

HOUSE BILL NO. 831

INTRODUCED BY MCNUTT, POMNICHOWSKI, COHENOUR, VAN DYK, SMALL-EASTMAN

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING WATER LAWS IN CLOSED BASINS; DEFINING TERMS IN WATER USE LAWS; AMENDING REQUIREMENTS FOR AN APPLICATION TO APPROPRIATE GROUND WATER IN A CLOSED BASIN; PROVIDING THAT CERTAIN APPLICATIONS TO APPROPRIATE SURFACE WATER ARE EXEMPT FROM CLOSED BASIN REQUIREMENTS; PROVIDING REQUIREMENTS FOR HYDROGEOLOGIC ASSESSMENTS, MITIGATION PLANS, AND AQUIFER RECHARGE PLANS; PROVIDING MINIMUM WATER QUALITY STANDARDS FOR CERTAIN DISCHARGES OF EFFLUENT; ~~REQUIRING THAT PREVIOUSLY APPROVED PLANS THAT WERE NOT LOCATED IN THE CLARK FORK BASIN MUST MEET CERTAIN CRITERIA;~~ REQUIRING THAT DATA BE SUBMITTED TO THE BUREAU OF MINES AND GEOLOGY; PROVIDING FOR RULEMAKING; PROVIDING FOR A CASE STUDY AND REQUIREMENTS AND A FEE FOR PARTICIPATION IN THE CASE STUDY; ~~RECOGNIZING AND CONFIRMING EXISTING APPROPRIATION RIGHTS IN CERTAIN INSTANCES;~~ PROVIDING AN APPROPRIATION; AMENDING SECTIONS 85-2-102, 85-2-302, 85-2-311, 85-2-329, 85-2-330, 85-2-335, 85-2-336, ~~85-2-337~~, 85-2-340, 85-2-341, 85-2-342, 85-2-343, 85-2-344, ~~85-2-402~~, AND 85-2-506, MCA; REPEALING SECTION 85-2-337, MCA; DIRECTING THE AMENDMENT OF ARM 36.12.101 AND 36.12.120; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND ~~APPLICABILITY DATES~~ AN APPLICABILITY DATE."

WHEREAS, it is the policy of this state to encourage the wise use of the state's water resources by making them available for appropriation and to provide wise utilization, development, and conservation of the water of the state for the maximum benefit of its people with the least possible degradation of the state's natural aquatic ecosystems; and

WHEREAS, there has been confusion regarding ground water issues in closed basins and the Department of Natural Resources and Conservation needs guidance from the Legislature on how to proceed; and

WHEREAS, the basin closure laws were passed to protect senior appropriators while the state water adjudication is ongoing; and

WHEREAS, ground water development in closed basins should be able to proceed as long as the applicant collects the necessary scientific information to determine if there will be an adverse effect on a prior appropriator and takes the necessary actions to mitigate or prevent any adverse effects on a prior appropriator;

and

WHEREAS, it is critical that the Legislature develop state water policies in a way that protects the prior appropriation doctrine while at the same time protecting the quality of Montana's water and the ability to appropriate water consistent with section 85-1-101, MCA, and Article IX, section 3, of the Montana Constitution; and

WHEREAS, augmentation is statutorily authorized for the Clark Fork River Basin only; and

WHEREAS, the Department of Natural Resources and Conservation has developed administrative rules and applied augmentation through these administrative rules to all basins even though not specifically statutorily authorized; and

WHEREAS, administrative rules and rulemaking must comply with section 2-4-305, MCA, and may not engraft material not contemplated by the Legislature; and

WHEREAS, this bill provides definitions and a new procedure for mitigation and aquifer recharge.

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

Section 1. Section 85-2-102, MCA, is amended to read:

"85-2-102. (Temporary) Definitions. Unless the context requires otherwise, in this chapter, the following definitions apply:

(1) "Appropriate" means:

(a) to divert, impound, or withdraw, including by stock for stock water, a quantity of water for a beneficial use;

(b) in the case of a public agency, to reserve water in accordance with 85-2-316;

(c) in the case of the department of fish, wildlife, and parks, to lease water in accordance with 85-2-436;

or

(d) temporary changes or leases for instream flow to maintain or enhance instream flow to benefit the fishery resource in accordance with 85-2-408;

(e) a use of water for aquifer recharge or mitigation as provided in [sections 15 14 and 17 16]; or

(f) a use of water for an aquifer storage and recovery project as provided in [section 20].

(2) "Aquifer recharge" means either the controlled subsurface addition of water directly to the aquifer or controlled application of water to the ground surface for the purpose of replenishing the aquifer to offset ADVERSE EFFECTS RESULTING FROM net depletion of surface water in a closed basin resulting from a new appropriation right

or certain changes in an appropriation right.

(3) "Aquifer storage and recovery project" means a project involving the use of an aquifer to temporarily store water through various means, including but not limited to injection, surface spreading and infiltration, drain fields, or another department-approved method. The stored water may be either pumped from the injection well or other wells for beneficial use or allowed to naturally drain away for maintenance or enhancement of the streamflow A BENEFICIAL USE.

~~(2)~~(4) "Beneficial use", unless otherwise provided, means:

(a) a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural ~~(including stock water)~~, domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses;

(b) a use of water appropriated by the department for the state water leasing program under 85-2-141 and of water leased under a valid lease issued by the department under 85-2-141;

(c) a use of water by the department of fish, wildlife, and parks pursuant to a lease authorized under 85-2-436; ~~or~~

(d) a use of water through a temporary change in appropriation right or lease to enhance instream flow to benefit the fishery resource in accordance with 85-2-408;

(e) a use of water for aquifer recharge or mitigation as provided in [sections 45 14 and 47 16]; or

(f) a use of water for an aquifer storage and recovery project as provided in [section 20].

~~(3)~~(5) "Certificate" means a certificate of water right issued by the department.

~~(4)~~(6) "Change in appropriation right" means a change in the place of diversion, the place of use, the purpose of use, or the place of storage.

~~(5)~~(7) "Commission" means the fish, wildlife, and parks commission provided for in 2-15-3402.

~~(6)~~(8) "Correct and complete" means that the information required to be submitted conforms to the standard of substantial credible information and that all of the necessary parts of the form requiring the information have been filled in with the required information.

~~(7)~~(9) "Declaration" means the declaration of an existing right filed with the department under section 8, Chapter 452, Laws of 1973.

~~(8)~~(10) "Department" means the department of natural resources and conservation provided for in Title 2, chapter 15, part 33.

~~(9)~~(11) "Developed spring" means any artificial opening or excavation in the ground, however made, including any physical alteration at the point of discharge regardless of whether it results in any increase in the

yield of ground water, from which ground water is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn.

~~(10)~~(12) "Existing right" or "existing water right" means a right to the use of water that would be protected under the law as it existed prior to July 1, 1973. The term includes federal non-Indian and Indian reserved water rights created under federal law and water rights created under state law.

~~(11)~~(13) "Ground water" means any water that is beneath the ground surface.

~~(12)~~(14) "Late claim" means a claim to an existing right forfeited pursuant to the conclusive presumption of abandonment under 85-2-226.

(15) "Mitigation" means the reallocation of surface water or ground water through a change in appropriation right or other means that does not result in surface water being introduced into an aquifer through aquifer recharge to offset ADVERSE EFFECTS RESULTING FROM net depletion of surface water in a closed basin resulting from a new appropriation right or certain changes in an appropriation right.

(16) "Municipality" means an incorporated city or town organized and incorporated under Title 7, chapter 2.

~~(13)~~(17) "Permit" means the permit to appropriate issued by the department under 85-2-301 through 85-2-303 and 85-2-306 through 85-2-314.

~~(14)~~(18) "Person" means an individual, association, partnership, corporation, state agency, political subdivision, the United States or any agency of the United States, or any other entity.

~~(15)~~(19) (a) "Political subdivision" means any county, incorporated city or town, public corporation, or district created pursuant to state law or other public body of the state empowered to appropriate water.

(b) The term does not mean a private corporation, association, or group.

~~(16)~~(20) "Salvage" means to make water available for beneficial use from an existing valid appropriation through application of water-saving methods.

~~(17)~~(21) "State water reservation" means a water right created under state law after July 1, 1973, that reserves water for existing or future beneficial uses or that maintains a minimum flow, level, or quality of water throughout the year or at periods or for defined lengths of time.

~~(18)~~(22) "Substantial credible information" means probable, believable facts sufficient to support a reasonable legal theory upon which the department should proceed with the action requested by the person providing the information.

~~(19)~~(23) "Waste" means the unreasonable loss of water through the design or negligent operation of an appropriation or water distribution facility or the application of water to anything but a beneficial use.

~~(20)~~(24) "Water" means all water of the state, surface and subsurface, regardless of its character or manner of occurrence, including but not limited to geothermal water, diffuse surface water, and sewage effluent.

~~(21)~~(25) "Water division" means a drainage basin as defined in 3-7-102.

~~(22)~~(26) "Water judge" means a judge as provided for in Title 3, chapter 7.

~~(23)~~(27) "Water master" means a master as provided for in Title 3, chapter 7.

~~(24)~~(28) "Watercourse" means any naturally occurring stream or river from which water is diverted for beneficial uses. It does not include ditches, culverts, or other constructed waterways.

~~(25)~~(29) "Well" means any artificial opening or excavation in the ground, however made, by which ground water is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn. (Terminates June 30, 2009--sec. 9, Ch. 123, L. 1999.)

