appropriator, other than an appropriator described in subsection (7), is adversely affected.

(4) (a) During the term of the original temporary change authorization, the department may modify or revoke its authorization for a temporary change if it determines that the right of an appropriator, other than an appropriator described in subsection (7), is adversely affected.

(b) An appropriator, other than an appropriator identified in subsection (7), may object:

(i) during the initial temporary change application process;

1 (ii) during the temporary change renewal process; and

2 (iii) once during the term of the temporary change permit.

3 (5) The priority of appropriation for a temporary change in appropriation right is the same as the priority
4 of appropriation of the right that is temporarily changed.

5 (6) Neither a change in appropriation right nor any other authorization right is required for reversion of
6 the appropriation right to the permanent purpose, place of use, point of diversion, or place of storage after the
7 period for which a temporary change was authorized expires.

8 (7) A person issued a water use permit with a priority of appropriation after the date of filing of an
9 application for a temporary change in appropriation right under this section may not object to the exercise of the
10 temporary change according to its terms, the renewal of the authorization for the temporary change, or the
11 reversion of the appropriation right to its permanent purpose, place of use, point of diversion, or place of storage.
12 Persons described in this subsection must be notified of the existence of any temporary change authorizations
13 from the same source of supply.

14 (8) If a water right for which a temporary change has been approved is transferred as an appurtenance
15 of real property, the temporary change remains in effect unless another change in appropriation right is
16 authorized by the department.

17 (9) If the quantity of water that is subject to a temporary change is made available from the development
18 of a new water conservation or storage project, a temporary change in appropriation right pursuant to 85-2-408
19 may be approved for a period equal to the expected life of the project, not to exceed 30 years. (Terminates June
20 30, 2005--sec. 3, Ch. 433, L. 2001.)

21 **85-2-407. (Effective July 1, 2005) Temporary changes in appropriation right.** (1) Except as provided
22 in section 1 and 85-2-410, an appropriator may not make a temporary change in appropriation right for the
23 appropriator's use or another's use except with department approval in accordance with 85-2-402 and this
24 section.

25 (2) A temporary change in appropriation right may be approved for a period not to exceed 10 years. A
26 temporary change in appropriation right may be approved for consecutive or intermittent use.

27 (3) An authorization for a temporary change in appropriation right may be renewed by the department
28 for a period not to exceed 10 years. Renewal of an authorization for a temporary change in appropriation right
29 requires application to the department by the appropriator. Upon application, the department shall notify other
30 appropriators potentially affected by the renewal and shall allow 30 days for submission of new evidence of

1 adverse effects to other water rights. A temporary change authorization may not be renewed by the department
2 if it determines that the right of an appropriator, other than an appropriator described in subsection (7), is
3 adversely affected.

4 (4) (a) During the term of the original temporary change authorization, the department may modify or
5 revoke its authorization for a temporary change if it determines that the right of an appropriator, other than an
6 appropriator described in subsection (7), is adversely affected.

7 (b) An appropriator, other than an appropriator identified in subsection (7), may object:

8 (i) during the initial temporary change application process;

9 (ii) during the temporary change renewal process; and

10 (iii) once during the term of the temporary change permit.

11 (5) The priority of appropriation for a temporary change in appropriation right is the same as the priority
12 of appropriation of the right that is temporarily changed.

13 (6) Neither a change in appropriation right nor any other authorization right is required for reversion of
14 the appropriation right to the permanent purpose, place of use, point of diversion, or place of storage after the
15 period for which a temporary change was authorized expires.

16 (7) A person issued a water use permit with a priority of appropriation after the date of filing of an
17 application for a temporary change in appropriation right under this section may not object to the exercise of the
18 temporary change according to its terms, the renewal of the authorization for the temporary change, or the
19 reversion of the appropriation right to its permanent purpose, place of use, point of diversion, or place of storage.
20 Persons described in this subsection must be notified of the existence of any temporary change authorizations
21 from the same source of supply.

22 (8) If a water right for which a temporary change has been approved is transferred as an appurtenance
23 of real property, the temporary change remains in effect unless another change in appropriation right is
24 authorized by the department."

25

26 **Section 8.** Section 85-2-408, MCA, is amended to read:

27 **"85-2-408. (Temporary) Temporary change authorization for instream flow -- additional**
28 **requirements.** (1) ~~The~~ Except as provided in [section 1], the department shall accept and process an application
29 for a temporary change in appropriation rights to maintain or enhance instream flow to benefit the fishery
30 resource under the provisions of 85-2-402, 85-2-407, and this section.

1 (2) (a) A temporary change authorization under the provisions of this section is allowable only if the
2 owner of the water right voluntarily agrees to:

3 (i) change the purpose of a consumptive use water right to instream flow for the benefit of the fishery
4 resource; or

5 (ii) lease a consumptive use water right to another person for instream flow to benefit the fishery
6 resource.

7 (b) For the purpose of this section, "person" means and is limited to an individual, association,
8 partnership, or corporation.

9 (3) In addition to the requirements of 85-2-402 and 85-2-407, an applicant for a change authorization
10 under this section shall prove by a preponderance of evidence that:

11 (a) the temporary change authorization for water to maintain and enhance instream flow to benefit the
12 fishery resource, as measured at a specific point, will not adversely affect the water rights of other persons; and

13 (b) the amount of water for the proposed use is needed to maintain or enhance instream flows to benefit
14 the fishery resource.

