

HOUSE BILL NO. 106

INTRODUCED BY P. CONNELL

BY REQUEST OF THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING WATER LAWS; REVISING ENFORCEMENT PROVISIONS; ELIMINATING REDUNDANT LANGUAGE; CLARIFYING THE PROCESS FOR A PERMIT OR A CHANGE IN APPROPRIATION RIGHT; STREAMLINING PERMIT REQUIREMENTS IN CLOSED BASINS; AMENDING SECTIONS 3-7-311, 85-2-102, 85-2-114, 85-2-122, 85-2-302, 85-2-310, 85-2-311, 85-2-314, 85-2-320, 85-2-360, 85-2-361, 85-2-362, 85-2-369, 85-2-402, AND 85-2-424, MCA; AND REPEALING SECTION 85-2-363, MCA."

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

~~Section 1. Section 3-7-311, MCA, is amended to read:~~

~~"3-7-311. Duties of water masters. (1) The water master has the general powers given to a master by Rule 53(c), M.R.Civ.P.~~

~~(2) Within a reasonable time after June 30, 1983, the water master shall issue a report to the water judge meeting the requirements for the preliminary decree as specified in 85-2-231.~~

~~(3) After a water judge issues a preliminary decree, the water master shall assist the water judge in the performance of the water division's further duties as ordered by the water judge.~~

~~(4) A water master may be appointed by a district court to serve as a special master to a district court for actions brought pursuant to 85-2-114(1) or (3) 85-2-114 or 85-5-301 if the appointment is approved by the chief water judge."~~

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

"85-2-102. 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;



- 1 (b) in the case of a public agency, to reserve water in accordance with 85-2-316;
- 2 (c) in the case of the department of fish, wildlife, and parks, to change an appropriation right to instream
3 flow to protect, maintain, or enhance streamflows to benefit the fishery resource in accordance with 85-2-436;
- 4 (d) in the case of the United States department of agriculture, forest service:
- 5 (i) instream flows and in situ use of water created in 85-20-1401, Article V; or
- 6 (ii) to change an appropriation right to divert or withdraw water under subsection (1)(a) to instream flow
7 to protect, maintain, or enhance streamflows in accordance with 85-2-320;
- 8 (e) temporary changes or leases for instream flow to maintain or enhance instream flow to benefit the
9 fishery resource in accordance with 85-2-408;
- 10 (f) a use of water for aquifer recharge or mitigation; or
- 11 (g) a use of water for an aquifer storage and recovery project as provided in 85-2-368.
- 12 (2) "Aquifer recharge" means either the controlled subsurface addition of water directly to the aquifer or
13 controlled application of water to the ground surface for the purpose of replenishing the aquifer to offset adverse
14 effects resulting from net depletion of surface water.
- 15 (3) "Aquifer storage and recovery project" means a project involving the use of an aquifer to temporarily
16 store water through various means, including but not limited to injection, surface spreading and infiltration, drain
17 fields, or another department-approved method. The stored water may be either pumped from the injection well
18 or other wells for beneficial use or allowed to naturally drain away for a beneficial use.
- 19 (4) "Beneficial use", unless otherwise provided, means:
- 20 (a) a use of water for the benefit of the appropriator, other persons, or the public, including but not limited
21 to agricultural, stock water, domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and
22 recreational uses;
- 23 (b) a use of water appropriated by the department for the state water leasing program under 85-2-141
24 and of water leased under a valid lease issued by the department under 85-2-141;
- 25 (c) a use of water by the department of fish, wildlife, and parks through a change in an appropriation right
26 for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource authorized under
27 85-2-436;
- 28 (d) a use of water through a temporary change in appropriation right or lease to enhance instream flow
29 to benefit the fishery resource in accordance with 85-2-408;
- 30 (e) a use of water for aquifer recharge or mitigation; or

- 1 (f) a use of water for an aquifer storage and recovery project as provided in 85-2-368.
- 2 (5) "Certificate" means a certificate of water right issued by the department.
- 3 (6) "Change in appropriation right" means a change in the place of diversion, the place of use, the
4 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
7 of substantial credible information and that all of the necessary parts of the form requiring the information have
8 been filled in with the required information for the department to begin evaluating the information.
- 9 (9) "Declaration" means the declaration of an existing right filed with the department under section 8,
10 Chapter 452, Laws of 1973.
- 11 (10) "Department" means the department of natural resources and conservation provided for in Title 2,
12 chapter 15, part 33.
- 13 (11) "Developed spring" means any artificial opening or excavation in the ground, however made,
14 including any physical alteration at the point of discharge regardless of whether it results in any increase in the
15 yield of ground water, from which ground water is sought or can be obtained or through which it flows under
16 natural pressures or is artificially withdrawn.
- 17 (12) "Existing right" or "existing water right" means a right to the use of water that would be protected
18 under the law as it existed prior to July 1, 1973. The term includes federal non-Indian and Indian reserved water
19 rights created under federal law and water rights created under state law.
- 20 (13) "Ground water" means any water that is beneath the ground surface.
- 21 (14) "Late claim" means a claim to an existing right forfeited pursuant to the conclusive presumption of
22 abandonment under 85-2-226.
- 23 (15) "Mitigation" means the reallocation of surface water or ground water through a change in
24 appropriation right or other means that does not result in surface water being introduced into an aquifer through
25 aquifer recharge to offset adverse effects resulting from net depletion of surface water.
- 26 (16) "Municipality" means an incorporated city or town organized and incorporated under Title 7, chapter
27 2.
- 28 (17) (a) "National forest system lands" means all lands within Montana that are owned by the United
29 States and administered by the secretary of agriculture through the forest service.
- 30 (b) The term does not include any lands within the exterior boundaries of national forest system units

1 that are not owned by the United States and administered by the secretary of agriculture through the forest
 2 service.

3 ~~(17)~~(18) "Permit" means the permit to appropriate issued by the department under 85-2-301 through
 4 85-2-303 and 85-2-306 through 85-2-314.

5 ~~(18)~~(19) "Person" means an individual, association, partnership, corporation, state agency, political
 6 subdivision, the United States or any agency of the United States, or any other entity.

7 ~~(19)~~(20) (a) "Political subdivision" means any county, incorporated city or town, public corporation, or
 8 district created pursuant to state law or other public body of the state empowered to appropriate water.

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

10 ~~(20)~~(21) "Salvage" means to make water available for beneficial use from an existing valid appropriation
 11 through application of water-saving methods.