85-2-102. (Effective July 1, 2009) Definitions. Unless the context requires otherwise, in this chapter, the following definitions apply:

(1) "Appropriate" means:

(a) to divert, impound, or withdraw, including by stock for stock water, a quantity of water for a beneficial use;

(b) in the case of a public agency, to reserve water in accordance with 85-2-316; ~~or~~

(c) temporary changes or leases for instream flow to maintain or enhance instream flow to benefit the fishery resource in accordance with 85-2-408;

~~(d) a use of water for aquifer recharge or mitigation as provided in [sections 45 14 and 47 16]; or~~

~~(e) a use of water for an aquifer storage and recovery project as provided in [section 20].~~

~~(2) "Aquifer recharge" means either controlled subsurface addition of water directly to the aquifer or controlled application of water to the ground surface for the purpose of replenishing the aquifer to offset ADVERSE EFFECTS RESULTING FROM net depletion of surface water in a closed basin resulting from a new appropriation right or certain changes in an appropriation right.~~

~~(3) "Aquifer storage and recovery project" means a project involving the use of an aquifer to temporarily store water through various means, including but not limited to injection, surface spreading and infiltration, drain fields, or another department-approved method. The stored water may be either pumped from the injection well or other wells for beneficial use or allowed to naturally drain away for maintenance or enhancement of the streamflow A BENEFICIAL USE.~~

~~(2)~~(4) "Beneficial use", unless otherwise provided, means:

(a) a use of water for the benefit of the appropriator, other persons, or the public, including but not limited

to agricultural, ~~(including stock water)~~, domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses;

(b) a use of water appropriated by the department for the state water leasing program under 85-2-141 and of water leased under a valid lease issued by the department under 85-2-141; ~~or~~

(c) a use of water through a temporary change in appropriation right or lease to enhance instream flow to benefit the fishery resource in accordance with 85-2-408;

~~(d) a use of water for aquifer recharge or mitigation as provided in [sections 45 14 and 47 16]; or~~

~~(e) a use of water for an aquifer storage and recovery project as provided in [section 20].~~

~~(3)(5)~~ "Certificate" means a certificate of water right issued by the department.

~~(4)(6)~~ "Change in appropriation right" means a change in the place of diversion, the place of use, the purpose of use, or the place of storage.

~~(5)(7)~~ "Correct and complete" means that the information required to be submitted conforms to the standard of substantial credible information and that all of the necessary parts of the form requiring the information have been filled in with the required information.

~~(6)(8)~~ "Declaration" means the declaration of an existing right filed with the department under section 8, Chapter 452, Laws of 1973.

~~(7)(9)~~ "Department" means the department of natural resources and conservation provided for in Title 2, chapter 15, part 33.

~~(8)(10)~~ "Developed spring" means any artificial opening or excavation in the ground, however made, including any physical alteration at the point of discharge regardless of whether it results in any increase in the yield of ground water, from which ground water is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn.

~~(9)(11)~~ "Existing right" or "existing water right" means a right to the use of water that would be protected under the law as it existed prior to July 1, 1973. The term includes federal non-Indian and Indian reserved water rights created under federal law and water rights created under state law.

~~(10)(12)~~ "Ground water" means any water that is beneath the ground surface.

~~(11)(13)~~ "Late claim" means a claim to an existing right forfeited pursuant to the conclusive presumption of abandonment under 85-2-226.

(14) "Mitigation" means the reallocation of surface water or ground water through a change in appropriation right or other means that does not result in surface water being introduced into an aquifer through aquifer recharge to offset ADVERSE EFFECTS RESULTING FROM net depletion of surface water in a closed basin

~~resulting from a new appropriation right or certain changes in an appropriation right.~~

~~(15)~~(16) "Municipality" means an incorporated city or town organized and incorporated under Title 7, chapter 2.

~~(12)~~(16) "Permit" means the permit to appropriate issued by the department under 85-2-301 through 85-2-303 and 85-2-306 through 85-2-314.

~~(13)~~(17) "Person" means an individual, association, partnership, corporation, state agency, political subdivision, the United States or any agency of the United States, or any other entity.

~~(14)~~(18) (a) "Political subdivision" means any county, incorporated city or town, public corporation, or district created pursuant to state law or other public body of the state empowered to appropriate water.

(b) The term does not mean a private corporation, association, or group.

~~(15)~~(19) "Salvage" means to make water available for beneficial use from an existing valid appropriation through application of water-saving methods.

~~(16)~~(20) "State water reservation" means a water right created under state law after July 1, 1973, that reserves water for existing or future beneficial uses or that maintains a minimum flow, level, or quality of water throughout the year or at periods or for defined lengths of time.

~~(17)~~(21) "Substantial credible information" means probable, believable facts sufficient to support a reasonable legal theory upon which the department should proceed with the action requested by the person providing the information.

~~(18)~~(22) "Waste" means the unreasonable loss of water through the design or negligent operation of an appropriation or water distribution facility or the application of water to anything but a beneficial use.

~~(19)~~(23) "Water" means all water of the state, surface and subsurface, regardless of its character or manner of occurrence, including but not limited to geothermal water, diffuse surface water, and sewage effluent.

~~(20)~~(24) "Water division" means a drainage basin as defined in 3-7-102.

~~(24)~~(25) "Water judge" means a judge as provided for in Title 3, chapter 7.

~~(22)~~(26) "Water master" means a master as provided for in Title 3, chapter 7.

~~(23)~~(27) "Watercourse" means any naturally occurring stream or river from which water is diverted for beneficial uses. It does not include ditches, culverts, or other constructed waterways.

~~(24)~~(28) "Well" means any artificial opening or excavation in the ground, however made, by which ground water is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn."

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

"85-2-302. Application for permit. (1) Except as provided in 85-2-306 ~~and for the purpose of test wells for conducting the hydrogeologic assessment and monitoring pursuant to [sections 15 through 17 and 22] [SECTION 21],~~ a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or related distribution works except by applying for and receiving a permit from the department.

(2) The department shall adopt rules that are necessary to determine whether or not an application is correct and complete, based on the provisions applicable to issuance of a permit under this part. The rules must be adopted in compliance with Title 2, chapter 4.

(3) The application must be made on a form prescribed by the department. The department shall make the forms available through its offices.

(4) The applicant shall submit a correct and complete application. The determination of whether an application is correct and complete must be based on rules adopted under subsection (2) that are in effect at the time the application is submitted.

(5) The department shall notify the applicant of any defects in an application within 180 days. The defects must be identified by reference to the rules adopted under subsection (2). If the department does not notify the applicant of any defects within 180 days, the application must be treated as a correct and complete application.

(6) An application does not lose priority of filing because of defects if the application is corrected or completed within 30 days of the date of notification of the defects or within a further time as the department may allow, but not to exceed 90 days from the date of notification. If an application is made correct and complete after the mandated time period, but within 90 days of the date of notification of the defects, the priority date of the application is the date the application is made correct and complete.

(7) An application not corrected or completed within 90 days from the date of notification of the defects is terminated."

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

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

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

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

(A) identification of physical water availability;

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

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

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

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

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

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

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

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

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

(2) The applicant is required to prove that the criteria in subsections (1)(f) through (1)(h) have been met only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the satisfaction of the department that the criteria in subsection (1)(f), (1)(g), or (1)(h), as applicable, may not be met. For the criteria set forth in subsection (1)(g), only the department of environmental quality or a local water quality district established under Title 7, chapter 13, part 45, may file a valid objection.

(3) The department may not issue a permit for an appropriation of 4,000 or more acre-feet of water a

year and 5.5 or more cubic feet per second of water unless the applicant proves by clear and convincing evidence that:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- (i) whether there are present or projected water shortages within the state of Montana;
 - (ii) whether the water that is the subject of the application could feasibly be transported to alleviate water shortages within the state of Montana;
 - (iii) the supply and sources of water available to the applicant in the state where the applicant intends to use the water; and
 - (iv) the demands placed on the applicant's supply in the state where the applicant intends to use the water.
- (d) When applying for a permit or a lease to withdraw and transport water for use outside the state, the applicant shall submit to and comply with the laws of the state of Montana governing the appropriation, lease, and use of water.

(5) ~~To~~ Subject to [section 15 14], to meet the preponderance of evidence standard in this section, the applicant, in addition to other evidence demonstrating that the criteria of subsection (1) have been met, shall submit hydrologic or other evidence, including but not limited to water supply data, ~~MODELING INFORMATION,~~ field reports, and other information developed by the applicant, the department, the U.S. geological survey, or the U.S. natural resources conservation service and other specific field studies.

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

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

(8) FOR AN APPLICATION FOR GROUND WATER IN A BASIN CLOSED PURSUANT TO 85-2-330, 85-2-336, 85-2-341, 85-2-343, OR 85-2-344 OR DURING THE PERIOD OF CLOSURE FOR ANY BASIN THAT IS ADMINISTRATIVELY CLOSED PURSUANT TO 85-2-319, THE APPLICANT SHALL COMPLY WITH THE PROVISIONS OF [SECTION 14] IN ADDITION TO THE REQUIREMENTS OF THIS SECTION."

Section 4. Section 85-2-329, MCA, is amended to read:

"85-2-329. Definitions. Unless the context requires otherwise, in 85-2-330 and this section, the following definitions apply:

(1) "Application" means an application for a beneficial water use permit pursuant to 85-2-302 or a state

water reservation pursuant to 85-2-316.

~~(2) "Ground water" means water that is beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water and that is not immediately or directly connected to surface water.~~

~~(3)~~(2) "Nonconsumptive use" means a beneficial use of water that does not cause a reduction in the source of supply and in which substantially all of the water returns without delay to the source of supply, causing little or no disruption in stream conditions.

