

1 HOUSE BILL NO. 924
2 INTRODUCED BY M. REGIER, S. GUNDERSON
3
4 A BILL FOR AN ACT ENTITLED: "AN ACT PROHIBITING THE TRANSFER OR LEASE OF WATER RIGHTS
5 OUT OF STATE UNTIL 2048; ESTABLISHING A FEE; AMENDING SECTIONS 85-1-101, 85-2-141, 85-2-301,
6 85-2-311, 85-2-316, 85-2-402, AND 85-2-403, MCA; PROVIDING FOR CONTINGENT VOIDNESS; AND
7 PROVIDING EFFECTIVE DATES, AN APPLICABILITY DATE, AND A TERMINATION DATE."
8

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

10
11 **Section 1.** Section 85-1-101, MCA, is amended to read:

12 **"85-1-101. Policy considerations.** It is hereby declared as follows:

13 (1) The general welfare of the people of Montana, in view of the state's population growth and
14 expanding economy, requires that water resources of the state be put to optimum beneficial use and not
15 wasted.

16 (2) The public policy of the state is to promote the conservation, development, and beneficial use
17 of the state's water resources to secure maximum economic and social prosperity for its citizens.

18 (3) The state, in the exercise of its sovereign power, acting through the department of natural
19 resources and conservation, shall coordinate the development and use of the water resources of the state so
20 as to effect full utilization, conservation, and protection of its water resources.

21 (4) The development and utilization of water resources and the efficient, economic distribution
22 thereof are vital to the people in order to protect existing uses and to assure adequate future supplies for
23 domestic, industrial, agricultural, and other beneficial uses.

24 (5) The water resources of the state must be protected and conserved to assure adequate
25 supplies for public recreational purposes and for the conservation of wildlife and aquatic life.

26 (6) The public interest requires the construction, operation, and maintenance of a system of works
27 for the conservation, development, storage, distribution, and utilization of water, which construction, operation,
28 and maintenance is a single object and is in all respects for the welfare and benefit of the people of the state.

1 (7) It is necessary to coordinate local, state, and federal water resource development and
2 utilization plans and projects through a single agency of state government, the department of natural resources
3 and conservation.

4 (8) The greatest economic benefit to the people of Montana can be secured only by the sound
5 coordination of development and utilization of water resources with the development and utilization of all other
6 resources of the state.

7 (9) Any attempt to gain control of or speculate on large quantities of ground-water of the state of
8 Montana is not in the interest of the people and is to be restricted. The right to use water may not be sold,
9 leased, or transferred out of state until January 1, 2048. After the expiration of this moratorium, the department
10 shall promptly develop an administrative process to accept applications for proposals to transfer water out of
11 state and evaluate the applicant's compliance with [this act].

12 (10) To achieve these objectives and to protect the waters of Montana from diversion to other areas
13 of the nation, it is essential that a comprehensive, coordinated multiple-use water resource plan be
14 progressively formulated, to be known as the "state water plan".

15

16 **Section 2.** Section 85-1-101, MCA, is amended to read:

17 **"85-1-101. Policy considerations.** It is hereby declared as follows:

18 (1) The general welfare of the people of Montana, in view of the state's population growth and
19 expanding economy, requires that water resources of the state be put to optimum beneficial use and not
20 wasted.

21 (2) The public policy of the state is to promote the conservation, development, and beneficial use
22 of the state's water resources to secure maximum economic and social prosperity for its citizens.

23 (3) The state, in the exercise of its sovereign power, acting through the department of natural
24 resources and conservation, shall coordinate the development and use of the water resources of the state so
25 as to effect full utilization, conservation, and protection of its water resources.

26 (4) The development and utilization of water resources and the efficient, economic distribution
27 thereof are vital to the people in order to protect existing uses and to assure adequate future supplies for
28 domestic, industrial, agricultural, and other beneficial uses.

1 (5) The water resources of the state must be protected and conserved to assure adequate
2 supplies for public recreational purposes and for the conservation of wildlife and aquatic life.

3 (6) The public interest requires the construction, operation, and maintenance of a system of works
4 for the conservation, development, storage, distribution, and utilization of water, which construction, operation,
5 and maintenance is a single object and is in all respects for the welfare and benefit of the people of the state.