12 ~~(21)~~(22) "State water reservation" means a water right created under state law after July 1, 1973, that
 13 reserves water for existing or future beneficial uses or that maintains a minimum flow, level, or quality of water
 14 throughout the year or at periods or for defined lengths of time.

15 ~~(22)~~(23) "Substantial credible information" means probable, believable facts sufficient to support a
 16 reasonable legal theory upon which the department should proceed with the action requested by the person
 17 providing the information.

18 ~~(23)~~(24) "Waste" means the unreasonable loss of water through the design or negligent operation of an
 19 appropriation or water distribution facility or the application of water to anything but a beneficial use.

20 ~~(24)~~(25) "Water" means all water of the state, surface and subsurface, regardless of its character or
 21 manner of occurrence, including but not limited to geothermal water, diffuse surface water, and sewage effluent.

22 ~~(25)~~(26) "Water division" means a drainage basin as defined in 3-7-102.

23 ~~(26)~~(27) "Water judge" means a judge as provided for in Title 3, chapter 7.

24 ~~(27)~~(28) "Water master" means a master as provided for in Title 3, chapter 7.

25 ~~(28)~~(29) "Watercourse" means any naturally occurring stream or river from which water is diverted for
 26 beneficial uses. It does not include ditches, culverts, or other constructed waterways.

27 ~~(29)~~(30) "Well" means any artificial opening or excavation in the ground, however made, by which ground
 28 water is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn."
 29

30 ~~Section 3. Section 85-2-114, MCA, is amended to read:~~

1 ~~—————"85-2-114. Judicial enforcement **Enforcement.** (1) If the department ascertains, by a means~~
2 ~~reasonably considered sufficient by it, that a person is wasting water, using water unlawfully, preventing water~~
3 ~~from moving to another person having a prior right to use the water, or violating a provision of this chapter, it may~~
4 ~~petition the district court supervising the distribution of water among appropriators from the source to:~~

5 ~~—————(a) pursuant to an order under subsection (2), regulate the controlling works of an appropriation as may~~
6 ~~be necessary to prevent the wasting or unlawful use of water or to secure water to a person having a prior right~~
7 ~~to its use;~~

8 ~~—————(b) pursuant to subsection (2), order the person wasting, unlawfully using, or interfering with another's~~
9 ~~rightful use of the water to cease and desist from doing so and to take steps that may be necessary to remedy~~
10 ~~the waste, unlawful use, or interference; or~~

11 ~~—————(c) petition the district court to issue a temporary, preliminary, or permanent injunction to prevent a~~
12 ~~violation of this chapter. Notwithstanding the provisions of Title 27, chapter 19, part 3, a temporary restraining~~
13 ~~order must be granted A petition under this subsection (1)(c) must meet the following conditions:~~

14 ~~—————(i) The basis for injunctive relief must be a verified complaint or affidavit that alleges a violation of this~~
15 ~~chapter.~~

16 ~~—————(ii) A hearing on the complaint with notice or to show cause why a temporary restraining order should not~~
17 ~~be granted must be held within 10 business days after the department has filed and served its complaint.~~

18 ~~—————(iii) A court shall issue a temporary restraining order before the time to answer has expired if it clearly~~
19 ~~appears from the specific facts shown by affidavit or by the verified complaint that a provision of this chapter is~~
20 ~~being violated.~~

21 ~~—————(iv) A court may issue an ex parte temporary restraining order if the verified complaint or affidavit alleges~~
22 ~~life or property is put at risk by the violation.~~

23 ~~—————(v) If after a hearing, the court determines there are no material facts in dispute that would prevent a~~
24 ~~permanent injunction of a violation, the court shall issue an injunction permanently enjoining the violation and~~
25 ~~make findings of facts and conclusions of law from the record to support its ruling.~~

26 ~~—————(2) (a) An administrative order may be issued by the department in the form of a written notice served~~
27 ~~personally or by both first class and certified mail on the alleged violator or the alleged violator's agent.~~

28 ~~—————(b) The notice must specify the provision of this chapter, the rule, or the permit condition or limitation~~
29 ~~alleged to be violated and the facts alleged to constitute a violation.~~

30 ~~—————(c) The notice may include an order to take necessary corrective action within a reasonable period of~~

- 1 ~~time stated in the order, an order to pay an administrative penalty, or both.~~
- 2 ~~—— (d) The administrative order becomes final unless, within 30 days after issuance, the person named~~
 3 ~~requests in writing a hearing before a hearing examiner. On the department's receipt of the request, the~~
 4 ~~department shall schedule a hearing pursuant to 2-4-604.~~
- 5 ~~—— (3) (a) If after a hearing held under subsection (2) the hearing examiner finds that one or more violations~~
 6 ~~occurred, the department shall issue a final order to take corrective action, assess an administrative penalty, or~~
 7 ~~both:~~
- 8 ~~—— (b) A final order issued after a hearing may prescribe:~~
- 9 ~~—— (i) the date by which the violation must cease;~~
 10 ~~—— (ii) time limits for particular action in preventing, abating, or controlling an illegal water use;~~
 11 ~~—— (iii) the assessment of an administrative penalty until the violation ceases; and~~
 12 ~~—— (iv) the date by which the administrative penalty must be paid.~~
- 13 ~~—— (c) If after a hearing on an order issued under subsection (2) the department finds no violation, it shall~~
 14 ~~rescind the order.~~
- 15 ~~—— (d) A final order issued by the department under this subsection (3) may be reviewed pursuant to~~
 16 ~~2-4-702.~~
- 17 ~~—— (2)(4) Upon the issuance of an a final order or injunction, the department may attach to the controlling~~
 18 ~~works a written notice, properly dated and signed, setting forth the fact that the controlling works have been~~
 19 ~~properly regulated by it. The notice constitutes legal notice to all persons interested in the appropriation or~~
 20 ~~distribution of the water.~~
- 21 ~~—— (3)(5) The department may also direct its own attorney or request the attorney general or county attorney~~
 22 ~~to bring suit to enjoin the waste, unlawful use, interference, or violation:~~
- 23 ~~—— (4)(6) The county attorney or the attorney general may bring suit to enjoin the waste, unlawful use,~~
 24 ~~interference, or violation or bring an action under 85-2-122(1) without being requested to do so by the department.~~
- 25 ~~—— (5)(7) A county attorney who takes action pursuant to subsection (3) (5) or (4) (6) may request~~
 26 ~~assistance from the attorney general:~~
- 27 ~~—— (6)(8) When enforcing the provisions of this section, the department, the county attorney, and the~~
 28 ~~attorney general shall give priority to protecting the water rights of a prior appropriator under an existing water~~
 29 ~~right, a certificate, a permit, or a state water reservation.~~
- 30 ~~—— (7)(9) After considering the provisions of subsection (6) (8), the department may attempt to obtain~~

1 voluntary compliance through warning, conference, or any other appropriate means before petitioning the district
 2 court pursuing an action under subsection (1). An attempt to obtain voluntary compliance under this subsection
 3 must extend over a period of at least 7 days and may not exceed 30 working days."

