

**HOUSE BILL NO. 99**

INTRODUCED BY Z. BROWN

BY REQUEST OF THE WATER POLICY INTERIM COMMITTEE

4

5 A BILL FOR AN ACT ENTITLED: "AN ACT LIMITING ANALYSIS OF ADVERSE EFFECTS FOR CERTAIN  
6 WATER RIGHT APPLICATIONS; ALLOWING WATER RIGHT HOLDERS TO CONSENT TO APPROVAL OF  
7 CERTAIN WATER RIGHT APPLICATIONS; AMENDING SECTIONS 85-2-306, 85-2-311, 85-2-316, 85-2-319,  
8 85-2-320, 85-2-321, 85-2-360, 85-2-402, 85-2-407, 85-2-408, 85-2-410, AND 85-2-427, MCA; AND PROVIDING  
9 TERMINATION DATES."

10

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

12

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

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

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

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

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

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

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

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

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

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

10                  (iii) when the appropriation is outside a stream depletion zone, is 35 gallons a minute or less, and does  
11 not exceed 10 acre-feet a year, except that a combined appropriation from the same source by two or more wells  
12 or developed springs exceeding 10 acre-feet, regardless of the flow rate, requires a permit; or

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

16                  (b) (i) Within 60 days of completion of the well or developed spring and appropriation of the ground water  
17 for beneficial use, the appropriator shall file a notice of completion with the department on a form provided by the  
18 department through its offices.

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

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

26                  (c) A certificate of water right may not be issued until a correct and complete notice has been filed with  
27 the department, including proof of landowner notification or a written federal special use authorization as  
28 necessary under subsection (1). The original of the certificate must be sent to the appropriator. The department  
29 shall keep a copy of the certificate in its office in Helena. The date of filing of the notice of completion is the date  
30 of priority of the right.

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

7           (5) An appropriation under subsection (4) is an existing right, and a permit is not required. However, the  
8 department shall acknowledge the receipt of a correct and complete filing of a notice of completion, except that  
9 for an appropriation of 35 gallons a minute or less, not to exceed 10 acre-feet a year, the department shall issue  
10 a certificate of water right. If a certificate is issued under this section, a certificate need not be issued under the  
11 adjudication proceedings provided for in 85-2-236.

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

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

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

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

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

20           (7) (a) Within 60 days after constructing an impoundment or pit, the appropriator shall apply for a permit  
21 as prescribed by this part. Subject to subsection (7)(b), upon receipt of a correct and complete application for a  
22 stock water provisional permit, the department shall automatically issue a provisional permit. If the department  
23 determines after a hearing that the rights of other appropriators have been or will be adversely affected, it may  
24 revoke the permit or require the permittee to modify the impoundment or pit and may then make the permit  
25 subject to terms, conditions, restrictions, or limitations that it considers necessary to protect the rights of other  
26 appropriators. For purposes of an adverse effects determination under this subsection, the department may not  
27 consider adverse effects on any water right identified in a written consent to approval filed pursuant to 85-2-311.

28           (b) If the impoundment or pit is on national forest system lands, an application is not correct and  
29 complete under this section until the applicant has submitted proof of any written special use authorization  
30 required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion,

1 impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit.

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

4 (9) Pursuant to 85-20-1902, the provisions of this section do not apply within the exterior boundaries of  
5 the Flathead Indian reservation."

6

7 **Section 2.** 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. The  
30 applicant is not required to prove a lack of adverse effect for any water right identified in a written consent to

1       approval filed pursuant to subsection (9) in connection with a permit application.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2 made;

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

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

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

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

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

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

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

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

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

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

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

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

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

1      use of water.

2                (5) Subject to 85-2-360, to meet the preponderance of evidence standard in this section, the applicant,  
3      in addition to other evidence demonstrating that the criteria of subsection (1) have been met, shall submit  
4      hydrologic or other evidence, including but not limited to water supply data, field reports, and other information  
5      developed by the applicant, the department, the U.S. geological survey, or the U.S. natural resources  
6      conservation service and other specific field studies.

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

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

14               (8) For an application for ground water in a basin closed pursuant to 85-2-319, 85-2-321, 85-2-330,  
15     85-2-336, 85-2-341, 85-2-343, or 85-2-344, the applicant shall comply with the provisions of 85-2-360 in addition  
16     to the requirements of this section.

17               (9) The department may not conduct an adverse effects analysis on a water right holder  
18     files a written consent to approval of an application for a permit."

19

20               **Section 3.** Section 85-2-316, MCA, is amended to read:

21               "**85-2-316. State reservation of waters.** (1) The state, any political subdivision or agency of the state,  
22      or the United States or any agency of the United States may apply to the department to acquire a state water  
23      reservation for existing or future beneficial uses or to maintain a minimum flow, level, or quality of water  
24      throughout the year or at periods or for a length of time that the department designates.