~~(4)~~(3) "Teton River basin" means the drainage area of the Teton River and its tributaries above the confluence of the Teton and Marias Rivers."

Section 5. Section 85-2-330, MCA, is amended to read:

"85-2-330. Basin closure -- exceptions. (1) As provided in 85-2-319 and subject to the provisions of subsection (2) of this section, the department may not ~~process~~ or grant an application for a permit to appropriate water or for a reservation to reserve water within the Teton River basin.

(2) The provisions of subsection (1) do not apply to:

(a) an application for a permit to appropriate ground water if the applicant complies with the provisions of [section 45 14];

(b) an application for a permit to appropriate water for a nonconsumptive use;

(c) an application for a permit to appropriate water for:

(i) domestic use from surface water or pursuant to 85-2-306; ~~municipal, or~~

~~(ii) stock use; or~~

~~(iii) use OF SURFACE WATER by OR FOR a municipality;~~

(d) an application to store water during high spring flows; ~~or~~

(e) ~~emergency~~ temporary emergency appropriations as provided for in 85-2-113(3); or

(f) an application for a permit to appropriate surface water to conduct response actions related to natural resource restoration required for:

(i) remedial actions pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601, et seq.;

(ii) aquatic resource activities carried out in compliance with and as required by the federal Clean Water Act of 1977, 33 U.S.C. 1251 through 1387; or

(iii) remedial actions taken pursuant to Title 75, chapter 10, part 7.

(3) A permit issued to conduct remedial actions or aquatic resource activities under subsection (2)(f) may

not be used for dilution.

(4) A change of use authorization for changing the purpose of use may not be issued for any permit issued pursuant to subsection (2)(b), (2)(c), (2)(e), or (2)(f)."

SECTION 6. SECTION 85-2-335, MCA, IS AMENDED TO READ:

"85-2-335. Definitions. Unless the context requires otherwise, in 85-2-335, ~~through 85-2-336, and~~ 85-2-338, the following definitions apply:

(1) "Application" means an application for a beneficial water use permit pursuant to 85-2-302.

(2) "Upper Clark Fork River basin" means the drainage area of the Clark Fork River and its tributaries above Milltown dam."

Section 7. Section 85-2-336, MCA, is amended to read:

"85-2-336. Basin closure -- exception. (1) As provided in 85-2-319 and subject to the provisions of subsection (2) of this section, the department may not ~~process or~~ grant an application for a permit to appropriate water within the Upper Clark Fork River basin.

(2) The provisions of subsection (1) do not apply to:

(a) an application for a permit to appropriate ground water if the applicant complies with the provisions of [section 45 14];

~~(b) an application filed prior to January 1, 2000, for a permit to appropriate water to conduct response actions or remedial actions pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, or Title 75, chapter 10, part 7, at sites designated as of January 1, 1994. The total flow rates for all permits issued under this subsection (2)(b) may not exceed 10 cubic feet per second. A permit issued to conduct response actions or remedial actions may not be used for dilution and must be limited to a term not to exceed the necessary time to complete the response or remedial action, and the permit may not be transferred to any person for any purpose other than the designated response or remedial action an application for a permit to appropriate surface water to conduct aquatic resource activities carried out in compliance with and as required by the federal Clean Water Act of 1977, 33 U.S.C. 1251 through 1387. A permit issued to conduct aquatic resource actions may not be used for dilution.~~

(c) an application for a permit to appropriate water for stock use;

(d) an application to store water; or

(e) an application for power generation at existing hydroelectric dams. The department may not approve

a permit for power generation if approval results in additional consumption of water.

(3) A change of use authorization for changing the purpose of use may not be issued for any permit issued pursuant to subsection (2)(b) or (2)(c).

(4) Applications for state water reservations in the Upper Clark Fork River basin filed pursuant to 85-2-316 and pending as of May 1, 1991, have a priority date of May 1, 1991. The filing of a state water reservation application does not provide standing to object under 85-2-402.

(4)(5) The department may not process or approve applications for state water reservations in the Upper Clark Fork River basin filed pursuant to 85-2-316."

~~Section 7. Section 85-2-337, MCA, is amended to read:~~

~~"85-2-337. Ground water permit applications -- report required. (1) During the period of basin closure provided in 85-2-336(1), an applicant for a ground water permit in the Upper Clark Fork River basin shall submit a report prepared by a professional engineer or hydrologist addressing the hydrologic connection between the source of the ground water and surface water. If the applicant fails to submit the report required in this section, the application is considered defective and must be processed pursuant to 85-2-302 comply with the provisions of [section 15].~~

~~(2) Except as provided in subsection (3), the department may not issue a permit to appropriate ground water in the Upper Clark Fork River basin unless the applicant proves by a preponderance of evidence, in addition to the criteria of 85-2-311, that the source of the ground water is not a part of or substantially or directly connected to surface water.~~

~~(3)(2) The department may issue a permit to appropriate ground water if the application includes an augmentation plan and if the applicant proves by a preponderance of evidence, in addition to the criteria of 85-2-311, that the augmentation plan provides sufficient augmentation water in amount, time, and location to replace depletions to senior water rights pursuant to [section 15]."~~

Section 8. Section 85-2-340, MCA, is amended to read:

"85-2-340. Definitions. Unless the context requires otherwise, in 85-2-341 and this section, the following definitions apply:

(1) "Application" means an application for a beneficial water use permit pursuant to 85-2-302 or a state water reservation pursuant to 85-2-316.

(2) "Ground water" means water that is beneath the land surface or beneath the bed of a stream, lake,

reservoir, or other body of surface water and that is not immediately or directly connected to surface water has the meaning provided in 85-2-102.

(3) "Jefferson River basin" means the drainage area of the Jefferson River and its tributaries above the confluence of the Jefferson and Missouri Rivers.

(4) "Madison River basin" means the drainage area of the Madison River and its tributaries above the confluence of the Madison and Jefferson Rivers.

(5) "Nonconsumptive use" means a beneficial use of water that does not cause a reduction in the source of supply and in which substantially all of the water returns without delay to the source of supply, causing little or no disruption in stream conditions."

Section 9. Section 85-2-341, MCA, is amended to read:

"85-2-341. Basin closure -- exceptions. (1) As provided in 85-2-319 and subject to the provisions of subsection (2) of this section, the department may not ~~process or~~ grant an application for a permit to appropriate water or for a state water reservation to reserve water within the Jefferson River basin or Madison River basin.

(2) The provisions of subsection (1) do not apply to:

(a) an application for a permit to appropriate ground water if the applicant complies with the provisions of [section 45 14];

(b) an application for a permit to appropriate water for a nonconsumptive use;

(c) an application for a permit to appropriate water for:

(i) domestic use from surface water or pursuant to 85-2-306; municipal, or

(ii) stock use; or

(iii) use OF SURFACE WATER by OR FOR a municipality;

(d) an application to store water during high spring flows; ~~or~~

(e) temporary emergency appropriations as provided for in 85-2-113(3); or

(f) an application for a permit to appropriate surface water to conduct response actions related to natural resource restoration required for:

(i) remedial actions pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601, et seq.;

(ii) aquatic resource activities carried out in compliance with and as required by the federal Clean Water Act of 1977, 33 U.S.C. 1251 through 1387; or

(iii) remedial actions taken pursuant to Title 75, chapter 10, part 7.

(3) A permit issued to conduct remedial actions or aquatic resource activities under subsection (2)(f) may not be used for dilution.

(4) A change of use authorization for changing the purpose of use may not be issued for any permit issued pursuant to subsection (2)(b), (2)(c), (2)(e), or (2)(f)."

Section 10. Section 85-2-342, MCA, is amended to read:

"85-2-342. Definitions. Unless the context requires otherwise, in 85-2-343 and this section, the following definitions apply:

(1) "Application" means an application for a beneficial water use permit pursuant to 85-2-302 or a state water reservation pursuant to 85-2-316.

~~(2) "Ground water" means water that is beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water and that is not immediately or directly connected to surface water.~~

~~(3)~~(2) "Nonconsumptive use" means a beneficial use of water that does not cause a reduction in the source of supply and in which substantially all of the water returns without delay to the source of supply, causing little or no disruption in stream conditions.

~~(4)~~(3) "Upper Missouri River basin" means the drainage area of the Missouri River and its tributaries above Morony dam."

Section 11. Section 85-2-343, MCA, is amended to read:

"85-2-343. Basin closure -- exceptions. (1) As provided in 85-2-319 and subject to the provisions of subsection (2) of this section, the department may not ~~process or~~ grant an application for a permit to appropriate water or for a reservation to reserve water within the upper Missouri River basin until the final decrees have been issued in accordance with part 2 of this chapter for all of the subbasins of the upper Missouri River basin.

(2) The provisions of subsection (1) do not apply to:

(a) an application for a permit to appropriate ground water if the applicant complies with the provisions of [section 45 14];

(b) an application for a permit to appropriate water for a nonconsumptive use;

(c) an application for a permit to appropriate water for:

(i) domestic use from surface water or pursuant to 85-2-306; municipal, or

(ii) stock use; or

(iii) use OF SURFACE WATER by OR FOR a municipality;

- (d) an application to store water during high spring flows;
- (e) an application for a permit to use water from the Muddy Creek drainage, which drains to the Sun River, if the proposed use of water will help control erosion in the Muddy Creek drainage; or
- (f) temporary emergency appropriations as provided for in 85-2-113(3); or
- (g) an application for a permit to appropriate surface water to conduct response actions related to natural resource restoration required for:
 - (i) remedial actions pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601, et seq.;
 - (ii) aquatic resource activities carried out in compliance with and as required by the federal Clean Water Act of 1977, 33 U.S.C. 1251 through 1387; or
 - (iii) remedial actions taken pursuant to Title 75, chapter 10, part 7.
- (3) A permit issued to conduct remedial actions or aquatic resource activities under subsection (2)(g) may not be used for dilution.
- (4) A change of use authorization for changing the purpose of use may not be issued for any permit issued pursuant to subsection (2)(b), (2)(c), (2)(e), (2)(f), or (2)(g)."