4
 5 ~~Section 4.~~ Section 85-2-122, MCA, is amended to read:

6 ~~"85-2-122. Penalties.~~ (1) Except as provided in 85-2-410(6), a person who violates or refuses or
 7 neglects to comply with the provisions of 85-2-114, any order of the department, or any rule of the department
 8 is subject to an administrative penalty by the department or a civil penalty not to exceed \$1,000 per violation.
 9 Each day of violation constitutes a separate violation.

10 ~~(2) Except as provided in subsection (3), fines a penalty~~ collected by the department or a district court
 11 under subsection (1) must be deposited in the account established in 85-2-318 for use by the department in the
 12 enforcement of 85-2-114.

13 ~~(3) If a fine penalty is collected by an independent action brought by:~~
 14 ~~(a) the county attorney, the fine penalty must be deposited in the general fund of the county; or~~
 15 ~~(b) the county attorney with assistance from the attorney general or by the attorney general, the fine~~
 16 ~~penalty must be deposited in the water right enforcement account created in 44-4-1101 and must be used to~~
 17 ~~enforce the provisions of 85-2-114."~~

18
 19 **Section 2.** Section 85-2-302, MCA, is amended to read:

20 **"85-2-302. Application for permit --definition or change in appropriation right.** (1) Except as
 21 provided in 85-2-306 and 85-2-369, a person may not appropriate water or commence construction of diversion,
 22 impoundment, withdrawal, or related distribution works except by applying for and receiving unless the person
 23 applies for and receives a permit or an authorization for a change in appropriation right from the department.

24 (2) The department shall adopt rules that are necessary to determine whether or not an application is
 25 correct and complete, based on the provisions applicable to issuance of a permit under this part or a change in
 26 appropriation right pursuant to Title 85, chapter 2, part 4. The rules must be adopted in compliance with Title 2,
 27 chapter 4.

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

30 (4) (a) Subject to subsection (4)(b), the applicant shall submit a correct and complete application. The

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

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

8 ~~—— (c) As used in this part, "national forest system lands" has the same meaning as that provided in
 9 85-20-1401, Article I.~~

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

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

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

20

21 **Section 3.** Section 85-2-310, MCA, is amended to read:

22 **"85-2-310. Action on application for permit or change in appropriation right.** (1) (a) If the
 23 department proposes to deny an application for a permit or a change in appropriation right under 85-2-307, unless
 24 the applicant withdraws the application, the department shall hold a hearing pursuant to 2-4-604 after serving
 25 notice of the hearing by first-class mail upon the applicant for the applicant to show cause by a preponderance
 26 of the evidence as to why the permit or change in appropriation right should not be denied.

27 (b) (i) Upon request from the applicant, the department shall appoint a hearing examiner who did not
 28 participate in the preliminary determination.

29 (ii) The applicant may make only one request pursuant to this subsection (1)(b) for a different hearing
 30 examiner.

1 (2) A proposal to grant ~~an application~~ a permit or change in appropriation right with or without conditions
2 following a hearing on a proposal to deny the application must proceed as if the department proposed to grant
3 the ~~application~~ permit or change in appropriation right in its preliminary determination pursuant to 85-2-307.

4 (3) If valid objections are not received on an application or if valid objections are unconditionally
5 withdrawn and the department preliminarily determined to grant the permit or change in appropriation right, the
6 department shall grant the permit or change in appropriation right as proposed in the preliminary determination
7 pursuant to 85-2-307.

8 (4) If valid objections to an application are received and withdrawn with conditions stipulated with the
9 applicant and the department preliminarily determined to grant the permit or change in appropriation right, the
10 department shall grant the permit or change in appropriation right subject to conditions as necessary to satisfy
11 applicable criteria.

12 (5) The department shall deny or grant with or without conditions a permit under 85-2-311 or a change
13 in appropriation right under 85-2-402 within 90 days after the administrative record is closed.

14 (6) If an application is to appropriate water with a point of diversion, conveyance, or place of use on
15 national forest system lands, any application approved by the department is subject to any written special use
16 authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of
17 diversion, impoundment, storage, transportation, withdrawal, use, or distribution of the water applied for and any
18 terms, conditions, and limitations related to the use of water contained in any special use authorization required
19 by federal law.

20 (7) (a) ~~Except as provided in subsection (6), an application may not be denied or approved in a modified~~
21 ~~form or upon terms, conditions, or limitations specified by the department unless the applicant is first granted an~~
22 ~~opportunity to be heard if the department proposes to grant a permit or change in appropriation right in modified~~
23 ~~form, the applicant must be given an opportunity to be heard. The addition of conditions or changes to conditions~~
24 ~~required for approval does not constitute a modification of the application. If an objection is not filed against the~~
25 ~~application but the department is of the opinion that the application should be denied or approved in a modified~~
26 ~~form or upon terms, conditions, or limitations specified by it, the department shall prepare a statement of its~~
27 ~~opinion and its reasons for the opinion.~~

28 (b) The department shall serve ~~a statement of its opinion~~ notice of a preliminary determination to grant
29 a permit or change in appropriation right in a modified form by first-class mail upon the applicant, with a notice
30 that the applicant may obtain a hearing pursuant to 2-4-604 to show cause by a preponderance of the evidence

1 as to why the permit or change in appropriation right should not be preliminarily DETERMINED TO BE granted in the
 2 modified form by filing a request within 30 days after the notice is mailed. The notice must further state that the
 3 ~~application~~ permit or change in appropriation right will be preliminarily DETERMINED TO BE granted as modified in
 4 ~~a specified manner or denied~~ unless a hearing is requested.

5 (8) The department may cease action upon an application for a permit or change in appropriation right
 6 and return it to the applicant when it finds that the application is not in good faith or does not show a bona fide
 7 intent to appropriate water for a beneficial use. An application returned for either of these reasons must be
 8 accompanied by a statement of the reasons for which it was returned, and for a permit application there is not
 9 a right to a priority date based upon the filing of the application. Returning an application pursuant to this
 10 subsection is a final decision of the department.