25               (2) (a) Water may be reserved for existing or future beneficial uses in the basin where it is reserved, as  
26      described by the following basins:

27               (i) the Clark Fork River and its tributaries to its confluence with Lake Pend Oreille in Idaho;  
28               (ii) the Kootenai River and its tributaries to its confluence with Kootenay Lake in British Columbia;  
29               (iii) the St. Mary River and its tributaries to its confluence with the Oldman River in Alberta;  
30               (iv) the Little Missouri River and its tributaries to its confluence with Lake Sakakawea in North Dakota;

1               (v) the Missouri River and its tributaries to its confluence with the Yellowstone River in North Dakota; and  
2               (vi) the Yellowstone River and its tributaries to its confluence with the Missouri River in North Dakota.

3               (b) A state water reservation may be made for an existing or future beneficial use outside the basin  
4 where the diversion occurs only if stored water is not reasonably available for water leasing under 85-2-141 and  
5 the proposed use would occur in a basin designated in subsection (2)(a).

6               (3) (a) The department shall adopt rules that are necessary to determine whether or not an application  
7 is correct and complete based on the provisions applicable to issuance of a state water reservation. The rules  
8 must be adopted in compliance with Title 2, chapter 4.

9               (b) An applicant shall submit a correct and complete application. The determination of whether an  
10 application is correct and complete must be based on rules adopted under this subsection (3) that are in effect  
11 at the time the application is submitted. The department shall proceed in accordance with 85-2-302 with regard  
12 to any defects in the application.

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

15               (d) Upon receiving a correct and complete application, the department shall proceed in accordance with  
16 85-2-307 through 85-2-309. After the hearing provided for in 85-2-309, the department shall decide whether to  
17 reserve the water for the applicant. The department's costs of giving notice, holding the hearing, conducting  
18 investigations, and making records incurred in acting upon the application to reserve water, except the cost of  
19 salaries of the department's personnel, must be paid by the applicant. In addition, a reasonable proportion of the  
20 department's cost of preparing an environmental analysis must be paid by the applicant unless waived by the  
21 department upon a showing of good cause by the applicant.

22               (4) (a) Except as provided in 85-20-1401, the department shall issue a state water reservation if the  
23 applicant establishes to the department by a preponderance of evidence:

24               (i) the purpose of the reservation;

25               (ii) the need for the reservation;

26               (iii) the amount of water necessary for the purpose of the reservation;

27               (iv) that the reservation is in the public interest.

28               (b) In determining the public interest under subsection (4)(a)(iv), the department shall issue a water  
29 reservation for withdrawal and transport for use outside the state if the applicant proves by clear and convincing  
30 evidence that:

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

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

6                   (i) whether there are present or projected water shortages within the state of Montana;  
7                   (ii) whether the water that is the subject of the application could feasibly be transported to alleviate water  
8                   shortages within the state of Montana;  
9                   (iii) the supply and sources of water available to the applicant in the state where the applicant intends to  
10                  use the water; and

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

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

16                  (5) If the purpose of the state water reservation requires construction of a storage or diversion facility,  
17                  the applicant shall establish to the department by a preponderance of evidence that there will be progress toward  
18                  completion of the facility and accomplishment of the purpose with reasonable diligence in accordance with an  
19                  established plan.

20                  (6) (a) Upon issuing a state water reservation for the purpose of maintaining a minimum flow, level, or  
21                  quality of water, the appropriation of water is complete.

22                  (b) The department shall limit any state water reservations after May 9, 1979, for maintenance of  
23                  minimum flow, level, or quality of water that it awards at any point on a stream or river to a maximum of 50% of  
24                  the average annual flow of record on gauged streams. Ungauged streams are not subject to the limit under this  
25                  subsection (6)(b).

26                  (7) A state water reservation issued under this section has a priority of appropriation dating from the filing  
27                  of a correct and complete application with the department.

28                  (8) (a) A person desiring to use water reserved to a conservation district for agricultural purposes shall  
29                  make application for the use with the district, and the district, upon approval of the application, shall inform the  
30                  department of the approved use and issue the applicant an authorization for the use. The department shall

1 maintain records of all uses of water reserved to conservation districts and be responsible, when requested by  
2 the districts, for rendering technical and administrative assistance within the department's staffing and budgeting  
3 limitations in the preparation and processing of the applications for the conservation districts. The department  
4 shall, within its staffing and budgeting limitations, complete any feasibility study requested by the districts within  
5 12 months of the time that the request was made. The department shall extend the time allowed to develop a plan  
6 identifying projects for using a district's reservation as long as the conservation district makes a good faith effort,  
7 within its staffing and budget limitations, to develop a plan.

8 (b) Upon actual application of water to the proposed beneficial use, the authorized user shall notify the  
9 conservation district. The notification must contain a certified statement by a person with experience in the design,  
10 construction, or operation of project works for agricultural purposes describing how the reserved water was put  
11 to use. The department or the district may then inspect the appropriation to determine if it has been completed  
12 in substantial accordance with the authorization.

13 (9) A state water reservation issued under this section may not adversely affect any rights in existence  
14 at that time except for any water right for which a written consent to approval has been filed pursuant to 85-2-311  
15 in connection with the reservation. The department may issue a state water reservation subject to terms,  
16 conditions, restrictions, and limitations it considers necessary to satisfy the criteria of this section.