Section 12. Section 85-2-344, MCA, is amended to read:

"85-2-344. Bitterroot River subbasin temporary closure -- definitions -- exceptions. (1) Unless the context requires otherwise, in this section, the following definitions apply:

(a) "Application" means an application for a beneficial water use permit pursuant to 85-2-302 or a state water reservation pursuant to 85-2-316.

(b) "Bitterroot River basin" means the drainage area of the Bitterroot River and its tributaries above the confluence of the Bitterroot River and Clark Fork of the Columbia River and designated as "Basin 76H".

(c) "Bitterroot River subbasin" means one of the following hydrologically related portions of the Bitterroot River basin:

- (i) the mainstem subbasin, designated as "Subbasin 76HA";
- (ii) the north end subbasin, designated as "Subbasin 76HB";
- (iii) the east side subbasin, designated as "Subbasin 76HC";
- (iv) the southeast subbasin, designated as "Subbasin 76HD";
- (v) the south end subbasin, designated as "Subbasin 76HE";
- (vi) the southwest subbasin, designated as "Subbasin 76HF";

(vii) the west central subbasin, designated as "Subbasin 76HG"; or

(viii) the northwest subbasin, designated as "Subbasin 76HH".

(2) As provided in 85-2-319, the department may not ~~process or~~ grant an application for a permit to appropriate water or for a state water reservation within a Bitterroot River subbasin until the closure for the basin is terminated pursuant to subsection (3) of this section, except for:

(a) an application for a permit to appropriate ground water if the applicant complies with the provisions of [section 15 14];

(b) an application for a permit to appropriate water for ~~a municipal water supply~~ use OF SURFACE WATER by OR FOR a municipality;

(c) temporary emergency appropriations pursuant to 85-2-113(3); ~~or~~

(d) an application to store water during high spring flow in an impoundment with a capacity of 50 acre-feet or more; or

(e) an application for a permit to appropriate surface water to conduct response actions related to natural resource restoration required for:

(i) remedial actions pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601, et seq.;

(ii) aquatic resource activities carried out in compliance with and as required by the federal Clean Water Act of 1977, 33 U.S.C. 1251 through 1387; or

(iii) remedial actions taken pursuant to Title 75, chapter 10, part 7.

(3) A permit issued to conduct remedial actions or aquatic resource activities under subsection (2)(e) may not be used for dilution

(4) A change of use authorization for changing the purpose of use may not be issued for any permit issued pursuant to subsection (2)(b), (2)(c), or (2)(e).

~~(3)(5)~~ (5) Each Bitterroot River subbasin is closed to new appropriations and new state water reservations until 2 years after all water rights in the subbasin arising under the laws of the state are subject to an enforceable and administrable decree as provided in 85-2-406(4)."

~~Section 13.~~ Section 85-2-402, MCA, is amended to read:

~~"85-2-402. (Temporary) Changes in appropriation rights. (1) The right to make a change subject to the provisions of this section in an existing water right, a permit, or a state water reservation is recognized and confirmed. In a change proceeding under this section, there is no presumption that an applicant for a change in~~

appropriation right cannot establish lack of adverse effect prior to the adjudication of other rights in the source of supply pursuant to this chapter. Except as provided in 85-2-410 and subsections (15) and (16) of this section, an appropriator may not make a change in an appropriation right without the approval of the department or, if applicable, of the legislature. An applicant shall submit a correct and complete application:

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

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

——— (b) Except for a lease authorization pursuant to 85-2-436 or a temporary change in appropriation right authorization to maintain or enhance streamflows to benefit the fishery resource pursuant to 85-2-408, the proposed means of diversion, construction, and operation of the appropriation works are adequate:

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

——— (d) Except for a lease authorization pursuant to 85-2-436 or a temporary change in appropriation right authorization pursuant to 85-2-408, the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- ~~———(ii) the proposed out-of-state use of water is not contrary to water conservation in Montana; and~~
- ~~———(iii) the proposed out-of-state use of water is not otherwise detrimental to the public welfare of the citizens of Montana.~~
- ~~———(b) In determining whether the appropriator has proved by clear and convincing evidence that the requirements of subsections (6)(a)(ii) and (6)(a)(iii) will be met, the department and, if applicable, the legislature shall consider the following factors:~~
- ~~———(i) whether there are present or projected water shortages within the state of Montana;~~
- ~~———(ii) whether the water that is the subject of the proposed change in appropriation might feasibly be transported to alleviate water shortages within the state of Montana;~~
- ~~———(iii) the supply and sources of water available to the applicant in the state where the applicant intends to use the water; and~~
- ~~———(iv) the demands placed on the applicant's supply in the state where the applicant intends to use the water.~~
- ~~———(c) When applying for a change in appropriation right to withdraw and transport water for use outside the state, the applicant shall submit to and comply with the laws of the state of Montana governing the appropriation and use of water.~~
- ~~———(7) For any application for a change in appropriation right involving 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water, the department shall give notice of the proposed change in accordance with 85-2-307 and shall hold one or more hearings in accordance with 85-2-309 prior to its approval or denial of the proposed change. The department shall provide notice and may hold one or more hearings upon any other proposed change in appropriation right if it determines that the proposed change might adversely affect the rights of other persons.~~
- ~~———(8) The department or the legislature, if applicable, may approve a change in appropriation right subject to the terms, conditions, restrictions, and limitations that it considers necessary to satisfy the criteria of this section, including limitations on the time for completion of the change. The department may extend time limits specified in the change approval under the applicable criteria and procedures of 85-2-312(3).~~
- ~~———(9) Upon actual application of water to the proposed beneficial use within the time allowed, the appropriator shall notify the department that the appropriation has been completed. The notification must contain a certified statement by a person with experience in the design, construction, or operation of appropriation works describing how the appropriation was completed.~~
- ~~———(10) If a change in appropriation right is not completed as approved by the department or legislature or~~

if the terms, conditions, restrictions, and limitations of the change approval are not complied with, the department may, after notice and opportunity for hearing, require the appropriator to show cause why the change approval should not be modified or revoked. If the appropriator fails to show sufficient cause, the department may modify or revoke the change approval.

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

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

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

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

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

———(i) the appropriation right is for:

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

———(B) ground water inside the boundaries of a controlled ground water area and if the provisions of the order declaring the controlled ground water area do not restrict such a change;

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

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

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

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

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

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

———(b) (i) After completion of a replacement well and appropriation of ground water for a beneficial use, the

~~appropriator shall file a notice of replacement well with the department on a form provided by the department.~~

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

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

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

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

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

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

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

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

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

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

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

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

~~———(c) Within 60 days of completion of a redundant water supply well, the appropriator shall file a notice of construction of the well with the department on a form provided by the department. The department may return a defective notice of construction to the appropriator for correction and completion.~~

~~———(d) The provisions of subsections (9) and (10) do not apply to a change in appropriation right that meets~~

the requirements of this section:

~~———— (17) For an application for a change in appropriation right for ground water or to ground water in a basin closed pursuant to 85-2-330, 85-2-336, 85-2-341, 85-2-343, or 85-2-344 or during the period of closure for any basin that is administratively closed pursuant to 85-2-319, the applicant shall comply with the provisions of [section 15] in addition to the requirements of this section. (Terminates June 30, 2009—sec. 9, Ch. 123, L. 1999.)~~

~~———— **85-2-402. (Effective July 1, 2009) Changes in appropriation rights.** (1) The right to make a change subject to the provisions of this section in an existing water right, a permit, or a state water reservation is recognized and confirmed. In a change proceeding under this section, there is no presumption that an applicant for a change in appropriation right cannot establish lack of adverse effect prior to the adjudication of other rights in the source of supply pursuant to this chapter. Except as provided in 85-2-410 and subsections (15) and (16) of this section, an appropriator may not make a change in an appropriation right without the approval of the department or, if applicable, of the legislature. An applicant shall submit a correct and complete application.~~

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

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

~~———— (b) Except for a temporary change in appropriation right authorization to maintain or enhance streamflows to benefit the fishery resource pursuant to 85-2-408, the proposed means of diversion, construction, and operation of the appropriation works are adequate:~~

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

~~———— (d) Except for a temporary change in appropriation right authorization pursuant to 85-2-408, the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use:~~

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

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

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

~~———— (3) The applicant is required to prove that the criteria in subsections (2)(f) and (2)(g) have been met only~~

~~if a valid objection is filed. A valid objection must contain substantial credible information establishing to the satisfaction of the department that the criteria in subsection (2)(f) or (2)(g), as applicable, may not be met.~~

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

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

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

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

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

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

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

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

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

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

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

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

~~———— (6) The state of Montana has long recognized the importance of conserving its public waters and the necessity to maintain adequate water supplies for the state's water requirements, including requirements for federal non-Indian and Indian reserved water rights held by the United States for federal reserved lands and in trust for the various Indian tribes within the state's boundaries. Although the state of Montana also recognizes that, under appropriate conditions, the out-of-state transportation and use of its public waters are not in conflict~~

with the public welfare of its citizens or the conservation of its waters, the following criteria must be met before out-of-state use may occur:

