



AN ACT ALLOWING THE DEPARTMENT OF FISH, WILDLIFE, AND PARKS TO CHANGE WATER RIGHTS THAT IT HOLDS IN FEE SIMPLE TO INSTREAM FLOW PURPOSES TO PROTECT, MAINTAIN, OR ENHANCE STREAMFLOW TO BENEFIT FISHERY RESOURCES; REPEALING THE TERMINATION DATE ON LEASING OF WATER RIGHTS BY THE DEPARTMENT OF FISH, WILDLIFE, AND PARKS FOR INSTREAM FLOW PURPOSES; PROVIDING ADDITIONAL CRITERIA THAT MUST BE MET AND PROCEDURES THAT MUST BE FOLLOWED BY THE DEPARTMENT OF FISH, WILDLIFE, AND PARKS TO CHANGE AN APPROPRIATION RIGHT OR LEASED WATER RIGHT TO INSTREAM FLOW PURPOSES TO ENSURE THAT A CHANGE IN APPROPRIATION RIGHT WILL NOT ADVERSELY AFFECT OTHER WATER RIGHT HOLDERS; AMENDING SECTIONS 85-2-102, 85-2-308, 85-2-402, 85-2-419, 85-2-436, 85-2-602, AND 87-1-257, MCA; REPEALING SECTIONS 85-2-437 AND 85-2-438, MCA, SECTION 11, CHAPTER 658, LAWS OF 1989, SECTIONS 4 AND 7, CHAPTER 740, LAWS OF 1991, AND SECTIONS 5, 6, 7, AND 9, CHAPTER 123, LAWS OF 1999; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.

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~~ change an appropriation right to instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource 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.

(2) "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 through a change in an appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource 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.

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

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

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

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

(9) "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) "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) "Ground water" means any water that is beneath the ground surface.

(12) "Late claim" means a claim to an existing right forfeited pursuant to the conclusive presumption of

abandonment under 85-2-226.

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

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

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

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

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

(24) "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) "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.~~
- ~~\_\_\_\_\_ (2) "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.~~
- ~~\_\_\_\_\_ (3) "Certificate" means a certificate of water right issued by the department.~~
- ~~\_\_\_\_\_ (4) "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) "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) "Declaration" means the declaration of an existing right filed with the department under section 8, Chapter 452, Laws of 1973.~~
- ~~\_\_\_\_\_ (7) "Department" means the department of natural resources and conservation provided for in Title 2, chapter 15, part 33.~~
- ~~\_\_\_\_\_ (8) "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) "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) "Ground water" means any water that is beneath the ground surface.~~

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

~~———(12) "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) "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) "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. The term does not mean a private corporation, association, or group.~~

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

~~———(16) "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) "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) "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) "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) "Water division" means a drainage basin as defined in 3-7-102.~~

~~———(21) "Water judge" means a judge as provided for in Title 3, chapter 7.~~

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

~~———(23) "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) "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 85-2-308, MCA, is amended to read:

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

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

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

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

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

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

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

**Section 3.** Section 85-2-402, MCA, is amended to read:

**"85-2-402. ~~(Temporary)~~ Changes in appropriation rights.** (1) The right to make a change in appropriation right 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 in appropriation right 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, if applicable, 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~~ change in appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource 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~~ change in appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource 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 in appropriation right 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 appropriation right 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 in appropriation right. 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 in appropriation right 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 in appropriation right. The department may extend time limits specified in the change in appropriation right 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 in appropriation right approval are not complied with, the department may, after notice and opportunity for hearing, require the appropriator to show cause why the change in appropriation right approval should not be modified or revoked. If the appropriator fails to show sufficient cause, the department may modify or revoke the change in appropriation right approval.

(11) The original of a change in appropriation right approval issued by the department must be sent to 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 in appropriation right 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 in appropriation right 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 in appropriation right;

(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) The department shall accept and process an application for a change in appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource pursuant to 85-2-436 and 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), 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 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."~~

**Section 4.** Section 85-2-419, MCA, is amended to read:

**"85-2-419. Salvaged water.** It is the declared policy of the state in 85-1-101 to encourage the conservation and full use of water. Consistent with this policy, holders of appropriation rights who salvage water may retain the right to the salvaged water for beneficial use. Except for a short-term lease pursuant to 85-2-410, any use of the right to salvaged water for any purpose or in any place other than that associated with the original appropriation right must be approved by the department as a change in appropriation right in accordance with 85-2-402 and 85-2-436, if applicable. Sale of the right to salvaged water must also be in accordance with 85-2-403, and the lease of the right to salvaged water must be in accordance with 85-2-408, 85-2-410, or

85-2-436."