11 (9) For all applications filed after July 1, 1973, the department shall find that an application is not in good
 12 faith or does not show a bona fide intent to appropriate water for a beneficial use if:

13 (a) an application is not corrected and completed as required by 85-2-302;

14 (b) the appropriate filing fee is not paid;

15 (c) the application does not document:

16 (i) a beneficial use of water;

17 (ii) the proposed place of use of all water applied for;

18 (iii) for an appropriation of 4,000 acre-feet a year or more and 5.5 cubic feet per second or more, a
 19 detailed project plan describing when and how much water will be put to a beneficial use. The project plan must
 20 include a reasonable timeline for the completion of the project and the actual application of the water to a
 21 beneficial use.

22 (iv) for appropriations not covered in subsection (9)(c)(iii), a general project plan stating when and how
 23 much water will be put to a beneficial use; and

24 (v) except as provided in subsection (10), if the water applied for is to be appropriated above that which
 25 will be used solely by the applicant or if it will be marketed by the applicant to other users, information detailing:

26 (A) each person who will use the water and the amount of water each person will use;

27 (B) the proposed place of use of all water by each person;

28 (C) the nature of the relationship between the applicant and each person using the water; and

29 (D) each firm contractual agreement for the specified amount of water for each person using the water;

30 or

1 (d) the appropriate environmental impact statement costs or fees, if any, are not paid as required by
2 85-2-124.

3 (10) If water applied for is to be marketed by the applicant to other users for the purpose of aquifer
4 recharge or mitigation, the applicant is exempt from the provisions of subsection (9)(c)(v). The applicant must
5 provide information detailing the proposed place of use."
6

7 **Section 4.** Section 85-2-311, MCA, is amended to read:

8 **"85-2-311. Criteria for issuance of permit.** (1) A permit may be issued under this part prior to the
9 adjudication of existing water rights in a source of supply. In a permit proceeding under this part, there is no
10 presumption that an applicant for a permit cannot meet the statutory criteria of this section prior to the adjudication
11 of existing water rights pursuant to this chapter. In making a determination under this section, the department may
12 not alter the terms and conditions of an existing water right or an issued certificate, permit, or state water
13 reservation. Except as provided in subsections (3) and (4), the department shall issue a permit if the applicant
14 proves by a preponderance of evidence that the following criteria are met:

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

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

20 (A) identification of physical water availability;

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

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

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

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

1 adequate;

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

3 (e) the applicant has a possessory interest or the written consent of the person with the possessory
4 interest in the property where the water is to be put to beneficial use, or if the proposed use has a point of
5 diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use
6 authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of
7 diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit;

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

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

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

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

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

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

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

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

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

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

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

1 (v) the effects on private property rights by any creation of or contribution to saline seep; and
2 (vi) the probable significant adverse environmental impacts of the proposed use of water as determined
3 by the department pursuant to Title 75, chapter 1, or Title 75, chapter 20.

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

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

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

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

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

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

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

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

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

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

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

30 (5) Subject to 85-2-360, to meet the preponderance of evidence standard in this section, the applicant,

1 in addition to other evidence demonstrating that the criteria of subsection (1) have been met, shall submit
 2 hydrologic or other evidence, including but not limited to water supply data, field reports, and other information
 3 developed by the applicant, the department, the U.S. geological survey, or the U.S. natural resources
 4 conservation service and other specific field studies.

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

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

12 (8) For an application for ground water in a basin closed pursuant to 85-2-319, 85-2-321, 85-2-330,
 13 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~~
 14 ~~closed pursuant to 85-2-319,~~ the applicant shall comply with the provisions of 85-2-360 in addition to the
 15 requirements of this section."
 16

17 **Section 5.** Section 85-2-314, MCA, is amended to read:

18 **"85-2-314. Revocation or modification of permit or change in appropriation right. (1) (a)** If the work
 19 on an appropriation is not commenced, prosecuted, or completed within the time stated in the permit or an
 20 extension of the time stated in the permit, if the water is not being applied to the beneficial use contemplated in
 21 the permit or change in appropriation right, or if the permit or change in appropriation right is otherwise not being
 22 followed, the department may, after notice, require the permittee or the holder of the change in appropriation right
 23 to show cause why the permit or change in appropriation right should not be modified or revoked.

24 (b) If the permittee or holder of the change in appropriation right fails to show sufficient cause, the
 25 department may modify or revoke the permit or change in appropriation right.

26 (2) (a) A permittee or holder of a change in appropriation right may petition the department to modify or
 27 remove a condition of approval or reduce the amount of the permit or change authorization.

28 (b) The petition must be submitted on a form designated by the department, is subject to the criteria of
 29 85-2-311 and 85-2-402, and must be processed in the same manner as an application made pursuant to
 30 85-2-302, 85-2-307 through 85-2-309, and 85-2-310(1) through (5) except that:

1 (i) the department may waive the public notice of a preliminary determination to grant the petition IF THE
 2 DEPARTMENT FINDS, ON THE BASIS OF INFORMATION REASONABLY AVAILABLE TO IT, THAT THE PETITION AS PROPOSED
 3 IN THE APPLICATION WILL NOT ADVERSELY AFFECT THE RIGHTS OF OTHER APPROPRIATORS;

4 (ii) if the department issues a preliminary determination to grant the petition and waives public notice, the
 5 determination becomes final;

6 (iii) the department may condition a preliminary determination to grant the petition in order to meet the
 7 criteria under 85-2-311 and 85-2-402; and

8 (iv) a preliminary determination to deny a petition is final. Denial of a petition does NOT affect the permit
 9 or change authorization."

10
 11 **Section 6.** Section 85-2-320, MCA, is amended to read:

12 **"85-2-320. Change in appropriation right authorization for instream flow -- United States**
 13 **department of agriculture, forest service.** (1) (a) The department shall accept and process an application by
 14 the United States department of agriculture, forest service for a change in appropriation right under the provisions
 15 of 85-2-402 and this section to protect, maintain, or enhance streamflows to benefit the fishery or other resources
 16 on national forest system lands.