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

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

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

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

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

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

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

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

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

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

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

~~_____ (8) The department or the legislature, if applicable, may approve a change in appropriation right subject~~

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

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

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

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

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

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

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

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

~~———(i) the appropriation right is for:~~

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

~~———(B) ground water inside the boundaries of a controlled ground water area and if the provisions of the order declaring the controlled ground water area do not restrict such a change;~~

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

~~———(iii) the rate and volume of the appropriation from the replacement well are equal to or less than that of~~

the well being replaced and do not exceed:

- ~~——— (A) 450 gallons a minute for a municipal well; or~~
- ~~——— (B) 35 gallons a minute and 10 acre-feet a year for all other wells;~~
- ~~——— (iv) the water from the replacement well is appropriated from the same aquifer as the water appropriated from the well being replaced; and~~
- ~~——— (v) a timely, correct and complete notice of replacement well is submitted to the department as provided in subsection (15)(b).~~
- ~~——— (b) (i) After completion of a replacement well and appropriation of ground water for a beneficial use, the appropriator shall file a notice of replacement well with the department on a form provided by the department.~~
- ~~——— (ii) The department shall review the notice of replacement well and shall issue an authorization of a change in an appropriation right if all of the criteria in subsection (15)(a) have been met and the notice is correct and complete.~~
- ~~——— (iii) The department may not issue an authorization of a change in appropriation right until a correct and complete notice of replacement well has been filed with the department. The department shall return a defective notice to the appropriator, along with a description of defects in the notice. The appropriator shall refile a corrected and completed notice of replacement well within 30 days of notification of defects or within a further time as the department may allow, not to exceed 6 months.~~
- ~~——— (iv) If a notice of replacement well is not completed within the time allowed, the appropriator shall:~~
 - ~~——— (A) cease appropriation of water from the replacement well pending approval by the department; and~~
 - ~~——— (B) submit an application for a change in appropriation right to the department pursuant to subsections (1) through (3).~~
- ~~——— (c) The provisions of this subsection (15) do not apply to an appropriation right abandoned under 85-2-404.~~
- ~~——— (d) For each well that is replaced under this subsection (15), the appropriator shall follow the well abandonment procedures, standards, and rules adopted by the board of water well contractors pursuant to 37-43-202.~~
- ~~——— (e) The provisions of subsections (2), (3), (9), and (10) do not apply to a change in appropriation right that meets the requirements of subsection (15)(a).~~
- ~~——— (16) (a) An appropriator may change an appropriation right without the prior approval of the department for the purpose of constructing a redundant water supply well in a public water supply system, as defined in 75-6-102, if the redundant water supply well:~~

- ~~—— (i) withdraws water from the same ground water source as the original well; and~~
- ~~—— (ii) is required by a state or federal agency.~~
- ~~—— (b) The priority date of the redundant water supply well is the same as the priority date of the original well. Only one well may be used at one time.~~
- ~~—— (c) Within 60 days of completion of a redundant water supply well, the appropriator shall file a notice of construction of the well with the department on a form provided by the department. The department may return a defective notice of construction to the appropriator for correction and completion.~~
- ~~—— (d) The provisions of subsections (9) and (10) do not apply to a change in appropriation right that meets the requirements of this section.~~
- ~~—— (17) For an application for a change in appropriation right for ground water or to ground water in a basin closed pursuant to 85-2-330, 85-2-336, 85-2-341, 85-2-343, or 85-2-344 or during the period of closure for any basin that is administratively closed pursuant to 85-2-319, the applicant shall comply with the provisions of [section 15] in addition to the requirements of this section."~~

Section 13. Section 85-2-506, MCA, is amended to read:

"85-2-506. Controlled ground water areas -- designation or modification. (1) The department may designate or modify controlled ground water areas as provided in this part.

(2) Designation or modification of an area of controlled ground water use may be proposed to the department on its own motion, by petition of a state or local public health agency for identified public health risks, or by petition signed by at least 20 or one-fourth of the users, ₁ {whichever is the lesser number}, of ground water in a ground water area in which there are alleged to be facts showing that:

(a) ~~that~~ ground water withdrawals are in excess of recharge to the aquifer or aquifers within the ground water area;

(b) ~~that~~ excessive ground water withdrawals are very likely to occur in the near future because of consistent and significant increases in withdrawals from within the ground water area;

(c) ~~that~~ significant disputes regarding priority of rights, amounts of ground water in use by appropriators, or priority of type of use are in progress within the ground water area;

(d) ~~that~~ ground water levels or pressures in the area in question are declining or have declined excessively;

(e) ~~that~~ excessive ground water withdrawals would cause contaminant migration;

(f) ~~that~~ ground water withdrawals adversely affecting ground water quality within the ground water area

are occurring or are likely to occur; or

(g) ~~that~~ water quality within the ground water area is not suited for a specific beneficial use defined by ~~85-2-102(2)(a)~~ 85-2-102(4)(a).

(3) When a proposal is made, the department shall fix a time and place for a hearing, which ~~time~~ may not be less than 90 days from the making of the proposal. The place for the hearing must be within or as close as practical to the controlled ground water area.

(4) The department shall publish a notice of the hearing, setting forth:

(a) the names of the petitioners;

(b) the description by legal subdivisions (section, township, range) of all lands included in or proposed to be included in the ground water area or subarea;

(c) the purpose of the hearing; and

(d) the time and place of the hearing where any interested person may appear, either in person or by attorney, file written objections to the granting of the proposal, and be fully heard.

(5) (a) The notice of hearing must be published at least once in each week for 3 successive weeks not less than 30 days before the date of the hearing in a newspaper of general circulation in the county or counties in which the ground water area or subarea is located. The department shall also cause a copy of the notice, together with a copy of the petition, to be served by mail, not less than 30 days before the hearing, upon:

(i) each well driller licensed in Montana whose address is within any county in which any part of the area in question is located; ~~upon~~

(ii) each person or public agency known from an examination of the records in the department's office to be a claimant or appropriator of ground water in the area in question (~~claimant or appropriator meaning one who diverts, impounds, or withdraws ground water and not merely one who uses or obtains ground water from another who diverts, impounds, or withdraws ground water~~); ~~upon~~

(iii) the bureau; and ~~upon~~

(iv) the mayor or presiding officer of the governing body of each incorporated municipality located in whole or in part within the proposed ground water area.

(b) The department may also serve notice upon any other person or state or federal agency that the department feels may be interested in or affected by the proposed designation or modification of a controlled ground water area. The petition need not be served on any petitioner. A copy of the notice, together with a copy of the proposal, must be mailed to each person at the person's last-known address, and service is complete upon depositing it in the post office, postage prepaid, addressed to each person on whom it is to be served. Publication

and mailing of the notice as prescribed in this section, when completed, is considered to be sufficient notice of the hearing to all interested persons.

(c) As used in subsection (5)(a), "claimant or appropriator" means a person who diverts, impounds, or withdraws ground water and not merely a person who uses or obtains ground water from another person who diverts, impounds, or withdraws ground water."

NEW SECTION. Section 14. Ground water appropriation right in closed basins. (1) An application for a ground water appropriation right in a basin closed pursuant to 85-2-330, 85-2-336, 85-2-341, 85-2-343, or 85-2-344 or administratively closed pursuant to 85-2-319 ~~or an application for a change in appropriation right for an appropriation right located within a closed basin pursuant to 85-2-402(17)~~ must be accompanied by a hydrogeologic assessment that has been conducted pursuant to [section ~~46~~ 15] to predict whether the proposed appropriation right ~~or change in appropriation right~~ will result in a net depletion of surface water and must be accompanied by a plan as provided in [section ~~47~~ 16], if necessary.

(2) If the hydrogeologic assessment conducted pursuant to [section ~~46~~ 15] predicts that the proposed appropriation right ~~or change in appropriation right~~ will not result in a net depletion of surface water, the department shall proceed under the criteria provided in 85-2-311.

(3) (a) ~~(i)~~ If the hydrogeologic assessment predicts that the proposed appropriation right ~~or change in appropriation right~~ will result in a net depletion of surface water, the applicant shall ~~determine if~~ ANALYZE WHETHER the net depletion results in an adverse effect on a prior appropriator. If THE APPLICANT PROVIDES SUBSTANTIAL CREDIBLE INFORMATION SHOWING THAT there is no adverse effect on a prior appropriator ~~or a CORRECT AND COMPLETE APPLICATION~~ and the department agrees with this determination, the department shall proceed TO PROCESS THE APPLICATION as provided in ~~85-2-307 through 85-2-311~~ [SECTION 17].

~~(ii) If there is THE APPLICANT FAILS TO PROVIDE SUBSTANTIAL CREDIBLE INFORMATION SHOWING THE LACK OF an adverse effect on a prior appropriator FROM NET DEPLETIONS, the department may not grant the permit unless, IN ADDITION TO ALL OTHER APPLICABLE CRITERIA, the applicant complies with subsection (4).~~

(b) If the applicant has used the water for the purpose of conducting the hydrogeologic assessment, the applicant shall terminate the use of the water. Failure to terminate use of the water must result in a fine of not more than \$1,000 for each day of the violation.