17 (10) (a) Except for a reservation provided in subsection (6) or a reservation provided in 85-20-1401, the  
18 department shall, at least once every 10 years, review existing state water reservations to ensure that the  
19 objectives of the reservations are being met.

20 (b) An existing state water reservation subject to the review in subsection (10)(a) that was not reviewed  
21 in the 10 years prior to April 23, 2015, must be reviewed by July 1, 2016. The department shall provide the water  
22 policy interim committee, established in 5-5-231, a summary of the reviews before September 15, 2016.

23 (c) Following a review pursuant to this subsection (10), at the request of the entity holding a water  
24 reservation or when the objectives of a state water reservation are not being met, the department may:

25 (i) extend the time period to complete the appropriation of water;  
26 (ii) modify the reservation; or  
27 (iii) revoke the reservation.

28 (d) Any undeveloped water made available as a result of a revocation or modification under this  
29 subsection (10) is available for appropriation by others pursuant to this part.

30 (11) Except as provided in 85-20-1401, the department may modify an existing or future order originally

1 adopted to reserve water for the purpose of maintaining minimum flow, level, or quality of water, so as to  
2 reallocate the state water reservation or portion of the reservation to an applicant who is a qualified reservant  
3 under this section. Reallocation of water reserved pursuant to a state water reservation may be made by the  
4 department following notice and hearing if the department finds that all or part of the reservation is not required  
5 for its purpose and that the need for the reallocation has been shown by the applicant to outweigh the need  
6 shown by the original reservant. Reallocation of reserved water may not adversely affect the priority date of the  
7 reservation, and the reservation retains its priority date despite reallocation to a different entity for a different use.  
8 The department may not reallocate water reserved under this section on any stream or river more frequently than  
9 once every 5 years.

10 (12) A reservant may not make a change in a state water reservation under this section, except as  
11 permitted under 85-2-402 and this subsection. If the department approves a change, the department shall give  
12 notice and require the reservant to establish that the criteria in subsection (4) will be met under the approved  
13 change.

14 (13) A state water reservation may be transferred to another entity qualified to hold a reservation under  
15 subsection (1). Only the entity holding the reservation may initiate a transfer. The transfer occurs upon the filing  
16 of a water right ownership update form with the department, together with an affidavit from the entity receiving  
17 the reservation establishing that the entity is a qualified reservant under subsection (1), that the entity agrees to  
18 comply with the requirements of this section and the conditions of the reservation, and that the entity can meet  
19 the objectives of the reservation as granted. If the transfer of a state water reservation involves a change in an  
20 appropriation right, the necessary approvals must be acquired pursuant to subsection (12).

21 (14) This section does not vest the department with the authority to alter a water right that is not a state  
22 water reservation.

23 (15) The department shall undertake a program to educate the public, other state agencies, and political  
24 subdivisions of the state as to the benefits of the state water reservation process and the procedures to be  
25 followed to secure the reservation of water. The department shall provide technical assistance to other state  
26 agencies and political subdivisions in applying for reservations under this section.

27 (16) Water reserved under this section is not subject to the state water leasing program established under  
28 85-2-141."

29

30 **Section 4.** Section 85-2-319, MCA, is amended to read:

1       **"85-2-319. Permit action in highly appropriated basins or subbasins.** (1) With regard to a highly  
2 appropriated basin or subbasin, except as provided in 85-20-1401, the legislature may by law preclude permit  
3 applications or the department may by rule reject permit applications or modify or condition permits already  
4 issued.

5           (2) A rule may be adopted under this section only upon a petition that is signed by at least 25% or 10,  
6 whichever is less, of the users of water in the source of supply within a basin or subbasin or upon petition of the  
7 department of environmental quality that alleges facts under subsection (2)(d). The petition must be in a form  
8 prescribed by the department and must allege facts showing that throughout or at certain times of the year or for  
9 certain beneficial uses:

10           (a) there are no unappropriated waters in the source of supply;

11           (b) the rights of a prior appropriator appropriator will be adversely affected unless the prior appropriator  
12 has filed a written consent to approval pursuant to 85-2-311 in connection with the permit application;

13           (c) further uses will interfere unreasonably with other planned uses or developments for which a permit  
14 has been issued or for which water has been reserved; or

15           (d) in the case of a petition filed by the department of environmental quality:

16              (i) the water quality of an appropriator will be adversely affected by the issuance of permits;

17              (ii) further use will not be substantially in accordance with the classification of water set for the source  
18 of supply pursuant to 75-5-301(1); or

19              (iii) the ability of a discharge permitholder to satisfy effluent limitations of a permit issued in accordance  
20 with Title 75, chapter 5, part 4, will be adversely affected by the issuance of permits.

21           (3) Within 60 days after submission of a petition, the department shall:

22              (a) deny the petition in writing, stating its reasons for denial;

23              (b) inform the petitioners that the department shall study the allegations further before denying or  
24 proceeding further with the petition; or

25              (c) initiate rulemaking proceedings in accordance with 2-4-302 through 2-4-305.