17 ~~(b) As used in this section, "national forest system lands" has the same meaning as that provided in~~
 18 ~~85-20-1401, Article I.~~

19 ~~(c)~~(b) To change an appropriation right, the United States department of agriculture, forest service must
 20 own the appropriation right that it seeks to change to an instream flow right, the diversion or withdrawal that is
 21 to be changed to instream flow must be located within or immediately adjacent to the exterior boundaries of
 22 national forest system lands on the date provided in 85-20-1401, Article IV.B.2., and the stream reach in which
 23 the streamflow is to be protected, maintained, or enhanced must be located within or immediately adjacent to the
 24 exterior boundaries of national forest system lands as of the date provided in 85-20-1401, Article IV.B.2. The
 25 application for a change in appropriation right must:

26 (i) include specific information on the length and location of the stream reach in which the streamflow
 27 is to be protected, maintained, or enhanced; and

28 (ii) provide a detailed streamflow measuring plan that describes the point where and the manner in which
 29 the streamflow must be measured.

30 (2) In addition to the requirements of 85-2-402, when applying for a change in appropriation right

1 pursuant to this section, the United States department of agriculture, forest service, shall prove by a
2 preponderance of the evidence that:

3 (a) the change in appropriation right authorization to protect, maintain, or enhance streamflows to benefit
4 the fishery or other resources, as measured at a specific point, will not adversely affect the water rights of other
5 persons; and

6 (b) the amount of water for the proposed instream flow use is needed to protect, maintain, or enhance
7 streamflows to benefit the fishery or other resources.

8 (3) The proposed method of measurement of the water to protect, maintain, or enhance streamflows to
9 benefit the fishery or other resources must be approved by the department before a change in appropriation right
10 may be approved.

11 (4) The department is not responsible for costs associated with installing devices or providing personnel
12 to measure streamflows according to the measurement plan submitted under this section.

13 (5) If an appropriation right is changed pursuant to this section, the priority of the appropriation right
14 remains the same as the appropriation right that was changed.

15 (6) A change in appropriation right authorization under this section does not create a right of access
16 across private property or allow any infringement of private property rights.

17 (7) The maximum quantity of water that may be subject to a change in appropriation right authorization
18 to protect, maintain, or enhance streamflows to benefit the fishery or other resources is the amount historically
19 diverted. However, only the amount historically consumed or a smaller amount if specified by the department in
20 the change in appropriation right authorization may be used to protect, maintain, or enhance streamflows to
21 benefit the fishery or other resources below the existing point of diversion.

22 (8) The department may modify or revoke the change in appropriation right up to 10 years after it is
23 approved if an appropriator with a priority of appropriation that is earlier than the change in appropriation right
24 that was granted submits new evidence that was not available at the time the change in appropriation right was
25 approved that proves by a preponderance of evidence that the appropriator's water right is adversely affected."

26

27 **Section 7.** Section 85-2-360, MCA, is amended to read:

28 **"85-2-360. Ground water appropriation right in closed basins.** (1) An application for a ground water
29 appropriation right in a basin closed pursuant to 85-2-319, 85-2-321, 85-2-330, 85-2-336, 85-2-341, 85-2-343,
30 or 85-2-344 ~~or administratively closed pursuant to 85-2-319~~ must be accompanied by a hydrogeologic

1 ~~assessment report that has been conducted pursuant to 85-2-361, an aquifer recharge or mitigation plan if~~
 2 ~~required, and an application for a change in appropriation right or rights if necessary. to predict whether the~~
 3 ~~proposed appropriation right will result in a net depletion of surface water and must be accompanied by a plan~~
 4 ~~as provided in 85-2-362, if necessary.~~

5 ~~(2) If the hydrogeologic assessment conducted pursuant to 85-2-361 predicts that the proposed~~
 6 ~~appropriation right will not result in a net depletion of surface water, the department shall proceed under the~~
 7 ~~criteria provided in 85-2-311.~~

8 ~~———— (3) (a) If the hydrogeologic assessment predicts that the proposed appropriation right will result in a net~~
 9 ~~depletion of surface water, the applicant shall analyze whether the net depletion results in an adverse effect on~~
 10 ~~a prior appropriator. If the applicant provides a correct and complete application, the department shall proceed~~
 11 ~~to process the application as provided in 85-2-363.~~

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

15 ~~———— (4) If the hydrogeologic assessment predicts that there will be net depletion as provided in subsection~~
 16 ~~(3)(a), the department may proceed to process the application pursuant to 85-2-363 if, in addition to other~~
 17 ~~applicable criteria, the applicant complies with 85-2-362.~~

18 ~~(2) The department shall use the hydrogeologic report to determine if the proposed appropriation right~~
 19 ~~could result in a net depletion of surface water.~~

20 ~~(5)(3) (a) For the purposes of 85-2-360 through 85-2-362, the prediction of net depletion does not mean~~
 21 ~~that an adverse effect on a prior appropriator will occur or if an adverse effect does occur that the entire amount~~
 22 ~~of net depletion is the cause of the adverse effect. A DETERMINATION OF WHETHER OR NOT THERE IS AN ADVERSE~~
 23 ~~EFFECT ON A PRIOR APPROPRIATOR AS THE RESULT OF A NEW APPROPRIATION RIGHT IS A DETERMINATION THAT MUST~~
 24 ~~BE MADE BY THE DEPARTMENT BASED ON THE RATE, LOCATION, AND TIMING OF THE NET DEPLETION THAT CAUSES THE~~
 25 ~~ADVERSE EFFECT RELATIVE TO THE HISTORIC BENEFICIAL USE OF THE APPROPRIATION RIGHT THAT MAY BE ADVERSELY~~
 26 ~~AFFECTED. A determination of whether or not there is an adverse effect on a prior appropriator as the result of a~~
 27 ~~new appropriation right is a determination that must be made by the department based on the amount, location,~~
 28 ~~and duration of the amount of net depletion that causes the adverse effect relative to the historic beneficial use~~
 29 ~~of the appropriation right that may be adversely affected.~~

30 ~~———— (6) The priority date for an appropriation right that is granted to an entity whose permit application was~~

1 returned after April 11, 2006, and before May 3, 2007, because of the department's interpretation of a court
2 decision is the date of the initial application to the department.