(4) ~~(a)~~ If the hydrogeologic assessment predicts that there will be net depletion as provided in subsection (3)(a)~~(ii)~~, THE DEPARTMENT MAY PROCEED TO PROCESS THE APPLICATION PURSUANT TO [SECTION 17] IF, IN ADDITION TO OTHER APPLICABLE CRITERIA, the applicant ~~may receive an appropriation right if the applicant~~ complies with

~~[section 47 16] and the department determines that the amount of net depletion that causes PROVES BY A PREPONDERANCE OF THE EVIDENCE THAT the adverse effect CAUSED BY THE NET DEPLETION will be offset.~~

~~(b) The department shall analyze the plan submitted pursuant to [section 17]. The department shall determine if the amount of net depletion that will result in an adverse effect will be offset. If the department determines that the amount of net depletion that will result in an adverse effect will be offset, the department shall proceed under the criteria of 85-2-307 through 85-2-311. If the amount of net depletion that the department determines will result in an adverse effect will not be offset, the department shall reject the application.~~

(5) For the purposes of [sections 45 14 through 47 16], the prediction of net depletion does not mean that an adverse effect on a prior appropriator will occur or if an adverse effect does occur that the entire amount of net depletion is the cause of the adverse effect. A determination of whether or not there is an adverse effect on a prior appropriator as the result of a new appropriation right ~~or a change in appropriation right~~ is a determination that must be made by the department based on the amount, location, and duration of the amount of net depletion that causes the adverse effect relative to the historic beneficial use of the appropriation right that ~~is claimed to~~ MAY be adversely affected.

~~(6) This section may not be interpreted to change the parameters of any water reservation as it was granted within any closed basin.~~

~~(6) THE PRIORITY DATE FOR AN APPROPRIATION RIGHT THAT IS GRANTED TO AN ENTITY WHOSE PERMIT APPLICATION WAS RETURNED AFTER APRIL 11, 2006, AND BEFORE [THE EFFECTIVE DATE OF THIS ACT] BECAUSE OF THE DEPARTMENT'S INTERPRETATION OF A COURT DECISION IS THE DATE OF THE INITIAL APPLICATION TO THE DEPARTMENT.~~

NEW SECTION. Section 15. Hydrogeologic assessment -- definition -- minimum requirements.

(1) (a) For the purposes of [sections 45 14 through 47 16], "hydrogeologic assessment" means a report for the project for or through which water will be put to beneficial use, the point of diversion, ~~or~~ AND the place of use that describes the geology, hydrogeologic environment, ~~water balance~~, water quality with regard to the provisions of [sections 18 and 19], and predicted net depletion, if any, including the timing of any NET depletion, for surface water within the area described in subsection (2)(a)(i) within the closed basins that are subject to an appropriation right, including but not limited to rivers, streams, irrigation canals, or drains that might be affected by the new appropriation right ~~or change in appropriation right~~ and any predicted water quality changes that may result.

(b) In predicting net depletion of surface water from a proposed use, consideration must be given, at a minimum, to:

~~(i) the actual amount to be diverted according to historical practice;~~

~~(ii)~~(i) the actual amount diverted for like beneficial uses;

~~(iii)~~(ii) any amounts that will likely be lost in conveyance, if any, and whether any lost amounts are lost to the system through evaporation or other means or whether those amounts are returned to the system through percolation or other means; and

~~(iv)~~(iii) any return flows from the proposed use, including but not limited to any treated wastewater return flows if the treated wastewater that is considered effluent meets the requirements of [sections 18 and 19].

(2) (a) A hydrogeologic assessment that will be used to predict net depletion of surface water resulting from a new appropriation right ~~or a change in appropriation right~~ must include a hydrogeologic DATA OR A model developed by a hydrogeologist, a qualified scientist, or a qualified licensed professional engineer that incorporates for the new appropriation ~~or the change in appropriation right~~:

(i) the area or estimated area of ground water that will be affected not to exceed the boundaries of the drainage subdivisions established by the office of water data coordination, United States geological survey, AND USED BY THE WATER COURT, UNLESS THE APPLICANT CHOOSES TO EXPAND THE BOUNDARIES;

(ii) the geology in the area identified in subsection (2)(a)(i), including stratigraphy and structure;

(iii) the parameters of the aquifer system within the area identified in subsection (2)(a)(i) to include, at a minimum, estimates for:

(A) the lateral and vertical extent of the aquifer;

(B) whether the aquifer is confined or unconfined;

(C) the effective hydraulic conductivity of the aquifer;

(D) transmissivity and storage coefficient related to the aquifer; and

(E) the estimated flow direction or directions of ground water and the rate of movement;

(iv) the locations of surface waters within the area described in subsection (2)(a)(i) that are subject to an appropriation right, including but not limited to springs, creeks, streams, or rivers that may or may not show a net depletion;

(v) evidence of water availability; and

(vi) the locations of all wells or other sources of ground water of record within the area identified in subsection (2)(a)(i).

(b) A hydrogeologic assessment must also include a water quality report that includes:

(i) the location of existing documented hazards that could be affected or exacerbated by the appropriation right ~~or change in appropriation right~~, such as areas of subsidence, along with a plan to mitigate any conditions or impacts;

~~(ii) the chemical and physical composition of the source water or waters and any water quality impacts that may occur;~~

~~(iii)(II) other water quality information necessary to comply with [sections 18 and 19] and to determine any cumulative water quality impacts based on the impacts of the proposed appropriation right or change in appropriation and any return flow when considered in association with projects putting water to beneficial use or discharges that have been permitted since the effective date of the basin closure; and~~

~~(iv)(III) a description of any water treatment method that will be used at the time of any type of injection or introduction of water to the aquifer to ensure compliance with [sections 18 and 19] and the water quality laws under Title 75, chapter 5.~~

(3) The hydrogeologic assessment must include an analysis of whether the information required by subsection (2) predicts, ~~by a preponderance of the evidence,~~ that there may be a net depletion of surface water in the area described in subsection (2)(a)(i) and the extent of the depletion, if any.

(4) ~~(a)~~ The hydrogeologic assessment, THE model IF PROVIDED, THE test well data, THE monitoring well data, and other related information must be submitted to the department. The department shall submit this information to the bureau of mines and geology.

~~(b) The bureau of mines and geology shall examine the data and provide feedback to the department regarding the scientific adequacy of the assessment. If the bureau of mines and geology has not provided a written opinion regarding the scientific adequacy of the assessment within 90 days of receiving the information from the department, the assessment must be considered scientifically adequate and the department shall proceed with its determination.~~

~~(c)~~ The bureau of mines and geology shall ensure that information submitted pursuant to this section is entered into the ground water information center database as part of the ground water assessment program.

(5) An entity that has previously conducted some type of hydrogeologic assessment may submit the information from that assessment as the hydrogeologic assessment required by this section if the information meets the criteria and requirements of this section.

NEW SECTION. Section 16. Aquifer recharge or mitigation plans in closed basins -- minimum requirements. (1) An applicant whose hydrogeologic assessment conducted pursuant to [section ~~16 15~~] predicts that there will be a net depletion of surface water ~~that will result in an adverse effect on a prior appropriator as described in [section 15 14]~~ may SHALL offset the net depletion that results in the adverse effect through a mitigation plan or an aquifer recharge plan.

(2) ~~A mitigation plan must be approved by the department prior to approving a change in appropriation right or a new appropriation right that relies on mitigation to offset net depletion of surface water.~~ A mitigation plan must include:

- (a) where and how the water in the plan will be put to beneficial use;
- (b) when and where water reallocated through exchange or substitution will be required;
- (c) the amount of water reallocated through exchange or substitution that is required;
- (d) how the proposed project or beneficial use for which the mitigation plan is required will be operated;
- (e) evidence that an application for a change in appropriation right, if necessary, has been submitted;
- (f) evidence of water availability; and
- (g) evidence ~~that~~ OF HOW the mitigation plan will ~~be effective in offsetting~~ OFFSET the required amount of net depletion of surface water in a manner that will offset an adverse effect on a prior appropriator.

(3) ~~An aquifer recharge plan must be approved by the department prior to approving a change in appropriation right or a new appropriation right that relies on aquifer recharge to offset net depletion of surface water.~~ An aquifer recharge plan must include:

- (a) evidence that the appropriate water quality related permits have been granted pursuant to Title 75, chapter 5, and pursuant to [sections 18 and 19];
- (b) where and how the water in the plan will be put to beneficial use;
- (c) when and where water reallocated through exchange or substitution will be required;
- (d) the amount of water reallocated through exchange or substitution that is required;
- (e) how the proposed project or beneficial use for which the aquifer recharge plan is required will be operated;
- (f) evidence that an application for a change in appropriation right, if necessary, has been submitted;
- (g) a description of the process by which water will be reintroduced to the aquifer;
- (h) evidence of water availability; and
- (i) evidence ~~that~~ OF HOW the aquifer recharge plan will ~~be effective in offsetting~~ OFFSET the required amount of net depletion of surface water in a manner that will offset any adverse effect on a prior appropriator.

(4) The department may not require an applicant, through a mitigation plan or an aquifer recharge plan, to provide more water than the quantity needed to offset the ~~predicted~~ ADVERSE EFFECTS ON A PRIOR APPROPRIATOR CAUSED BY THE net depletion.

(5) An appropriation right that relies on a mitigation plan or aquifer recharge plan to offset net depletion of surface water that results in an adverse effect on a prior appropriator must be issued as a conditional permit

that requires that the mitigation plan or aquifer recharge plan must be exercised when the appropriation right is exercised.