15 (4) The department shall approve the method of measurement of the water to maintain and enhance
16 instream flow to benefit the fishery resource through a temporary change authorization as provided in this
17 section.

18 (5) For the purpose of identifying and consulting with individuals or groups that may be affected by the
19 proposed change authorization, the applicant shall, 30 days before submitting the application to the department,
20 publish notice of the proposed change authorization in a local newspaper of general circulation in the county or
21 counties affected.

22 (6) Only the owner of the water right may seek enforcement of the temporary change authorization or
23 object under 85-2-308.

24 (7) A temporary change authorization under this section does not create a right of access across private
25 property or allow any infringement of private property rights. (Terminates June 30, 2005--sec. 6, Ch. 322, L.
26 1995.)"

27

28 **Section 9.** Section 85-2-436, MCA, is amended to read:

29 **"85-2-436. (Temporary) Water leasing study.** (1) The department of fish, wildlife, and parks and the
30 department, in consultation with the environmental quality council, shall conduct and coordinate a study that,

1 at a minimum:

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

4 (i) the length of the stream reach and how it is determined;

5 (ii) technical methods and data used to determine critical streamflow or volume needed to preserve
6 fisheries;

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

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

11 (v) methods and technical means used to monitor use of water under each lease;

12 (b) based on the data provided under subsection (1)(a), develops a complete model of a water lease
13 and lease authorization that includes a step-by-step explanation of the process from initiation to completion.

14 (2) (a) For purposes of undertaking the study described in subsection (1) and as authorized by law, the
15 department of fish, wildlife, and parks and the department may engage in the activities described in this
16 subsection (2). Except as provided in 85-2-439, for purposes of this study, this section is the exclusive means
17 by which the department of fish, wildlife, and parks may seek to change an appropriation right to an instream
18 flow purpose.

19 (b) The department of fish, wildlife, and parks, with the consent of the commission, may lease existing
20 rights for the purpose of maintaining or enhancing streamflows for the benefit of fisheries in stream reaches that
21 are:

22 (i) determined eligible by the department pursuant to 85-2-437; and

23 (ii) not within a basin or part of a basin that is subject to the suspension of water use permit and change
24 provisions as provided in [section 1].

25 (c) Upon receipt of a correct and complete application for a lease from the department of fish, wildlife,
26 and parks, the department shall publish notice of the application as provided in 85-2-307. Parties who believe
27 that they may be adversely affected by the proposed lease may file an objection as provided in 85-2-308. A lease
28 may not be approved until all objections are resolved. After resolving all objections filed under 85-2-308, the
29 department shall authorize a lease of an existing right for the purpose of maintaining or enhancing streamflows
30 for the benefit of fisheries if the applicant submits a correct and complete application and meets the

1 requirements of 85-2-402.

2 (d) The application for a lease authorization must include specific information on the length and location
3 of the stream reach in which the streamflow must be maintained or enhanced and must provide a detailed
4 streamflow measuring plan that describes the points where and the manner in which the streamflow must be
5 measured.

6 (e) The maximum quantity of water that may be leased is the amount historically diverted by the lessor.
7 However, only the amount historically consumed, or a smaller amount if specified by the department in the lease
8 authorization, may be used to maintain or enhance streamflows below the lessor's point of diversion.

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

18 (g) During the term of the lease, the department may modify or revoke the lease authorization if an
19 appropriator other than an appropriator described in subsection (2)(j) proves by a preponderance of evidence
20 that the appropriator's water right is adversely affected.

21 (h) The priority of appropriation for a lease under this section is the same as the priority of appropriation
22 of the right that is leased.

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

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

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

30 (3) (a) The department of fish, wildlife, and parks shall complete and submit to the department,

1 commission, and environmental quality council an annual study progress report by December 1 of each year.
2 This report must include the applicable information listed in subsection (1) for each lease, a summary of stream
3 reach designation activity under 85-2-437, and a summary of leasing activity on all designated streams. If the
4 department of fish, wildlife, and parks has not leased additional water rights under this section by December 1
5 of any year, the department of fish, wildlife, and parks shall provide compelling justification for that fact in the
6 study progress report.

7 (b) A final study report must be adopted by the department and commission and submitted to the
8 environmental quality council, which shall complete the final report by December 1, 2008.

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

11
12 **NEW SECTION. Section 10. Notification to tribal governments.** The secretary of state shall send
13 a copy of [this act] to each tribal government located on the seven Montana reservations and to the Little Shell
14 band of Chippewa.

15
16 **NEW SECTION. Section 11. Codification instruction.** [Section 1] is intended to be codified as an
17 integral part of Title 85, chapter 2, part 1, and the provisions of Title 85, chapter 2, part 1, apply to [section 1].

18
19 **NEW SECTION. Section 12. Severability.** If a part of [this act] is invalid, all valid parts that are
20 severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications,
21 the part remains in effect in all valid applications that are severable from the invalid applications.

22
23 **NEW SECTION. Section 13. Effective date.** [This act] is effective on passage and approval.

24 - END -