3 ~~(b) If the department determines that the proposed appropriation right could result in a net depletion of~~
4 ~~surface water that could result in an adverse effect on a prior appropriator, the permit may be granted only if the~~
5 ~~department determines that the potential~~ THE DEPARTMENT MAY GRANT A PERMIT FOR A NEW APPROPRIATION ONLY
6 ~~IF THE APPLICANT PROVES BY A PREPONDERANCE OF THE EVIDENCE THAT THE adverse effect would be offset through~~
7 ~~an aquifer recharge or mitigation plan that meets the requirements of 85-2-362."~~

8

9 **Section 8.** Section 85-2-361, MCA, is amended to read:

10 **"85-2-361. Hydrogeologic assessment--definition report -- minimum requirements.** (1)(a) For the
11 purposes of 85-2-360 through 85-2-362, "hydrogeologic assessment" means a report for the project for or through
12 which water will be put to beneficial use, the point of diversion, and the place of use that describes the geology,
13 hydrogeologic environment, water quality with regard to the provisions of 75-5-410 and 85-2-364, and predicted
14 net depletion, if any, including the timing of any net depletion, for surface water within the area described in
15 subsection (2)(a)(i) within the closed basins that are subject to an appropriation right, including but not limited to
16 rivers, streams, irrigation canals, or drains that might be affected by the new appropriation right and any predicted
17 water quality changes that may result.

18 ~~——(b) In predicting net depletion of surface water from a proposed use, consideration must be given, at a~~
19 ~~minimum, to (1) A hydrogeologic report must include:~~

20 ~~(i)(a) a description of the proposed appropriation, including the point of diversion, the place of use, the~~
21 ~~area affected by the proposed appropriation, and aquifers and surface waters that may be affected by the~~
22 ~~proposed appropriation right;~~

23 ~~(b) the actual amount of water diverted for like beneficial uses and the amount of water consumed by~~
24 ~~the proposed appropriation right;~~

25 ~~(ii)(c) any amounts the amount of water that will likely be lost in conveyance, if any, and whether any lost~~
26 ~~amounts the amount of conveyance losses that would return to the system, and the location where conveyance~~
27 ~~losses would return to the system are lost to the system through evaporation or other means or whether those~~
28 ~~amounts are returned to the system through percolation or other means; and~~

29 ~~(iii)(d) any the amount, timing, and location of return flows from the proposed use;—including but not~~
30 ~~limited to any treated wastewater return flows if the treated wastewater that is considered effluent meets the~~

1 requirements of 75-5-410 and 85-2-364.

2 (e) the geology of the affected area, including stratigraphy and structure;

3 (f) the parameters of the aquifer system within the affected area to include estimates for:

4 (i) the lateral and vertical extent of the aquifer;

5 (ii) an analysis of whether the aquifer is confined or unconfined; and

6 (iii) the transmissivity and storage coefficient related to the aquifer;

7 (g) the locations of surface waters within the affected area that are subject to an appropriation right that
8 may show a net depletion;

9 (h) an analysis of whether there could MAY be a net depletion of surface water and a potential adverse
10 effect on a prior appropriator in the affected area and the rate, location, and timing of the depletion, IF ANY; and

11 (i) a description of any water treatment method used at the time of any type of injection or introduction
12 of water to the aquifer to ensure compliance with 75-5-410, 85-2-364, and the water quality laws under Title 75,
13 chapter 5.

14 (2) ~~(a)~~ A hydrogeologic assessment that will be used to predict net depletion of surface water resulting
15 from a new appropriation right must include hydrogeologic data or a model developed by report must be prepared
16 by a hydrogeologist, a qualified scientist, or a qualified licensed professional engineer, that incorporates for the
17 new appropriation:

18 ~~—— (i) the area or estimated area of ground water that will be affected, not to exceed the boundaries of the~~
19 ~~drainage subdivisions established by the office of water data coordination, United States geological survey, and~~
20 ~~used by the water court, unless the applicant chooses to expand the boundaries;~~

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

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

24 ~~—— (A) the lateral and vertical extent of the aquifer;~~

25 ~~—— (B) whether the aquifer is confined or unconfined;~~

26 ~~—— (C) the effective hydraulic conductivity of the aquifer;~~

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

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

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

1 depletion;

2 ~~—— (v) evidence of water availability; and~~

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

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

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

8 ~~—— (ii) other water quality information necessary to comply with 75-5-410 and 85-2-364; and~~

9 ~~—— (iii) a description of any water treatment method that will be used at the time of any type of injection or~~
10 ~~introduction of water to the aquifer to ensure compliance with 75-5-410 and 85-2-364 and the water quality laws~~
11 ~~under Title 75, chapter 5.~~

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

15 ~~(4)(3) The hydrogeologic assessment report, the model if provided, the test well data, the monitoring well~~
16 ~~data, and other related information must be submitted to the department. The department shall submit this~~
17 ~~information to the bureau of mines and geology. The bureau of mines and geology shall ensure that information~~
18 ~~submitted pursuant to this section is entered into the make the information available through the ground water~~
19 ~~information center database as part of the ground water assessment program.~~

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

23

24 **Section 9.** Section 85-2-362, MCA, is amended to read:

25 **"85-2-362. Aquifer recharge or mitigation plans in closed basins -- minimum requirements.** ~~(1) An~~
26 ~~applicant whose hydrogeologic assessment conducted pursuant to 85-2-361 predicts that there will be a net~~
27 ~~depletion of surface water shall offset the net depletion that results in the adverse effect through a mitigation plan~~
28 ~~or an aquifer recharge plan.~~

29 ~~(2)(1) If the department determines that the proposed appropriation right could result in a net depletion~~
30 ~~of surface water that could result in an adverse effect on a prior appropriator, an aquifer recharge or mitigation~~

1 ~~plan is required.~~ AN APPLICANT WHOSE HYDROGEOLOGIC REPORT CONDUCTED PURSUANT TO 85-2-361 PREDICTS THAT
 2 ~~THERE WILL BE A NET DEPLETION OF SURFACE WATER SHALL SUBMIT AN AQUIFER RECHARGE OR MITIGATION PLAN. An~~
 3 ~~aquifer recharge or mitigation plan. A mitigation plan~~ must include:

- 4 (a) where and how the water in the plan will be put to beneficial use;
- 5 (b) when and where, generally, water ~~reallocated through exchange or substitution for aquifer recharge~~
 6 ~~or mitigation~~ will be required;
- 7 (c) the amount of water ~~reallocated through exchange or substitution~~ that is required ~~for aquifer recharge~~
 8 ~~or mitigation~~;
- 9 (d) how the proposed project or beneficial use for which the ~~aquifer recharge or~~ mitigation plan is
 10 required will be operated;
- 11 (e) evidence that an application for a change in appropriation right, if necessary, has been submitted;
- 12 (f) evidence of water availability;
- 13 (g) evidence of how the ~~aquifer recharge or~~ mitigation plan will offset the required amount of net
 14 depletion of surface water in a manner that will offset an adverse effect on a prior appropriator; and
- 15 (h) evidence that the appropriate water quality permits have been granted pursuant to Title 75, chapter
 16 5, as required by 75-5-410 and 85-2-364.