NEW SECTION. SECTION 17. PROCESS FOR COMBINING DECISIONS ON GROUND WATER PERMIT APPLICATIONS

IN CLOSED BASINS. (1) AN APPLICANT FOR A PERMIT TO APPROPRIATE GROUND WATER IN A CLOSED BASIN SHALL SUBMIT TO THE DEPARTMENT A COMBINED APPLICATION CONSISTING OF A HYDROGEOLOGIC ASSESSMENT WITH AN ANALYSIS OF NET DEPLETION, A MITIGATION PLAN OR AQUIFER RECHARGE PLAN IF REQUIRED, AN APPLICATION FOR A BENEFICIAL WATER USE PERMIT OR PERMITS, AND AN APPLICATION FOR A CHANGE IN APPROPRIATION RIGHT OR RIGHTS IF NECESSARY.

(2) THE DEPARTMENT SHALL REVIEW THE APPLICATION TO DETERMINE IF IT IS CORRECT AND COMPLETE UNDER THE PROCESS AND REQUIREMENTS OF 85-2-302.

~~**(3) (A) ONCE AN APPLICATION HAS BEEN DETERMINED TO BE CORRECT AND COMPLETE, THE DEPARTMENT SHALL ISSUE A STATEMENT OF THE DEPARTMENT'S OPINION AND THE REASONS FOR ITS OPINION, INCLUDING A CRITERIA ASSESSMENT STATING WHETHER THE DEPARTMENT IS OF THE OPINION THAT THE APPLICATION SHOULD BE APPROVED, DENIED, OR APPROVED IN A MODIFIED FORM OR UPON TERMS, CONDITIONS, OR LIMITATIONS SPECIFIED BY THE DEPARTMENT. THE CRITERIA ASSESSMENT MUST BE PROVIDED TO THE APPLICANT AND MADE AVAILABLE TO THE PUBLIC PRIOR TO PUBLIC NOTICE OF THE APPLICATION. THE DEPARTMENT SHALL PREPARE A NOTICE AND PUBLISH IT AS PROVIDED UNDER 85-2-307.**~~

~~**(B) IF NO VALID OBJECTION IS FILED TO THE APPLICATION AND THE CRITERIA ASSESSMENT PREPARED BY THE DEPARTMENT STATES THAT THE DEPARTMENT IS OF THE OPINION THAT THE APPLICATION SHOULD BE APPROVED, THE DEPARTMENT SHALL ISSUE THE PERMIT AND A HEARING MAY NOT BE HELD.**~~

~~**(C) IF NO VALID OBJECTION IS FILED TO THE APPLICATION AND THE CRITERIA ASSESSMENT PREPARED BY THE DEPARTMENT STATES THAT THE DEPARTMENT IS OF THE OPINION THAT THE APPLICATION SHOULD BE DENIED OR APPROVED IN A MODIFIED FORM OR UPON TERMS, CONDITIONS, OR LIMITATIONS SPECIFIED BY THE DEPARTMENT, THE DEPARTMENT SHALL PROCEED TO PROCESS THE APPLICATION PURSUANT TO 85-2-310(2).**~~

~~**(D) IF A VALID OBJECTION IS FILED TO THE APPLICATION, THE DEPARTMENT SHALL PROCEED TO PROCESS THE APPLICATION PURSUANT TO 85-2-308 THROUGH 85-2-311. IF THE APPLICANT SATISFIES THE CRITERIA OF 85-2-311 AND 85-2-402, IF NECESSARY, AND PROVES BY A PREPONDERANCE OF THE EVIDENCE THAT NET DEPLETION, IF ANY, WILL NOT ADVERSELY AFFECT A PRIOR APPROPRIATOR BASED ON THE APPLICANT'S MITIGATION PLAN OR AQUIFER RECHARGE PLAN, THE DEPARTMENT SHALL ISSUE THE PERMIT.**~~

(3) (A) ONCE AN APPLICATION HAS BEEN DETERMINED TO BE CORRECT AND COMPLETE, THE DEPARTMENT SHALL PREPARE A NOTICE AND PUBLISH IT AS PROVIDED UNDER 85-2-307.

(B) IF NO VALID OBJECTION TO THE APPLICATION IS FILED AND THE APPLICANT PROVES THAT THE CRITERIA OF 85-2-311 OR 85-2-402, IF NECESSARY, HAVE BEEN SATISFIED, THE APPLICATION MUST BE GRANTED OR APPROVED IN A MODIFIED FORM OR UPON TERMS, CONDITIONS, OR LIMITATIONS SPECIFIED BY THE DEPARTMENT.

(C) IF NO VALID OBJECTION TO THE APPLICATION IS FILED AND THE APPLICANT HAS NOT PROVED THAT THE CRITERIA OF 85-2-311 OR 85-2-402, IF NECESSARY, HAVE BEEN SATISFIED, THE APPLICATION MUST BE DENIED.

(D) IF A VALID OBJECTION TO THE APPLICATION IS FILED, THE DEPARTMENT SHALL PROCEED TO PROCESS THE APPLICATION PURSUANT TO 85-2-308 THROUGH 85-2-311. IF THE APPLICANT SATISFIES THE CRITERIA OF 85-2-311 OR 85-2-402, IF NECESSARY, AND PROVES BY A PREPONDERANCE OF THE EVIDENCE THAT NET DEPLETION, IF ANY, WILL NOT ADVERSELY AFFECT A PRIOR APPROPRIATOR BASED ON THE APPLICANT'S MITIGATION PLAN OR AQUIFER RECHARGE PLAN, THE DEPARTMENT SHALL ISSUE THE PERMIT.

NEW SECTION. Section 18. Department permit coordination -- requirements for aquifer recharge plans. TO ENSURE THAT THE DEPARTMENT AND THE DEPARTMENT OF ENVIRONMENTAL QUALITY ARE COORDINATING THEIR RESPECTIVE PERMITTING ACTIVITIES:

(1) ~~An AN~~ applicant for a new appropriation right ~~or a change in appropriation right~~ pursuant to [section 45 14] that involves aquifer recharge ~~or mitigation~~ shall provide the department with a copy of a relevant discharge permit if necessary; AND

(2) ~~The THE~~ department may not grant a new appropriation right ~~or a change in appropriation right~~ pursuant to [section 45 14] that involves aquifer recharge ~~or mitigation~~ until the discharge permit, if necessary, has been obtained and presented to the department.

NEW SECTION. Section 19. Water quality of return flows and discharges associated with mitigation plan or aquifer recharge plan -- minimum requirements. (1) A person who proposes to use sewage FROM A SYSTEM REQUIRING A WATER QUALITY PERMIT for the purposes of aquifer recharge ~~or mitigation~~ pursuant to [section 47 16] or plans to use sewage FROM A SYSTEM REQUIRING A WATER QUALITY PERMIT as a return flow to minimize the amount of water necessary to offset adverse effects resulting from net depletion of surface water through ~~a mitigation plan or AN~~ aquifer recharge plan pursuant to [section 47 16] must obtain a current permit pursuant to this chapter.

(2) The minimum treatment requirements for sewage systems subject to this section are the federal requirements provided for in 40 CFR 133, and the system must meet AT A MINIMUM, the requirements of level two treatment for the removal of nitrogen in the effluent.

(3) In addition to the minimum treatment requirements of subsection (2), sewage systems subject to this section ~~must meet the following requirements:~~

- ~~_____ (a) the drinking water standards provided for in Title 75, chapter 6, at the point of discharge; and~~
- ~~_____ (b) the applicable water quality standards, including the nondegradation requirements of 75-5-301 and 75-5-303 at the point of discharge~~ THAT ARE USED FOR AQUIFER INJECTION MUST MEET THE MORE STRINGENT OF EITHER PRIMARY DRINKING WATER STANDARDS PURSUANT TO TITLE 75, CHAPTER 6, OR THE NONDEGRADATION REQUIREMENTS PURSUANT TO 75-5-303 AT THE POINT OF DISCHARGE.

(4) THE APPROPRIATE INTERIM LEGISLATIVE COMMITTEE SHALL REVIEW DRINKING WATER STANDARDS AND EFFLUENT TREATMENT STANDARDS IN OTHER JURISDICTIONS AND RECOMMEND APPROPRIATE TREATMENT STANDARDS FOR PURPOSES OF AQUIFER RECHARGE AND MITIGATION.

(5) FOR THE PURPOSES OF THIS SECTION, "AQUIFER INJECTION" MEANS THE USE OF A WELL TO INJECT WATER DIRECTLY INTO AN AQUIFER SYSTEM WITHOUT FILTRATION THROUGH THE GEOLOGIC MATERIALS OVERLYING THE AQUIFER SYSTEM FOR THE PURPOSE OF AQUIFER RECHARGE OR FOR AN AQUIFER STORAGE AND RECOVERY PROJECT.

NEW SECTION. Section 20. Aquifer storage and recovery projects in closed basins. (1) An aquifer storage and recovery project may be authorized in a closed basin.

(2) In addition to the criteria provided in Title 85, chapter 2, part 3, AND 85-2-402, an aquifer storage and recovery project must meet the requirements provided in [sections 45 14 through 19].