6 (7) It is necessary to coordinate local, state, and federal water resource development and
7 utilization plans and projects through a single agency of state government, the department of natural resources
8 and conservation.

9 (8) The greatest economic benefit to the people of Montana can be secured only by the sound
10 coordination of development and utilization of water resources with the development and utilization of all other
11 resources of the state.

12 (9) Any attempt to gain control of or speculate on large quantities of ground-water of the state of
13 Montana is not in the interest of the people and is to be restricted. Beginning January 1, 2048, the department
14 shall promptly develop an administrative process to accept applications for proposals to transfer water out of
15 state and evaluate the applicant's compliance with [this act].

16 (10) To achieve these objectives and to protect the waters of Montana from diversion to other areas
17 of the nation, it is essential that a comprehensive, coordinated multiple-use water resource plan be
18 progressively formulated, to be known as the "state water plan".

19
20 **Section 3.** Section 85-2-141, MCA, is amended to read:

21 **"85-2-141. Water leasing program.** (1) There is a water leasing program administered by the
22 department on behalf of the state of Montana.

23 (2) The department may acquire rights to water needed for leasing under this program:

24 (a) through appropriation of water in its own name;

25 (b) by agreement with or purchase from another holder of water rights; or

26 (c) by contract with the United States for water held in federal reservoirs as a means of protecting
27 the state's interest in those waters.

28 (3) Water for leasing under the water leasing program must be obtained from the following

1 sources:

2 (a) any existing or future reservoir in a basin concerning which a temporary preliminary decree, a
3 preliminary decree under 85-2-231, or a final decree under 85-2-234 has been entered;

4 (b) Fort Peck, Tiber, Canyon Ferry, Hungry Horse, Koocanusa, or Yellowtail reservoir if a contract
5 between the department and the federal government concerning the acquisition of water is in effect; and

6 (c) any other existing or future federal reservoir:

7 (i) located in a basin concerning which a temporary preliminary decree, a preliminary decree
8 under 85-2-231, or a final decree under 85-2-234 has been entered; and

9 (ii) for which and for so long as there is a contract between the department and the federal
10 government concerning the acquisition of water.

11 (4) ~~(a) Subject to subsections (4)(b) and (4)(c), the~~ The department may lease up to 1 million
12 acre-feet of water from the reservoirs identified in subsection (3)(b) to water users for beneficial uses in
13 Montana.

14 ~~(b) The department may lease up to 50,000 acre feet of water from the reservoirs identified in~~
15 ~~subsection (3)(b) to water users for beneficial uses outside Montana.~~

16 ~~(c) The total amount of water leased under this subsection (4) may not exceed 1 million acre feet.~~

17 (5) The term of any lease may not exceed 50 years. A term may be extended up to another 50
18 years if the department again determines the desirability of leasing by applying the considerations in subsection
19 (7). In making a redetermination, the department may require the completion of an environmental impact
20 statement in accordance with subsection (6).

21 (6) The department shall require the completion of an environmental impact statement under the
22 provisions of Title 75, chapter 1, for lease applications that would result in the consumption of 4,000 acre-feet a
23 year or more and 5.5 cubic feet per second or more of water and for any other application for which an
24 environmental impact statement is required by law. The department shall require the completion of an
25 environmental impact statement whenever the cumulative effect of more than one application for a lease would
26 constitute a probable significant environmental impact.

27 (7) Upon application by a person to lease water, the department shall make an initial determination
28 of whether it is desirable for the department to lease water to the applicant. The determination of desirability

1 must be made solely on the following considerations:

2 (a) the content of the environmental impact statement, if required;

3 (b) whether there is sufficient water available under the water leasing program; and

4 (c) whether the criteria, except as to legislative approval, set forth in 85-2-311 have been satisfied.

5 (8) The department shall for any lease agreement require commercially reasonable terms and

6 conditions, which may include the requirement that up to 25% of the water to be leased be made available to a

7 potential user for any beneficial use upon payment by the user of the costs of tapping into and removing water

8 from the applicant's project. The department may differentiate in pricing, depending on the proposed beneficial

9 use of the water.

10 (9) The lease of water or the use of water under a lease does not constitute a permit, as provided

11 in 85-2-102, and does not establish a right to appropriate water within the meaning of Title 85, chapter 2, part 3.