26           (4) Title 2, chapter 4, parts 1 through 4, govern rulemaking proceedings conducted under this section,  
27 except that in addition to the notice requirements of those parts, the department notice of the rulemaking hearing  
28 must be published at least once in each week for 3 successive weeks, not less than 30 days before the date of  
29 the hearing, in a newspaper of general circulation in the county or counties in which the source is located. The  
30 department shall serve by mail a copy of the notice, not less than 30 days before the hearing, upon each person

1 or public agency known from the examination of the records of the department to be a claimant, appropriator, or  
2 permitholder of water in the source.

3 (5) The department may adopt rules to implement the provisions of this section."

4

5 **Section 5.** Section 85-2-320, MCA, is amended to read:

6 **"85-2-320. Change in appropriation right authorization for instream flow -- United States**  
7 **department of agriculture, forest service.** (1) (a) The department shall accept and process an application by  
8 the United States department of agriculture, forest service for a change in appropriation right under the provisions  
9 of 85-2-402 and this section to protect, maintain, or enhance streamflows to benefit the fishery or other resources  
10 on national forest system lands.

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

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

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

22 (2) In addition to the requirements of 85-2-402, when applying for a change in appropriation right  
23 pursuant to this section, the United States department of agriculture, forest service, shall prove by a  
24 preponderance of the evidence that:

25 (a) the change in appropriation right authorization to protect, maintain, or enhance streamflows to benefit  
26 the fishery or other resources, as measured at a specific point, will not adversely affect the water rights of other  
27 persons, except for a water right identified in a written consent to approval filed pursuant to 85-2-402 in  
28 connection with the change in appropriation right; and

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

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

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

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

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

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

15          (8) The department may modify or revoke the change in appropriation right up to 10 years after it is  
16 approved if an appropriator with a priority of appropriation that is earlier than the change in appropriation right  
17 that was granted submits new evidence that was not available at the time the change in appropriation right was  
18 approved that proves by a preponderance of evidence that the prior appropriator's water right is adversely  
19 affected, unless the prior appropriator has filed a written consent to approval pursuant to 85-2-402 in connection  
20 with the change."

21  
22          **Section 6.** Section 85-2-321, MCA, is amended to read:

23          **"85-2-321. Milk River basin -- suspension of action on permits -- proposal -- priority in**  
24 **adjudication process.** (1) (a) In order to balance the need for the continued development of Montana's water  
25 and for protection of existing rights in the Milk River basin, the department may suspend action on a class of  
26 applications or may close a source in the basin and refuse to accept a class of applications, or both, for a permit  
27 under this part to appropriate from that source in the basin.

28          (b) Suspension or closure, or both, may only be proposed by the department.

29          (c) The proposal must state the source in the basin and class of applications for which suspension or  
30 closure, or both, is being proposed and any of the following allegations:

1           (i) that the frequency of occurrence of unappropriated waters is such that:

2           (A) any new appropriation from the source for the class of applications will adversely affect the rights of  
3 a prior appropriation from the source, unless the prior appropriator has filed a written consent to approval  
4 pursuant to 85-2-311 in connection with the new appropriation application; or

5           (B) any new appropriation from the source for the class of applications will interfere unreasonably with  
6 another planned use or development for which a permit has been given or for which water has been reserved  
7 pursuant to this part in the source; or

8           (ii) that significant disputes or enforcement problems regarding priority of rights or amounts or duration  
9 of water in use by appropriators are in progress or will arise.

10          (2) After April 8, 1985, the chief water judge shall make issuance of a temporary preliminary decree in  
11 the Milk River basin the highest priority in the adjudication of existing water rights pursuant to Title 85, chapter  
12 2, part 2."

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

15          **"85-2-360. Ground water appropriation right in closed basins.** (1) An application for a ground water  
16 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,  
17 or 85-2-344 must be accompanied by a hydrogeologic report conducted pursuant to 85-2-361, an aquifer  
18 recharge or mitigation plan if required, and an application for a change in appropriation right or rights if necessary.

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

21          (3) (a) For the purposes of 85-2-360 through 85-2-362, the prediction of net depletion does not mean  
22 that an adverse effect on a prior appropriator will occur or if an adverse effect does occur that the entire amount  
23 of net depletion is the cause of the adverse effect. A determination of whether or not there is an adverse effect  
24 on a prior appropriator as the result of a new appropriation right is a determination that must be made by the  
25 department based on the rate, location, and timing of the net depletion that causes the adverse effect relative to  
26 the historic beneficial use of the appropriation right that may be adversely affected.

27          (b) The department may not consider an adverse effect caused by the grant of an application pursuant  
28 to this section on any water right listed on a written consent to approval filed pursuant to 85-2-311.

29          (b)(c) The department may grant a permit for a new appropriation only if the applicant proves by a  
30 preponderance of the evidence that the adverse effect would be offset through an aquifer recharge or mitigation

1 plan that meets the requirements of 85-2-362."