~~_____ NEW SECTION. Section 21. Previously approved augmentation plans. (1) Except as provided in 85-2-337 for the Clark Fork basin, augmentation plans, mitigation plans, or aquifer recharge plans have not been specifically statutorily authorized prior to [the effective date of this act]. Any rules for augmentation plans, mitigation plans, or aquifer recharge plans that were adopted to apply to basins other than the Clark Fork basin were adopted without express statutory authority.~~

~~_____ (2) (a) Any appropriation right finally issued and not in administrative or judicial review in a closed basin for ground water prior to [the effective date of this act] other than in the Clark Fork basin pursuant to 85-2-337 that is contingent on or was approved based on the terms of an augmentation plan, mitigation plan, or aquifer recharge plan must meet the requirements of [sections 15 through 22] by July 1, 2008. If the requirements are not met by July 1, 2008, the permit holder shall cease operations. Failure to cease operations must result in a daily fine not to exceed \$1,000 for each day of the violation.~~

~~_____ (b) Any appropriation right that is not finally issued or that is the subject of an administrative or judicial~~

~~review in a closed basin for ground water on [the effective date of this act] other than in the Clark Fork basin pursuant to 85-2-337 that is contingent on or for which approval is based on the terms of an augmentation plan, mitigation plan, or aquifer recharge plan must meet the requirements of [sections 15 through 22].~~

~~————(3) The holder of an appropriation right described in subsection (2) shall submit proof of meeting the requirements to the department for the department's approval.~~

~~————(4) Once a new appropriation right or change in appropriation right that is subject to subsection (1) or (2) complies with the requirements of [sections 15 through 22], the priority date for a new appropriation right subject to this section is the date of the initial application to the department.~~

NEW SECTION. Section 21. Aquifer testing, test well, or monitoring well data submission -- not beneficial use. (1) All aquifer testing data and other related information from test wells, monitoring wells, or other sources that is collected for the purpose of obtaining a new appropriation right or a change in appropriation right pursuant to [sections 45 14 through 47 16] must be submitted to the department and the bureau of mines and geology in a form prescribed by the department and the bureau of mines and geology. The bureau of mines and geology shall ensure that information submitted pursuant to this section is entered into the ground water information center database as part of the ground water assessment program.

(2) (a) Water testing or monitoring is not a beneficial use of water requiring the filing of a permit application.

(b) A permit is not required if the intent of a person is to conduct aquifer tests, water quality tests, water level monitoring, or other testing or monitoring of a water source.

NEW SECTION. Section 22. Rulemaking. The department may adopt rules to implement the provisions of [sections 45 14 through 18 ~~and 20 through 22, 19, AND 20~~]. The rules must be oriented toward the protection of existing rights from adverse effects from net depletions caused by new appropriation rights or changes in appropriation rights in closed basins and must be consistent with and not exceed the requirements of [sections 45 14 through 18 ~~and 20 through 22, 19, AND 20~~].

NEW SECTION. Section 23. Closed basin case study. (1) (a) The Montana bureau of mines and geology, provided for in 20-25-211, shall review, assess for scientific accuracy, and compile and summarize ground water studies that have been conducted in the last 20 years in closed basins or subbasins in Montana that may have a bearing on better understanding the water balance in these basins with respect to potential

ground water withdrawal impacts on surface water. The bureau of mines and geology shall also study the extent to which ground water withdrawals may result in net depletion of surface water in a closed basin or in specific areas of a closed basin.

(b) After compilation of the information, the bureau of mines and geology shall present recommendations to the appropriate legislative interim committee regarding any additional studies that would help to assess the water balance in closed basins or subbasins with respect to potential ground water withdrawal impacts on surface waters.

(2) The bureau of mines and geology shall conduct a case study to gather and develop data to determine the adequacy of any additional recommended minimum standards and criteria for hydrogeologic assessments, as defined in [section ~~46~~ 15], associated with ground water withdrawals and the range of impacts of those withdrawals on surface water and ground water resources. The department of natural resources and conservation shall coordinate with the bureau of mines and geology with regard to surface water monitoring and other elements of the case study as necessary.

(3) The case study must be conducted in basins closed pursuant to sections 85-2-330, ~~85-2-337~~ 85-2-336, 85-2-341, 85-2-343, or 85-2-344. The bureau of mines and geology shall ensure that at each site involved in the case study the following, at a minimum, is accomplished to provide the necessary scientific data and information to policymakers:

(a) an appropriate number of monitoring wells are drilled or available to provide scientifically defensible data;

(b) aquifer testing and recovery testing is conducted at the site;

(c) water quality samples are collected from each pumping or primary well at the beginning of the case study and at the end of the case study;

(d) if information or data has already been collected for the site, the information is reviewed, analyzed, and verified by the bureau of mines and geology;

(e) if the site has an established system, that the established system is monitored under its current or planned operating conditions; and

(f) any other information is collected that the bureau of mines and geology determines is necessary to determine recommendations for additional minimum standards and criteria for hydrogeologic assessments, as defined in [section ~~46~~ 15], associated with ground water withdrawals and the range of impacts those withdrawals have on surface water and ground water resources.

(4) In addition to the requirements of subsection (3), the bureau of mines and geology shall develop a

system to compile existing aquifer testing data, as well as data resulting from hydrogeologic assessments, as defined in [section ~~46~~ 15], and monitoring activities.

(5) The department of natural resources and conservation shall coordinate with the bureau of mines and geology to provide surface water measurements ~~to determine impacts, if any, to surface water resources, AS APPROPRIATE,~~ when a well located at a case study site is pumped.

(6) The bureau of mines and geology shall:

(a) provide updates to the appropriate legislative interim committee throughout the interim related to the progress of the review pursuant to subsection (1) and the case study pursuant to subsections (2) through (5), data trends, if any, and other information necessary to assist the legislative interim committee in developing any necessary policy recommendations;

(b) upon request, provide updates to the ground water assessment steering committee provided for in 2-15-1523; and

(c) submit a report to the appropriate legislative interim committee and the 61st legislature providing a detailed analysis of the results of the review and case study.

NEW SECTION. Section 24. Case study -- requirements for participation -- FEE. (1) (a) Participants in the case study that are proposing a new ground water appropriation ~~or a change in appropriation right pursuant to 85-2-402(17)~~ are subject to the requirements of [sections ~~45~~ 14 through ~~22~~ 21].

(b) Up to a maximum of 10 sites that are the result of a new appropriation or a change in appropriation right may be included in the case study provided for in [section ~~24~~ 23]. If there are more than 10 entities wishing to participate in the case study, the bureau of mines and geology shall select participants to ensure that to the extent possible each closed basin is represented and as many different scenarios are represented as necessary to ensure a scientifically accurate analysis.

(c) If there are fewer than 10 entities wishing to participate or if there is a scenario that is not represented by case study participants that is necessary to ensure a scientifically accurate analysis, the bureau of mines and geology may request cooperation and participation from entities that hold appropriation rights for wells within closed basins.

(d) Entities that had an application pending with the department of natural resources and conservation on April 11, 2006, must be given the option to participate in the case study before the bureau accepts other requests for participation.

(2) The bureau of mines and geology, in cooperation with the appropriate legislative interim committee,

shall notify each of the entities described in subsection (1)(d), in writing, of the opportunity to participate in the case study and the requirements for participation.

(3) To participate in the case study, a participant shall agree:

(a) that the use of a ground water well in accordance with an application submitted pursuant to [section 45 14] does not grant or give the participant an appropriation right;

(b) to allow the installation of monitoring wells and shall allow access for monitoring and review purposes;

(c) if monitoring or test wells exist at the site, to allow the bureau of mines and geology access to those wells for monitoring and review purposes;

(d) to allow for the measurement of pumping at the primary pumping well, including any plumbing requirements necessary to ensure an accurate analysis of pumping records and of the impacts, if any, resulting from pumping of the well; ~~and~~

(e) that the participant is responsible for costs associated with drilling the primary pumping well, maintenance associated with the well, and other costs reasonably related to the normal operation of a pumping well in the absence of the case study; AND

(F) TO PAY A FEE OF \$15.

~~NEW SECTION. Section 26. Recognition of existing appropriation rights. Except as provided in [section 21], an appropriation right in a closed basin prior to April 11, 2006, that was finally issued and that is not subject to any administrative or judicial action is recognized and confirmed.~~

NEW SECTION. Section 25. Appropriation. There is appropriated FROM THE GENERAL FUND \$500,000 to the Montana bureau of mines and geology ONLY for the biennium beginning July 1, 2007, for the purpose of conducting a case study in coordination with the department of natural resources and conservation to gather and develop data to determine minimum standards and criteria for hydrogeologic assessments, as defined in [section 46 15], associated with ground water withdrawals and the impacts of those withdrawals on surface water and ground water resources.

NEW SECTION. Section 26. Direction for amendment of rule. Pursuant to 2-4-412(2), the department shall:

(1) amend ARM 36.12.101 by striking subsection (8); and

(2) amend ARM 36.12.120 by striking subsections (6) through (10).

NEW SECTION. SECTION 27. REPEALER. SECTION 85-2-337, MCA, IS REPEALED.

NEW SECTION. Section 28. Codification instruction. (1) [Sections ~~45~~ 14 through 18 and 20 through ~~23~~ 22] are intended to be codified as an integral part of Title 85, chapter 2, part 3, and the provisions of Title 85, chapter 2, part 3, apply to [sections ~~45~~ 14 through 18 and 20 through ~~23~~ 22].

(2) [Section 19] is intended to be codified as an integral part of Title 75, chapter 5, part 4, and the provisions of Title 75, chapter 5, part 4, apply to [section 19].

NEW SECTION. Section 29. Severability. If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

NEW SECTION. Section 30. Effective date. [This act] is effective on passage and approval.

NEW SECTION. Section 31. Applicability --retroactive applicability. (1) [Sections ~~1 through 20 and 22 through 26~~] apply [THIS ACT] APPLIES to applications for an appropriation right ~~or change in appropriation right~~ in a closed basin ~~pending or~~ filed on or after [the effective date of this act] or that are in administrative or judicial proceedings on [the effective date of this act].

(2) [Section ~~21~~] applies retroactively, within the meaning of 1-2-109, to ~~augmentation plans, mitigation plans, or aquifer recharge plans in closed basins, other than the Clark Fork River basin, that have not been specifically statutorily authorized prior to [the effective date of this act].~~

- END -