12 (10) For purposes of the water leasing program established in this section, it is the intent of the

13 legislature that the state act as a proprietor."

14

15 **Section 4.** Section 85-2-141, MCA, is amended to read:

16 **"85-2-141. Water leasing program.** (1) There is a water leasing program administered by the

17 department on behalf of the state of Montana.

18 (2) The department may acquire rights to water needed for leasing under this program:

19 (a) through appropriation of water in its own name;

20 (b) by agreement with or purchase from another holder of water rights; or

21 (c) by contract with the United States for water held in federal reservoirs as a means of protecting

22 the state's interest in those waters.

23 (3) Water for leasing under the water leasing program must be obtained from the following

24 sources:

25 (a) any existing or future reservoir in a basin concerning which a temporary preliminary decree, a

26 preliminary decree under 85-2-231, or a final decree under 85-2-234 has been entered;

27 (b) Fort Peck, Tiber, Canyon Ferry, Hungry Horse, Kooconusa, or Yellowtail reservoir if a contract

28 between the department and the federal government concerning the acquisition of water is in effect; and

1 (c) any other existing or future federal reservoir:

2 (i) located in a basin concerning which a temporary preliminary decree, a preliminary decree
3 under 85-2-231, or a final decree under 85-2-234 has been entered; and

4 (ii) for which and for so long as there is a contract between the department and the federal
5 government concerning the acquisition of water.

6 (4) (a) Subject to subsections (4)(b) and (4)(c), the department may lease up to 1 million acre-feet
7 of water from the reservoirs identified in subsection (3)(b) to water users for beneficial uses in Montana.

8 (b) The department may lease up to 50,000 acre-feet of water from the reservoirs identified in
9 subsection (3)(b) to water users for beneficial uses outside Montana. A water user outside the state shall pay a
10 fee of \$100,000 an acre foot for water approved for lease out of state.

11 (c) The total amount of water leased under this subsection (4) may not exceed 1 million acre-feet.

12 (5) The term of any lease may not exceed 50 years. A term may be extended up to another 50
13 years if the department again determines the desirability of leasing by applying the considerations in subsection
14 (7). In making a redetermination, the department may require the completion of an environmental impact
15 statement in accordance with subsection (6).

16 (6) The department shall require the completion of an environmental impact statement under the
17 provisions of Title 75, chapter 1, for lease applications that would result in the consumption of 4,000 acre-feet a
18 year or more and 5.5 cubic feet per second or more of water and for any other application for which an
19 environmental impact statement is required by law. The department shall require the completion of an
20 environmental impact statement whenever the cumulative effect of more than one application for a lease would
21 constitute a probable significant environmental impact.

22 (7) Upon application by a person to lease water, the department shall make an initial determination
23 of whether it is desirable for the department to lease water to the applicant. The determination of desirability
24 must be made solely on the following considerations:

25 (a) the content of the environmental impact statement, if required;

26 (b) whether there is sufficient water available under the water leasing program; and

27 (c) whether the criteria, except as to legislative approval, set forth in 85-2-311 have been satisfied.

28 (8) The department shall for any lease agreement require commercially reasonable terms and

1 conditions, which may include the requirement that up to 25% of the water to be leased be made available to a
2 potential user for any beneficial use upon payment by the user of the costs of tapping into and removing water
3 from the applicant's project. The department may differentiate in pricing, depending on the proposed beneficial
4 use of the water.

5 (9) The lease of water or the use of water under a lease does not constitute a permit, as provided
6 in 85-2-102, and does not establish a right to appropriate water within the meaning of Title 85, chapter 2, part 3.

7 (10) For purposes of the water leasing program established in this section, it is the intent of the
8 legislature that the state act as a proprietor."

9

10 **Section 5.** Section 85-2-301, MCA, is amended to read:

11 **"85-2-301. Right to appropriate -- recognition and confirmation of permits issued after July 1,**

12 **1973.** (1) After July 1, 1973, a person may not appropriate water except as provided in this chapter. A person
13 may appropriate water only for a beneficial use.