2

3       **Section 8.** Section 85-2-402, MCA, is amended to read:

4       **"85-2-402. Changes in appropriation rights -- definition.** (1) (a) The right to make a change in  
5 appropriation right subject to the provisions of this section in an existing water right, a permit, or a state water  
6 reservation is recognized and confirmed. In a change in appropriation right proceeding under this section, there  
7 is no presumption that an applicant for a change in appropriation right cannot establish lack of adverse effect prior  
8 to the adjudication of other rights in the source of supply pursuant to this chapter. Except as provided in 85-2-410  
9 and subsections (15) and (16) of this section, an appropriator may not make a change in an appropriation right  
10 without the approval of the department or, if applicable, of the legislature. An applicant shall submit a correct and  
11 complete application.

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

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

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

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

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

- 27           (i) a change in appropriation right for instream flow pursuant to 85-2-320 or 85-2-436;  
28           (ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or  
29           (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.  
30       (c) The proposed use of water is a beneficial use.

1                 (d) The applicant has a possessory interest, or the written consent of the person with the possessory  
2 interest, in the property where the water is to be put to beneficial use or, if the proposed change involves a point  
3 of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special  
4 use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose  
5 of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water. This subsection (2)(d)  
6 does not apply to:  
7                     (i) a change in appropriation right for instream flow pursuant to 85-2-320 or 85-2-436;  
8                     (ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or  
9                     (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.  
10                 (e) If the change in appropriation right involves salvaged water, the proposed water-saving methods will  
11 salvage at least the amount of water asserted by the applicant.  
12                 (f) The water quality of an appropriator will not be adversely affected.  
13                 (g) The ability of a discharge permitholder to satisfy effluent limitations of a permit issued in accordance  
14 with Title 75, chapter 5, part 4, will not be adversely affected.  
15                 (3) The applicant is required to prove that the criteria in subsections (2)(f) and (2)(g) have been met only  
16 if a valid objection is filed. A valid objection must contain substantial credible information establishing to the  
17 satisfaction of the department that the criteria in subsection (2)(f) or (2)(g), as applicable, may not be met.  
18                 (4) The department may not approve a change in purpose of use or place of use of an appropriation of  
19 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water unless the appropriator  
20 proves by a preponderance of evidence that:  
21                     (a) the criteria in subsection (2) are met; and  
22                     (b) the proposed change in appropriation right is a reasonable use. A finding of reasonable use must  
23 be based on a consideration of:  
24                     (i) the existing demands on the state water supply, as well as projected demands for water for future  
25 beneficial purposes, including municipal water supplies, irrigation systems, and minimum streamflows for the  
26 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 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               (5) The department may not approve a change in purpose of use or place of use for a diversion that

5 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

6 unless:

7               (a) the applicant proves by clear and convincing evidence and the department finds that the criteria in

8 subsections (2) and (4) are met; and

9               (b) for the withdrawal and transportation of appropriated water for out-of-state use, the department then

10 petitions the legislature and the legislature affirms the decision of the department after one or more public

11 hearings.

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

13 necessity to maintain adequate water supplies for the state's water requirements, including requirements for

14 federal non-Indian and Indian reserved water rights held by the United States for federal reserved lands and in

15 trust for the various Indian tribes within the state's boundaries. Although the state of Montana also recognizes

16 that, under appropriate conditions, the out-of-state transportation and use of its public waters are not in conflict

17 with the public welfare of its citizens or the conservation of its waters, the following criteria must be met before

18 out-of-state use may occur:

19               (a) The department and, if applicable, the legislature may not approve a change in appropriation right

20 for the withdrawal and transportation of appropriated water for use outside the state unless the appropriator

21 proves by clear and convincing evidence and, if applicable, the legislature approves after one or more public

22 hearings that:

23               (i) depending on the volume of water diverted or consumed, the applicable criteria and procedures of

24 subsection (2) or (4) are met;

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

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

27 of Montana.

28               (b) In determining whether the appropriator has proved by clear and convincing evidence that the

29 requirements of subsections (6)(a)(ii) and (6)(a)(iii) will be met, the department and, if applicable, the legislature

30 shall consider the following factors:

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

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

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

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

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

11          (7) For any application for a change in appropriation right involving 4,000 or more acre-feet of water a  
12 year and 5.5 or more cubic feet per second of water, the department shall give notice of the proposed change  
13 in appropriation right in accordance with 85-2-307 and shall hold one or more hearings in accordance with  
14 85-2-309 prior to its approval or denial of the proposed change in appropriation right. The department shall  
15 provide notice and may hold one or more hearings upon any other proposed change in appropriation right if it  
16 determines that the proposed change in appropriation right might adversely affect the rights of other persons,  
17 except for any right for which a written consent to approval has been filed pursuant to subsection (19) in  
18 connection with the application.

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

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

28          (10) If a change in appropriation right is not completed as approved by the department or legislature or  
29 if the terms, conditions, restrictions, and limitations of the change in appropriation right approval are not complied  
30 with, the department may, after notice and opportunity for hearing, require the appropriator to show cause why

1 the change in appropriation right approval should not be modified or revoked. If the appropriator fails to show  
2 sufficient cause, the department may modify or revoke the change in appropriation right approval.