17 ~~(3)(2) An~~ In addition to the requirements of subsection (1), an aquifer recharge plan must include:

18 ~~———(a) evidence that the appropriate water quality permits have been granted pursuant to Title 75, chapter~~
 19 ~~5, as required by 75-5-410 and 85-2-364;~~

20 ~~———(b) where and how the water in the plan will be put to beneficial use;~~

21 ~~———(c) when and where, generally, water reallocated through exchange or substitution will be required;~~

22 ~~———(d) the amount of water reallocated through exchange or substitution that is required;~~

23 ~~———(e) how the proposed project or beneficial use for which the aquifer recharge plan is required will be~~
 24 ~~operated;~~

25 ~~———(f) evidence that an application for a change in appropriation right, if necessary, has been submitted;~~

26 ~~———(g) a description of the process by which water will be reintroduced to the aquifer;~~

27 ~~———(h) evidence of water availability; and~~

28 ~~———(i) evidence of how the aquifer recharge plan will offset the required amount of net depletion of surface~~
 29 ~~water in a manner that will offset any adverse effect on a prior appropriator.~~

30 ~~(4)(3) The department may not require an applicant, through a mitigation plan or an aquifer recharge or~~

1 mitigation plan, to provide more water than the quantity needed to offset the adverse effects on a prior
2 appropriator caused by the net depletion.

3 ~~(5)(4)~~ An appropriation right that relies on a ~~mitigation plan or an~~ aquifer recharge or mitigation plan ~~to~~
4 ~~offset net depletion of surface water that results in an adverse effect on a prior appropriator must be issued as~~
5 ~~a conditional permit that requires~~ must require that the ~~mitigation plan or~~ aquifer recharge or mitigation plan ~~must~~
6 be exercised when the appropriation right is exercised."

7

8 **Section 10.** Section 85-2-369, MCA, is amended to read:

9 ~~"85-2-369. Aquifer testing, test well, or monitoring well data submission -- not beneficial use~~

10 **Permit not required for testing.** ~~(1) All aquifer testing data and other related information from test wells,~~
11 ~~monitoring wells, or other sources that is collected for the purpose of obtaining a new appropriation right or a~~
12 ~~change in appropriation right pursuant to 85-2-360 through 85-2-362 must be submitted to the department and~~
13 ~~the bureau of mines and geology in a form prescribed by the department and the bureau of mines and geology.~~
14 ~~The bureau of mines and geology shall ensure that information submitted pursuant to this section is entered into~~
15 ~~the ground water information center database as part of the ground water assessment program.~~

16 ~~(2)(a)(1)~~ Water testing or monitoring is not a beneficial use of water requiring the filing of a permit
17 application.

18 ~~(b)(2)~~ A permit is not required if the intent of a person is to conduct aquifer tests, water quality tests,
19 water level monitoring, or other testing or monitoring of a water source."

20

21 **Section 11.** Section 85-2-402, MCA, is amended to read:

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

30 (b) If an application involves a change in a point of diversion, conveyance, or place of use located on

1 national forest system lands, the application is not correct and complete until the applicant has submitted proof
 2 to the department of any written special use authorization required by federal law for the proposed change in
 3 occupancy, use, or traverse of national forest system lands for the purpose of diversion, impoundment, storage,
 4 transportation, withdrawal, use, or distribution of water.

5 ~~(c) As used in this part, "national forest system lands" has the same meaning as that provided in~~
 6 ~~85-20-1401, Article I.~~

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

30 (6) The state of Montana has long recognized the importance of conserving its public waters and the

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

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

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

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

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

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

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

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

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

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

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

29 (7) For any application for a change in appropriation right involving 4,000 or more acre-feet of water a
30 year and 5.5 or more cubic feet per second of water, the department shall give notice of the proposed change

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

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

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

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

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

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

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

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

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

- 1 (i) the appropriation right is for:
- 2 (A) ground water outside the boundaries of a controlled ground water area; or
- 3 (B) ground water inside the boundaries of a controlled ground water area and if the provisions of the rule
- 4 establishing the controlled ground water area do not restrict a change in appropriation right;
- 5 (ii) the change in appropriation right is to replace an existing well and the existing well will no longer be
- 6 used;
- 7 (iii) the rate and volume of the appropriation from the replacement well are equal to or less than that of
- 8 the well being replaced and do not exceed:
- 9 (A) 450 gallons a minute for a municipal well; or
- 10 (B) 35 gallons a minute and 10 acre-feet a year for all other wells;
- 11 (iv) the water from the replacement well is appropriated from the same aquifer as the water appropriated
- 12 from the well being replaced; and
- 13 (v) a timely, correct and complete notice of replacement well is submitted to the department as provided
- 14 in subsection (15)(b).
- 15 (b) (i) After completion of a replacement well and appropriation of ground water for a beneficial use, the
- 16 appropriator shall file a notice of replacement well with the department on a form provided by the department.
- 17 (ii) (A) The department shall review the notice of replacement well and shall issue an authorization of a
- 18 change in an appropriation right if all of the criteria in subsection (15)(a) have been met and the notice is correct
- 19 and complete.
- 20 (B) If the replacement well is located on national forest system lands, the notice is not correct and
- 21 complete under this subsection (15) until the appropriator has submitted proof of any written special use
- 22 authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of
- 23 constructing the replacement well.
- 24 (iii) The department may not issue an authorization of a change in appropriation right until a correct and
- 25 complete notice of replacement well has been filed with the department. The department shall return a defective
- 26 notice to the appropriator, along with a description of defects in the notice. The appropriator shall refile a
- 27 corrected and completed notice of replacement well within 30 days of notification of defects or within a further
- 28 time as the department may allow, not to exceed 6 months.
- 29 (iv) If a notice of replacement well is not completed within the time allowed, the appropriator shall:
- 30 (A) cease appropriation of water from the replacement well pending approval by the department; and

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

3 (c) The provisions of this subsection (15) do not apply to an appropriation right abandoned under
4 85-2-404.

5 (d) For each well that is replaced under this subsection (15), the appropriator shall follow the well
6 abandonment procedures, standards, and rules adopted by the board of water well contractors pursuant to
7 37-43-202.