14 ~~(2) (a) Only the department may appropriate water by permit for transport outside the following river~~
15 ~~basins:~~

16 ~~(i) the Clark Fork River and its tributaries to its confluence with Lake Pend Oreille in Idaho;~~

17 ~~(ii) the Kootenai River and its tributaries to its confluence with Kootenay Lake in British Columbia;~~

18 ~~(iii) the St. Mary River and its tributaries to its confluence with the Oldman River in Alberta;~~

19 ~~(iv) the Little Missouri River and its tributaries to its confluence with Lake Sakakawea in North Dakota;~~

20 ~~(v) the Missouri River and its tributaries to its confluence with the Yellowstone River in North Dakota;~~

21 and

22 ~~(vi) the Yellowstone River and its tributaries to its confluence with the Missouri River in North Dakota.~~

23 ~~(b) The department may lease water subject to this subsection (2) under the provisions of 85-2-141.~~

24 ~~(3)~~(2) A right to appropriate water may not be acquired by any other method, including by adverse
25 use, adverse possession, prescription, or estoppel. The method prescribed by this chapter is exclusive.

26 ~~(4)~~(3) All permit actions of the department after July 1, 1973, are recognized and confirmed subject to
27 this part and any terms, conditions, and limitations placed on a permit by the department.

28 ~~(5)~~(4) Pursuant to 85-20-1902, the provisions of this section do not apply within the exterior

1 boundaries of the Flathead Indian reservation."

2

3 **Section 6.** Section 85-2-311, MCA, is amended to read:

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

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

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

16 (A) identification of physical water availability;

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

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

22 (b) the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a
23 state water reservation will not be adversely affected. In this subsection (1)(b), adverse effect must be
24 determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that
25 the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied. [The
26 applicant is not required to prove a lack of adverse effect for any water right identified in a written consent to
27 approval filed pursuant to subsection (9) in connection with a permit application.]

28 (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
4 possessory interest in the property where the water is to be put to beneficial use, or if the proposed use has a
5 point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written
6 special use authorization required by federal law to occupy, use, or traverse national forest system lands for the
7 purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the
8 permit;

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

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

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

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

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

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

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

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

- 1 (ii) the benefits to the applicant and the state;
- 2 (iii) the effects on the quantity and quality of water for existing beneficial uses in the source of
- 3 supply;
- 4 (iv) the availability and feasibility of using low-quality water for the purpose for which application
- 5 has been made;
- 6 (v) the effects on private property rights by any creation of or contribution to saline seep; and
- 7 (vi) the probable significant adverse environmental impacts of the proposed use of water as
- 8 determined by the department pursuant to Title 75, chapter 1, or Title 75, chapter 20.

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

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

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

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

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

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

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

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

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

1 to use the water; and

2 (iv) the existing legal demands of water rights placed on the applicant's supply in the state where the
3 applicant intends to use the water.

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

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

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

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

19 (8) For an application for ground water in a basin closed pursuant to 85-2-319, 85-2-321, 85-2-
20 330, 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
21 addition to the requirements of this section.

22 [(9) The department may not conduct an adverse effects analysis on a water right if the water right
23 holder files a written consent to approval of an application for a permit.] (Bracketed language in subsections
24 (1)(b) and (9) terminates September 30, 2023--sec. 8, Ch. 243, L. 2017.)"

25

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

27 **"85-2-311. Criteria for issuance of permit.** (1) A permit may be issued under this part prior to the
28 adjudication of existing water rights in a source of supply. In a permit proceeding under this part, there is no

1 presumption that an applicant for a permit cannot meet the statutory criteria of this section prior to the
2 adjudication of existing water rights pursuant to this chapter. In making a determination under this section, the
3 department may not alter the terms and conditions of an existing water right or an issued certificate, permit, or
4 state water reservation. Except as provided in subsections (3) and (4), the department shall issue a permit if the
5 applicant proves by a preponderance of evidence that the following criteria are met:

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

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

11 (A) identification of physical water availability;

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

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

17 (b) the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a
18 state water reservation will not be adversely affected. In this subsection (1)(b), adverse effect must be
19 determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that
20 the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied. [The
21 applicant is not required to prove a lack of adverse effect for any water right identified in a written consent to
22 approval filed pursuant to subsection (9) in connection with a permit application.]