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

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

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

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

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

15 (i) the appropriation right is for:

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

17 (B) ground water inside the boundaries of a controlled ground water area and if the provisions of the rule  
18 establishing the controlled ground water area do not restrict a change in appropriation right;

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

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

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

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

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

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

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

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

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

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

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

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

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

17               (c) The provisions of this subsection (15) do not apply to an appropriation right abandoned under  
18 85-2-404.

19               (d) For each well that is replaced under this subsection (15), the appropriator shall follow the well  
20 abandonment procedures, standards, and rules adopted by the board of water well contractors pursuant to  
21 37-43-202.

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

24               (16) (a) An appropriator may change an appropriation right without the prior approval of the department  
25 for the purpose of constructing a redundant water supply well in a public water supply system, as defined in  
26 75-6-102, if the redundant water supply well:

27               (i) withdraws water from the same ground water source as the original well; and  
28               (ii) is required by a state or federal agency.

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

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

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

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

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

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

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

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

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

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

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

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

26                   (viii) the appropriator can show the change will not increase access to water availability, change the  
27 method of irrigation, if applicable, or increase the amount of water diverted, used, or consumed; and

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

30                  (b) (i) Within 60 days after completion of a replacement point of diversion, the appropriator shall file a

1 notice of replacement point of diversion with the department on a form provided by the department.

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

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

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

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

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

19           (c) The provisions of this subsection (18) do not apply to an appropriation right abandoned under  
20 85-2-404.

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

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

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

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

3                   (19) The department may not conduct an adverse effects analysis on a water right if the water right holder  
4 files a written consent to approval of an application for a change in appropriation right."

5

6                   **Section 9.** Section 85-2-407, MCA, is amended to read:

7                   **"85-2-407. Temporary changes in appropriation right.** (1) Except as provided in 85-2-410, an  
8 appropriator may not make a temporary change in appropriation right for the appropriator's use or another's use  
9 except with department approval in accordance with 85-2-402 and this section.

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

13                  (3) An authorization for a temporary change in appropriation right may be renewed by the department  
14 for a period not to exceed 10 years. There is no limitation on the number of renewals the appropriator may seek.  
15 Renewal of an authorization for a temporary change in appropriation right requires notice to the department by  
16 the appropriator. Upon receipt of the notice, the department shall notify other appropriators potentially affected  
17 by the renewal and shall allow 90 days for submission of new evidence of adverse effects to other water rights.  
18 A temporary change authorization may not be renewed by the department if it determines that the right of an  
19 appropriator, ~~other than an appropriator described in subsection (7)~~, is adversely affected, except for an  
20 appropriator described in subsection (7) or a right identified in a written consent to approval filed pursuant to  
21 85-2-402 in connection with a temporary change.

22                  (4) (a) During the term of the original temporary change authorization, the department may modify or  
23 revoke its authorization for a temporary change if it determines that the right of an appropriator, ~~other than an~~  
24 ~~appropriator described in subsection (7)~~, is adversely affected, except for an appropriator described in subsection  
25 (7) or a right identified in a written consent to approval filed pursuant to 85-2-402 in connection with a temporary  
26 change.

27                  (b) An appropriator, other than an appropriator identified in subsection (7), may object:  
28                    (i) during the initial temporary change application process;  
29                    (ii) during the temporary change renewal process; and  
30                    (iii) once during the term of the temporary change permit.

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

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

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

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

15               (9) If the quantity of water that is subject to a temporary change in appropriation right is made available  
16 from the development of a new water conservation or storage project, a temporary change in appropriation right  
17 may be approved for a period not to exceed 30 years unless a renewal is obtained pursuant to subsection (3)."

18

19               **Section 10.** Section 85-2-408, MCA, is amended to read:

20               **"85-2-408. Temporary change authorization for instream flow -- additional requirements.** (1) The  
21 department shall accept and process an application for a temporary change in appropriation rights to maintain  
22 or enhance instream flow to benefit the fishery resource under the provisions of 85-2-402, 85-2-407, and this  
23 section. The application must:

24               (a) include specific information on the length and location of the stream reach in which the streamflow  
25 is to be maintained or enhanced; and

26               (b) provide a detailed streamflow measuring plan that describes the point where and the manner in which  
27 the streamflow must be measured.

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

30               (i) change the purpose of a consumptive use water right to instream flow for the benefit of the fishery

1 resource; or

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

3 (b) For the purpose of this subsection (2), "person" means and is limited to an individual, association,  
4 partnership, or corporation.

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

7 (a) the temporary change authorization for water to maintain and enhance instream flow to benefit the  
8 fishery resource, as measured at a specific point, will not adversely affect the water rights of other persons; and  
9 (b) the amount of water for the proposed use is needed to maintain or enhance instream flows to benefit  
10 the fishery resource.

11 (4) The applicant is not required to prove a lack of adverse effect for any water right identified in a written  
12 consent to approval filed pursuant to 85-2-402 in connection with a change application.

13 ~~(4)~~(5) The department shall approve the method of measurement of the water to maintain and enhance  
14 instream flow to benefit the fishery resource through a temporary change authorization as provided in this section.