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

10 (16) (a) An appropriator may change an appropriation right without the prior approval of the department
11 for the purpose of constructing a redundant water supply well in a public water supply system, as defined in
12 75-6-102, if the redundant water supply well:

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

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

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

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

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

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

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

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

- 1 (ii) there are no other changes to the water right;
- 2 (iii) the capacity of the diversion is not increased;
- 3 (iv) there are no points of diversion or intervening water rights between the existing point of diversion and
- 4 the replacement point of diversion or the appropriator obtains written waivers from all intervening water right
- 5 holders;
- 6 (v) the replacement point of diversion is on the same surface water source and is located as close as
- 7 reasonably practicable to the existing point of diversion;
- 8 (vi) the replacement point of diversion replaces an existing point of diversion and the existing point of
- 9 diversion will no longer be used;
- 10 (vii) the appropriator can show that the existing point of diversion has been used in the 10 years prior to
- 11 the notice for change of appropriation right for a replacement point of diversion;
- 12 (viii) the appropriator can show the change will not increase access to water availability, change the
- 13 method of irrigation, if applicable, or increase the amount of water diverted, used, or consumed; and
- 14 (ix) a timely, correct and complete notice of replacement point of diversion is submitted to the department
- 15 as provided in subsection (18)(b).
- 16 (b) (i) Within 60 days after completion of a replacement point of diversion, the appropriator shall file a
- 17 notice of replacement point of diversion with the department on a form provided by the department.
- 18 (ii) The department shall review the notice of replacement point of diversion and shall issue an
- 19 authorization of a change in an appropriation right if all of the criteria in subsection (18)(a) have been met and
- 20 the notice is correct and complete. The department may inspect the diversion to confirm that the criteria under
- 21 subsection (18)(a) have been met. If the department issues an authorization of a change in an appropriation right
- 22 for a replacement point of diversion, the department shall prepare a notice of the authorization and provide notice
- 23 of the authorization in the same manner as required in 85-2-307 for applications.
- 24 (iii) The department may not issue an authorization of a change in appropriation right until a correct and
- 25 complete notice of replacement point of diversion has been filed with the department. The department shall return
- 26 a defective notice to the appropriator, along with a description of defects in the notice. The appropriator shall refile
- 27 a corrected and completed notice of replacement point of diversion within 30 days of notification of defects or
- 28 within a further time as the department may allow, not to exceed 6 months.
- 29 (iv) If a notice of replacement point of diversion is not filed and completed within the time allowed or if the
- 30 department determines the criteria under subsection (18)(a) have not been met, the appropriator shall:

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

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

5 (c) The provisions of this subsection (18) do not apply to an appropriation right abandoned under
6 85-2-404.

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

9 (e) (i) An appropriator may file a correct and complete objection with the department alleging that the
10 change in appropriation right for a replacement point of diversion will adversely affect the use of the existing water
11 rights of other persons or other perfected or planned uses or developments for which a permit or certificate has
12 been issued or for which a state water reservation has been issued under Title 85, chapter 2, part 3.

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

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

19

20 **Section 12.** Section 85-2-424, MCA, is amended to read:

21 **"85-2-424. Filing.** (1) Except in the case of a transfer of real property served by a public service water
22 supply, when a person presents for recording a deed or other instrument evidencing a transfer of real property,
23 the realty transfer certificate must contain a water rights disclosure in which the transferor shall acknowledge, at
24 or before closing or transfer of real property, whether or not any water rights are associated with the property to
25 be transferred and whether or not any water rights will transfer with the real property.

26 (2) (a) If the realty transfer certificate discloses that the water rights will transfer with the property, the
27 department's records must be updated to reflect the purchaser of the property as the new owner of the water right
28 based on information received from the department of revenue. The appropriate fee must be paid at closing or
29 upon completion of the transfer of real property as provided in 85-2-426.

30 (b) The transferee of a water right, after receiving notice provided in subsection (2)(c), is responsible for

1 compliance with this section.

2 (c) If the department receives notice from the department of revenue that a property transfer has
3 occurred and the proper fee was not received by the department, the department shall send a notice to the
4 transferee requesting payment of the fee. If the transferee does not pay the fee within 60 days, the department
5 may assess a penalty against the transferee pursuant to 85-2-431.

6 (3) If the realty transfer certificate discloses the division of a water right among parcels, the person
7 dividing the water right shall complete and file with the department a water right ownership update form, a map,
8 and the required fee.

9 (4) If a person exempts a water right pursuant to 85-2-403, the person shall file with the department, on
10 a form provided by the department, information describing the exempting of the water right and the appropriate
11 fee.

12 (5) If a person severs a water right from appurtenant property without selling the property, the person
13 shall file with the department, on a form provided by the department, information describing the severance and
14 the appropriate fee.

15 (6) If the realty transfer certificate submitted with a deed or other instrument indicates that a water right
16 is being severed, divided, or exempted, the clerk and recorder may not record the deed or instrument unless there
17 is submitted with the deed or instrument a certification under penalty of false swearing, on a form provided by the
18 department and signed by the transferor and transferee, that states either:

19 (a) that the documents and fee necessary to comply with this section are held in escrow, in which case
20 the certification must also be signed by the escrow agent; or

21 (b) if there is no escrow, that the transferor and transferee certify that they have prepared the required
22 documents and will send the required documents and fee to the department within ~~5 business~~ 60 business days
23 of recording, in which case the certification must also require the transferee to acknowledge that failure to file the
24 appropriate documents and fee with the department will result in the department assessing the penalty in
25 85-2-431 against the transferee.

26 (7) Any written agreement to transfer land that has appurtenant water rights on record with the
27 department must contain the following disclosure or words of a similar nature:

28 "WATER RIGHT OWNERSHIP UPDATE DISCLOSURE:

29 By Montana law, failure of the parties at closing or transfer of real property to pay the required fee to the
30 Montana Department of Natural Resources and Conservation for updating water right ownership may result in

1 the transferee of the property being subject to a penalty. Additionally, in the case of water rights being exempted,
2 severed, or divided, the failure of the parties to comply with section 85-2-424, MCA, could result in a penalty
3 against the transferee and rejection of the deed for recording.""

4
5 NEW SECTION. **Section 13. Repealer.** The following section of the Montana Code Annotated is
6 repealed:

7 85-2-363. Process for combining decisions on ground water permit applications in closed basins.

8 - END -