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

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

26 (e) the applicant has a possessory interest or the written consent of the person with the
27 possessory interest in the property where the water is to be put to beneficial use, or if the proposed use has a
28 point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written

1 special use authorization required by federal law to occupy, use, or traverse national forest system lands for the
2 purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the
3 permit;

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

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

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

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

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

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

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

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

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

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

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

3 determined 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

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

6 requirements for federal non-Indian and Indian reserved water rights held by the United States for federal

7 reserved lands and in trust for the various Indian tribes within the state's boundaries. Although the state of

8 Montana also recognizes that, under appropriate conditions, the out-of-state transportation and use of its public

9 waters are not in conflict with the public welfare of its citizens or the conservation of its waters, the criteria in

10 this subsection (4) must be 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

14 procedures of 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

17 citizens 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

22 water shortages within the state of Montana;

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

24 intends to use the water; and

25 (iv) the existing legal demands of water rights placed on the applicant's supply in the state where

26 the applicant intends to use the water.

27 (d) When applying for a permit or a lease to withdraw and transport water for use outside the state,

28 the applicant shall:

1 (i) submit to and comply with the laws of the state of Montana governing the appropriation, lease,
2 and use of water; and

3 (ii) pay a fee of \$100,000 an acre foot for water approved for lease out of state; or

4 (iii) pay a fee of \$1 million an acre foot for water approved for transfer out of state.

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

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

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

17 (8) For an application for ground water in a basin closed pursuant to 85-2-319, 85-2-321, 85-2-
18 330, 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
19 addition to the requirements of this section.

20 [(9) The department may not conduct an adverse effects analysis on a water right if the water right
21 holder files a written consent to approval of an application for a permit.] (Bracketed language in subsections
22 (1)(b) and (9) terminates September 30, 2023--sec. 8, Ch. 243, L. 2017.)"

23

24 **Section 8.** Section 85-2-316, MCA, is amended to read:

25 **"85-2-316. State reservation of waters.** (1) The state, any political subdivision or agency of the
26 state, or the United States or any agency of the United States may apply to the department to acquire a state
27 water reservation for existing or future beneficial uses or to maintain a minimum flow, level, or quality of water
28 throughout the year or at periods or for a length of time that the department designates.

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

3 ~~(i) the Clark Fork River and its tributaries to its confluence with Lake Pend Oreille in Idaho;~~

4 ~~(ii) the Kootenai River and its tributaries to its confluence with Kootenay Lake in British Columbia;~~

5 ~~(iii) the St. Mary River and its tributaries to its confluence with the Oldman River in Alberta;~~

6 ~~(iv) the Little Missouri River and its tributaries to its confluence with Lake Sakakawea in North Dakota;~~

7 ~~(v) the Missouri River and its tributaries to its confluence with the Yellowstone River in North Dakota;~~

8 and

9 ~~(vi) the Yellowstone River and its tributaries to its confluence with the Missouri River in North Dakota.~~

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

13 ~~(3)~~(2) (a) The department shall adopt rules that are necessary to determine whether or not an
14 application is correct and complete based on the provisions applicable to issuance of a state water reservation.
15 The rules must be adopted in compliance with Title 2, chapter 4.

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

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

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

1 ~~(4)(3)~~ (a) Except as provided in 85-20-1401, the department shall issue a state water reservation if
2 the applicant establishes to the department by a preponderance of evidence:

3 ~~(i)(a)~~ the purpose of the reservation;

4 ~~(ii)(b)~~ the need for the reservation;

5 ~~(iii)(c)~~ the amount of water necessary for the purpose of the reservation;

6 ~~(iv)(d)~~ that the reservation is in the public interest.

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

10 ~~(i)~~ the proposed out of state use of water is not contrary to water conservation in Montana; and

11 ~~(ii)~~ the proposed out of state use of water is not otherwise detrimental to the public welfare of the
12 citizens of Montana.

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

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

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

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

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

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

25 ~~(5)(4)~~ If the purpose of the state water reservation requires construction of a storage or diversion
26 facility, the applicant shall establish to the department by a preponderance of evidence that there will be
27 progress toward completion of the facility and accomplishment of the purpose with reasonable diligence in
28 accordance with an established plan.