**Section 5.** Section 85-2-436, MCA, is amended to read:

**"85-2-436. (Temporary) Water leasing study Instream flow to protect, maintain, or enhance streamflows to benefit fishery resource -- change in appropriation rights by department of fish, wildlife, and parks until June 30, 2019.** (1) ~~The department of fish, wildlife, and parks and the department, in consultation~~

~~with the environmental quality council, shall conduct and coordinate a study that, at a minimum:~~

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

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

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

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

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

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

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

(1) The department of fish, wildlife, and parks may change an appropriation right, which it either holds in fee simple or leases, to an instream flow purpose of use and a defined place of use to protect, maintain, or enhance streamflows to benefit the fishery resource.

(2) The change in purpose of use or place of use must meet all the criteria and process of 85-2-307 through 85-2-309, 85-2-401, and 85-2-402 and the additional criteria and process in subsection (3) of this section to protect the rights of other appropriators from adverse impacts.

~~(2) (a) For purposes of undertaking the study described in subsection (1) and as authorized by law, the department of fish, wildlife, and parks and the department may engage in the activities described in this subsection (2). For purposes of this study, this section is the exclusive means by which the department of fish, wildlife, and parks may seek to change an appropriation right to an instream flow purpose:~~

~~(b)(3) (a) The department of fish, wildlife, and parks, with the consent of the commission, may lease~~

existing rights for the purpose of protecting, maintaining, or enhancing streamflows for the to benefit of fisheries in stream reaches determined eligible by the department pursuant to 85-2-437 the fishery resource.

(e)(b) Upon receipt of a correct and complete application for a lease change in purpose of use or place of use from the department of fish, wildlife, and parks, the department shall publish notice of the application as provided in 85-2-307. Parties who believe that they may be adversely affected by the proposed lease change in appropriation right may file an objection as provided in 85-2-308. A lease change in appropriation right may not be approved until all objections are resolved. After resolving all objections filed under 85-2-308, the department shall authorize a lease change of an existing appropriation right for the purpose of protecting, maintaining, or enhancing streamflows for the to benefit of fisheries the fishery resource if the applicant submits a correct and complete application and meets the requirements of 85-2-402.

(d)(c) The application for a lease change in appropriation right authorization must include specific information on the length and location of the stream reach in which the streamflow must is to be protected, maintained, or enhanced and must provide a detailed streamflow measuring plan that describes the points where and the manner in which the streamflow must be measured.

(e)(d) The maximum quantity of water that may be leased changed to instream flow is the amount historically diverted by the lessor. However, only the amount historically consumed, or a smaller amount if specified by the department in the lease change in appropriation right authorization, may be used to protect, maintain, or enhance streamflows below the lessor's point of diversion that existed prior to the change in appropriation right.

(f)(e) ~~The lease~~ A lease for instream flow purposes may ~~not be issued~~ entered for a term of ~~more than~~ up to 10 years, but it may be renewed once for up to 10 years, except that a lease of water made available from the development of a water conservation or storage project ~~is restricted to~~ may be for a term equal to the expected life of the project but ~~to~~ not more than 30 years. All leases may be renewed an indefinite number of times but not for more than 10 years for each term. Upon receiving notice of a lease renewal, the department shall notify other appropriators potentially affected by the lease and shall allow ~~30~~ 90 days for submission of new evidence of adverse effects to other water rights. A lease change in appropriation right authorization is not required for a renewal unless an appropriator other than an appropriator described in subsection ~~(2)(j)~~ (3)(i) submits evidence of adverse effects to the appropriator's rights that has not been considered previously. If new evidence is submitted, a lease change in appropriation right authorization must be obtained according to the requirements of 85-2-402.

~~(g)(f)~~ During the term of the lease, the The department may modify or revoke the lease change in appropriation right authorization up to 10 years after it is approved if an appropriator other than an appropriator described in subsection ~~(2)(f)~~ (3)(i) submits new evidence not available at the time the change in appropriation right was approved that proves by a preponderance of evidence that the appropriator's water right is adversely affected.

~~(h)(g)~~ The priority of appropriation for a lease or change in appropriation right under this section is the same as the priority of appropriation of the right that is ~~leased~~ changed to an instream flow purpose.

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

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

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

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

(b) For each change in appropriation right to an instream flow purpose, the report must include a copy of the change authorization issued by the department and must address:

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

(ii) critical streamflow or volume needed to protect, maintain, or enhance streamflow to benefit the fishery resource;

(iii) the amount of water available for instream flow as a result of the change in appropriation right;

(iv) contractual parameters, conditions, and other steps taken to ensure that each change in appropriation right does not harm other appropriators, particularly if the stream is one that experiences natural dewatering; and

(v) methods used to monitor use of water under each change in appropriation right.