15 ~~(5)~~(6) Only the owner of the water right may seek enforcement of the temporary change authorization  
16 or object under 85-2-308.

17 ~~(6)~~(7) A temporary change authorization under this section does not create a right of access across  
18 private property or allow any infringement of private property rights.

19 ~~(7)~~(8) The maximum quantity of water that may be changed to maintain and enhance streamflows to  
20 benefit the fishery resource is the amount historically diverted. However, only the amount historically consumed,  
21 or a smaller amount if specified by the department in the lease authorization, may be used to maintain or enhance  
22 streamflows to benefit the fishery resource below the existing point of diversion."

23

24 **Section 11.** Section 85-2-410, MCA, is amended to read:

25 **"85-2-410. Short-term lease of appropriation right.** (1) An appropriator may lease for a term not to  
26 exceed 90 days all or part of an appropriation right for road construction or dust abatement without the prior  
27 approval of the department, subject to the requirements of this section. The lease agreement must include the  
28 following information:

29 (a) the name and address of the lessee;

30 (b) the name of the owner of the appropriation right;

- (c) the number of the appropriation right;
  - (d) the purpose of use of water for which the lease is being made;
  - (e) the source of water to be appropriated;
  - (f) the starting and ending date of the proposed use of water;
  - (g) the proposed point of diversion;
  - (h) the proposed place of use;
  - (i) the diversion flow rate and volume of water to be used during the period of use; and
  - (j) a description of how the existing use of water will be reduced to accommodate the temporary change of the appropriation right, including the number and location of acres to be removed from irrigation, if applicable.

(2) A short-term lease of an appropriation right under this section may not exceed 60,000 gallons a day or the amount of the appropriation right, whichever is less. Any combination of short-term leases cannot exceed 120,000 gallons a day for one project.

(3) Except as provided in subsection (9), the following information must be submitted to the department at least 2 days prior to the use of water by a lessee under this section:

- (a) a copy of the publication notice or copies of the individual notice required under subsection (4);
  - (b) a copy of the lease agreement; and
  - (c) for a combination of short-term leases greater than 60,000 gallons a day for one project, an analysis of lessee of any potential adverse effects and a description of planned actions to mitigate any potential effects to appropriators in the area of the proposed point of diversion.

(4) Except as provided in subsection (9), the lessee of an appropriation right under this section shall, 30 days prior to the use of the water, publish a notice of the proposed use of water once in a newspaper of general circulation in the area of the diversion or mail individual notice to potentially affected appropriators in the area of the proposed point of diversion. The published notice or the individual notice must contain the information listed in subsections (1)(a) through (1)(i) and (3)(c).

(5) (a) The owner of a water right, whether the right is prior or subsequent in priority to the short-term lease acquired by a person under this section, who cannot satisfy in full the owner's right during the time that the short-term lessee is diverting water may make a complaint to the department and cause the short-term lessee's diversion to be discontinued.

(b) The diversion is discontinued until the owner's right is satisfied or until the lessee establishes to the

1 department that the discontinuance has had no effect on the owner's water right. Upon establishment that  
2 discontinuance has not had an effect, the department shall enter an order allowing the diversion to continue.

3 (6) If a person purposely, with malicious intent, causes the discontinuance of a short-term diversion  
4 through the complaint process provided in subsection (5)(a) and the complaint is found to be invalid and frivolous,  
5 the person is, upon conviction, guilty of a misdemeanor and shall be fined in an amount not to exceed \$500.

6 (7) This section does not limit the remedies available to an appropriator to enjoin or to seek damages  
7 from a person appropriating water under this section.

8 (8) A civil action instituted to enjoin or seek damages from a person appropriating water pursuant to this  
9 section must be commenced against the lessee. The lessor is not a necessary party to a civil action. The lessee  
10 has the burden of establishing that the lessee's use does not have an adverse effect on a prior appropriator of  
11 water. The lessee is not required to prove a lack of adverse effect on any water right identified on a written  
12 consent to approval filed pursuant to 85-2-402.

13 (9) (a) A local government entity, as defined in 7-6-602, is not subject to the requirements of subsections  
14 (3)(a) and (4) when conducting dust abatement that was not scheduled or contracted for 30 days or more prior  
15 to the use of the water.

16 (b) A local government entity that does not publish notice as provided in subsection (4) shall post a copy  
17 of the lease agreement at the point of diversion at least 24 hours prior to and during the time that water is  
18 diverted."

19

20 **Section 12.** Section 85-2-427, MCA, is amended to read:

21 **"85-2-427. (Temporary) Temporary lease of appropriation right -- requirements -- rulemaking.** (1)  
22 Applications to temporarily lease an appropriation right that comply with the requirements of this section are not  
23 subject to the provisions of 85-2-402, 85-2-407, 85-2-408, or 85-2-436. After obtaining department approval  
24 pursuant to this section, an appropriator may temporarily lease an appropriation right.

25 (2) The amount of water leased may not exceed the total consumptive use of the appropriation right. For  
26 an irrigation right, the consumptive volume may not exceed 1 acre-foot per acre irrigated. The department shall  
27 determine the consumptive volume limits for other uses by rule.