1 ~~(6)~~(5) (a) Upon issuing a state water reservation for the purpose of maintaining a minimum flow, level,
2 or quality of water, the appropriation of water is complete.

3 (b) The department shall limit any state water reservations after May 9, 1979, for maintenance of
4 minimum flow, level, or quality of water that it awards at any point on a stream or river to a maximum of 50% of
5 the average annual flow of record on gauged streams. Ungauged streams are not subject to the limit under this
6 subsection ~~(6)~~(5).

7 ~~(7)~~(6) A state water reservation issued under this section has a priority of appropriation dating from
8 the filing of a correct and complete application with the department.

9 ~~(8)~~(7) (a) A person desiring to use water reserved to a conservation district for agricultural purposes
10 shall make application for the use with the district, and the district, upon approval of the application, shall inform
11 the department of the approved use and issue the applicant an authorization for the use. The department shall
12 maintain records of all uses of water reserved to conservation districts and be responsible, when requested by
13 the districts, for rendering technical and administrative assistance within the department's staffing and
14 budgeting limitations in the preparation and processing of the applications for the conservation districts. The
15 department shall, within its staffing and budgeting limitations, complete any feasibility study requested by the
16 districts within 12 months of the time that the request was made. The department shall extend the time allowed
17 to develop a plan identifying projects for using a district's reservation as long as the conservation district makes
18 a good faith effort, within its staffing and budget limitations, to develop a plan.

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

24 ~~(9)~~(8) A state water reservation issued under this section may not adversely affect any rights in
25 existence at that time. The department may issue a state water reservation subject to terms, conditions,
26 restrictions, and limitations it considers necessary to satisfy the criteria of this section.

27 ~~(40)~~(9) (a) Except for a reservation provided in subsection ~~(6)~~(5) or a reservation provided in 85-20-
28 1401, the department shall, at least once every 10 years, review existing state water reservations to ensure that

1 the objectives of the reservations are being met.

2 (b) The department shall provide the water policy interim committee a summary of the reviews
3 before September 15, 2026, in accordance with 5-11-210.

4 (c) Following a review pursuant to this subsection ~~(40)~~(9), at the request of the entity holding a
5 water reservation or when the objectives of a state water reservation are not being met, the department may:

6 (i) extend the time period to complete the appropriation of water;

7 (ii) modify the reservation; or

8 (iii) revoke the reservation.

9 (d) Any undeveloped water made available as a result of a revocation or modification under this
10 subsection ~~(40)~~(9) is available for appropriation by others pursuant to this part.

11 ~~(41)~~(10) Except as provided in 85-20-1401, the department may modify an existing or future order
12 originally adopted to reserve water for the purpose of maintaining minimum flow, level, or quality of water, so as
13 to reallocate the state water reservation or portion of the reservation to an applicant who is a qualified reservant
14 under this section. Reallocation of water reserved pursuant to a state water reservation may be made by the
15 department following notice and hearing if the department finds that all or part of the reservation is not required
16 for its purpose and that the need for the reallocation has been shown by the applicant to outweigh the need
17 shown by the original reservant. Reallocation of reserved water may not adversely affect the priority date of the
18 reservation, and the reservation retains its priority date despite reallocation to a different entity for a different
19 use. The department may not reallocate water reserved under this section on any stream or river more
20 frequently than once every 5 years.

21 ~~(42)~~(11) A reservant may not make a change in a state water reservation under this section, except as
22 permitted under 85-2-402 and this subsection. If the department approves a change, the department shall give
23 notice and require the reservant to establish that the criteria in subsection ~~(4)~~(3) will be met under the
24 approved change.

25 ~~(43)~~(12) A state water reservation may be transferred to another entity qualified to hold a reservation
26 under subsection (1). Only the entity holding the reservation may initiate a transfer. The transfer occurs upon
27 the filing of a water right ownership update form with the department, together with an affidavit from the entity
28 receiving the reservation establishing that the entity is a qualified reservant under subsection (1), that the entity

1 agrees to comply with the requirements of this section and the conditions of the reservation, and that the entity
2 can meet the objectives of the reservation as granted. If the transfer of a state water reservation involves a
3 change in an appropriation right, the necessary approvals must be acquired pursuant to subsection ~~(12)~~ (11).