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

~~(4)(5) This section does not create the right for a person to bring suit to compel the renewal of a lease that has expired.~~

(6) (a) From [the effective date of this act] through June 30, 2019, the department of fish, wildlife, and parks may change, pursuant to this section, the appropriation rights that it holds in fee simple to instream flow purposes on no more than 12 stream reaches.

(b) After June 30, 2019, the department may not change the appropriation rights that it holds in fee simple to instream flow purposes on any stream reaches.

(7) After June 30, 2019, the department may not enter into any new lease agreements pursuant to this section or renew any leases that expire after that date. (Terminates June 30, 2009--sec. 9, Ch. 123, L. 1999.)"

**Section 6.** Section 85-2-602, MCA, is amended to read:

**"85-2-602. Definitions.** Unless the context clearly requires otherwise, in this part the following definitions apply:

(1) (a) "Application" means an application for a permit under part 3 of this chapter to appropriate surface water from any source of supply within the basin for either or both of the following purposes:

- (i) a reservoir with a total planned capacity of 14,000 acre-feet or more; or
- (ii) for a flow rate greater than 20 cubic feet of water per second.

(b) The term also includes an application for approval under 85-2-402 and 85-2-436, if applicable, to change the purpose of use.

(2) "Basin" means the Yellowstone River basin.

(3) "Reservation" means a reservation of water provided for by 85-2-316."

**Section 7.** Section 87-1-257, MCA, is amended to read:

**"87-1-257. River restoration program.** (1) The department shall administer a river restoration program.

(2) The program may consist of physical projects to improve rivers and their associated lands in order

to conserve and enhance fish and wildlife habitat, including but not limited to ~~the~~ a change in appropriation right or leasing of water rights under 85-2-436.

(3) The department shall work cooperatively with individuals, conservation districts, and state, local, private, tribal, and federal organizations to achieve the goals of the program and may contract with private organizations to implement specific river restoration projects.

(4) The department shall present projects to the local conservation district for review and recommendations and obtain any applicable permits.

(5) The department shall receive the consent of the landowner or lessee of any associated lands before initiating physical projects on these lands.

(6) A project conducted under the program may not restrict or interfere with the exercise of any water right."

**Section 8. Repealer.** (1) Sections 85-2-437 and 85-2-438, MCA, are repealed.

(2) Section 11, Chapter 658, Laws of 1989, sections 4 and 7, Chapter 740, Laws of 1991, and sections 5, 6, 7, and 9, Chapter 123, Laws of 1999, are repealed.

**Section 9. Effective date.** [This act] is effective on passage and approval.

- END -

I hereby certify that the within bill,  
SB 0128, originated in the Senate.

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Secretary of the Senate

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President of the Senate

Signed this \_\_\_\_\_ day  
of \_\_\_\_\_, 2019.

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Speaker of the House

Signed this \_\_\_\_\_ day  
of \_\_\_\_\_, 2019.

SENATE BILL NO. 128

INTRODUCED BY J. LASLOVICH

BY REQUEST OF THE DEPARTMENT OF FISH, WILDLIFE, AND PARKS

AN ACT ALLOWING THE DEPARTMENT OF FISH, WILDLIFE, AND PARKS TO CHANGE WATER RIGHTS THAT IT HOLDS IN FEE SIMPLE TO INSTREAM FLOW PURPOSES TO PROTECT, MAINTAIN, OR ENHANCE STREAMFLOW TO BENEFIT FISHERY RESOURCES; REPEALING THE TERMINATION DATE ON LEASING OF WATER RIGHTS BY THE DEPARTMENT OF FISH, WILDLIFE, AND PARKS FOR INSTREAM FLOW PURPOSES; PROVIDING ADDITIONAL CRITERIA THAT MUST BE MET AND PROCEDURES THAT MUST BE FOLLOWED BY THE DEPARTMENT OF FISH, WILDLIFE, AND PARKS TO CHANGE AN APPROPRIATION RIGHT OR LEASED WATER RIGHT TO INSTREAM FLOW PURPOSES TO ENSURE THAT A CHANGE IN APPROPRIATION RIGHT WILL NOT ADVERSELY AFFECT OTHER WATER RIGHT HOLDERS; AMENDING SECTIONS 85-2-102, 85-2-308, 85-2-402, 85-2-419, 85-2-436, 85-2-602, AND 87-1-257, MCA; REPEALING SECTIONS 85-2-437 AND 85-2-438, MCA, SECTION 11, CHAPTER 658, LAWS OF 1989, SECTIONS 4 AND 7, CHAPTER 740, LAWS OF 1991, AND SECTIONS 5, 6, 7, AND 9, CHAPTER 123, LAWS OF 1999; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.