28 (3) (a) Each appropriation right leased pursuant to this section:

29 (i) must have been used within 5 years prior to the application date;

30 (ii) may be leased only during the period of diversion for the appropriation right; and

1                   (iii) may not be leased for more than 2 years one time during any consecutive 10-year period.

2                   (b) The volume of water leased may not exceed 180 acre-feet per year.

3                   (c) The point of diversion for the appropriation right may not be changed.

4                   (4) The use of any appropriation rights on the place of use associated with a leased appropriation right  
5 is forbidden during the term of the lease.

6                   (5) Storage may not be added to the leased appropriation right at the point of diversion or the original  
7 place of use.

8                   (6) This section does not apply to changes in an appropriation right that would result in leased water  
9 being transported outside Montana. Proposed out-of-state uses are subject to the provisions of 85-2-402.

10                  (7) Water leased pursuant to this section must be measured at the point of diversion by a meter  
11 approved by the department. The appropriator shall report the amount of water measured at the end of the year  
12 in which the lease occurred or upon request of the department.

13                  (8) An applicant proposing to lease an appropriation right pursuant to this section shall submit a correct  
14 and complete application on a form provided by the department and a fee as established by rule. The application  
15 must include:

16                  (a) the name and address of each lessee;

17                  (b) the name of all owners of each appropriation right;

18                  (c) the number of each appropriation right;

19                  (d) the proposed use and the place of use for the leased water;

20                  (e) the source of water to be appropriated;

21                  (f) the start and end dates of the proposed lease;

22                  (g) the proposed diversion flow rate and volume of water to be used during the lease;

23                  (h) evidence that the appropriation right has been used within the last 5 years;

24                  (i) a description of how the existing use of the appropriation rights would cease at the place of use during  
25 the lease period, including the number and location of acres to be removed from irrigation, if applicable; and

26                  (j) an analysis of potential adverse effects and a description of planned actions to mitigate potential  
27 adverse effects.

28                  (9) The applicant is not required to prove a lack of adverse effect on any water right identified in a written  
29 consent to approval filed pursuant to 85-2-402 in connection with a change application.

30                  (9)(10) Within 30 days of receiving the application, the department shall approve or deny the application.

1 An approved application must be correct and complete and meet the requirements of this section. The  
2 department may approve an application with conditions.

3 ~~(10)~~(11) After approval, the department shall provide notice of the proposed lease that includes the  
4 information in subsections (8)(a) through (8)(g). The department shall:

5 (a) mail individual notice to potentially affected appropriators identified by the department in the area of  
6 the point of diversion; and

7 (b) post the notice on the department's website.

8 ~~(11)~~(12) (a) For 60 days from the date that notice is mailed pursuant to subsection ~~(10)~~ (11), the  
9 department shall accept correct and complete objections to the proposed lease from any person whose property,  
10 water rights, or interests would be adversely affected by the proposed appropriation. The objection must be made  
11 on a form provided by the department.

12 (b) The department shall determine if an objection is valid. A valid objection contains facts indicating that  
13 the rights of other appropriators would be adversely affected by the lease of the appropriation right. If the  
14 department determines that an objection is valid, the approval for the use of the appropriation right under the  
15 lease is canceled and no water may be used pursuant to the lease.

16 (c) The owner of an appropriation right whose approval is canceled under subsection ~~(11)(b)~~(12)(b) may  
17 request a hearing on the objection pursuant to 2-4-604 within 15 days of notice of the cancellation. The  
18 department shall issue an order reinstating approval for the use of the appropriation right under the lease if the  
19 applicant proves by a preponderance of the evidence that the water rights of other appropriators will not be  
20 adversely affected by the lease.

21 ~~(12)~~(13) Leased water may not be put to use until a final determination is made pursuant to subsection  
22 ~~(11)~~(12). The lessee shall provide the department with a copy of the executed lease agreement before the leased  
23 water is put to use.

24 ~~(13)~~(14) Violations of this section are subject to the provisions of 85-2-114 and 85-2-122. This subsection  
25 does not limit the remedies available to an appropriator to enjoin or seek damages from the owner of an  
26 appropriation right who leased the water or from a lessee.

27 ~~(14)~~(15) The department shall adopt rules to implement this section. The rules must include definitions  
28 of consumptive uses and criteria for determining if an appropriation right has been used in the 5 years prior to  
29 the temporary lease application.

30 ~~(15)~~(16) The department shall report annually to the water policy interim committee provided for in

1    5-5-231. The report must include the number of leases, the amount of water leased, and the number of irrigated  
2    acres taken out of production.

3                ~~(16)~~<sup>(17)</sup> Pursuant to 85-20-1902, the provisions of this section do not apply within the exterior boundaries  
4    of the Flathead Indian reservation. (Terminates July 1, 2019--sec. 4, Ch. 236, L. 2013.)"

5

6                **NEW SECTION. Section 13. Termination.** (1) Except as provided in subsection (2), [this act]  
7    terminates September 30, 2023.

8                (2) [Section 12] terminates July 1, 2019.

9

- END -