4 ~~(14)~~(13) This section does not vest the department with the authority to alter a water right that is not a
5 state water reservation.

6 ~~(15)~~(14) The department shall undertake a program to educate the public, other state agencies, and
7 political subdivisions of the state as to the benefits of the state water reservation process and the procedures to
8 be followed to secure the reservation of water. The department shall provide technical assistance to other state
9 agencies and political subdivisions in applying for reservations under this section.

10 ~~(16)~~(15) Water reserved under this section is not subject to the state water leasing program
11 established under 85-2-141."

12

13 **Section 9.** Section 85-2-316, MCA, is amended to read:

14 **"85-2-316. State reservation of waters.** (1) The state, any political subdivision or agency of the
15 state, or the United States or any agency of the United States may apply to the department to acquire a state
16 water reservation for existing or future beneficial uses or to maintain a minimum flow, level, or quality of water
17 throughout the year or at periods or for a length of time that the department designates.

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

20 (i) the Clark Fork River and its tributaries to its confluence with Lake Pend Oreille in Idaho;

21 (ii) the Kootenai River and its tributaries to its confluence with Kootenay Lake in British Columbia;

22 (iii) the St. Mary River and its tributaries to its confluence with the Oldman River in Alberta;

23 (iv) the Little Missouri River and its tributaries to its confluence with Lake Sakakawea in North
24 Dakota;

25 (v) the Missouri River and its tributaries to its confluence with the Yellowstone River in North
26 Dakota; and

27 (vi) the Yellowstone River and its tributaries to its confluence with the Missouri River in North
28 Dakota.

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

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

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

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

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

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

- 22 (i) the purpose of the reservation;
- 23 (ii) the need for the reservation;
- 24 (iii) the amount of water necessary for the purpose of the reservation;
- 25 (iv) that the reservation is in the public interest.

26 (b) In determining the public interest under subsection (4)(a)(iv), the department shall issue a
27 water reservation for withdrawal and transport for use outside the state if the applicant proves by clear and
28 convincing 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
- 3 citizens of Montana.
- 4 (c) In determining whether the applicant has proved by clear and convincing evidence that the
- 5 requirements of subsections (4)(b)(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
- 8 water shortages within the state of Montana;
- 9 (iii) the supply and sources of water available to the applicant in the state where the applicant
- 10 intends to use the water; and
- 11 (iv) the demands placed on the applicant's supply in the state where the applicant intends to use
- 12 the water.
- 13 (d) When applying for a state water reservation to withdraw and transport water for use outside the
- 14 state, the applicant shall:
- 15 (i) submit to and comply with the laws of the state of Montana governing the appropriation, lease,
- 16 use, and reservation of water; and
- 17 (ii) pay a fee of \$100,000 an acre foot for water approved for lease out of state; or
- 18 (iii) pay a fee of \$1 million an acre foot for water approved for transfer out of state.
- 19 (5) If the purpose of the state water reservation requires construction of a storage or diversion
- 20 facility, the applicant shall establish to the department by a preponderance of evidence that there will be
- 21 progress toward completion of the facility and accomplishment of the purpose with reasonable diligence in
- 22 accordance with an established plan.
- 23 (6) (a) Upon issuing a state water reservation for the purpose of maintaining a minimum flow, level,
- 24 or quality of water, the appropriation of water is complete.
- 25 (b) The department shall limit any state water reservations after May 9, 1979, for maintenance of
- 26 minimum flow, level, or quality of water that it awards at any point on a stream or river to a maximum of 50% of
- 27 the average annual flow of record on gauged streams. Ungauged streams are not subject to the limit under this
- 28 subsection (6)(b).

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

3 (8) (a) A person desiring to use water reserved to a conservation district for agricultural purposes
4 shall make application for the use with the district, and the district, upon approval of the application, shall inform
5 the department of the approved use and issue the applicant an authorization for the use. The department shall
6 maintain records of all uses of water reserved to conservation districts and be responsible, when requested by
7 the districts, for rendering technical and administrative assistance within the department's staffing and
8 budgeting limitations in the preparation and processing of the applications for the conservation districts. The
9 department shall, within its staffing and budgeting limitations, complete any feasibility study requested by the
10 districts within 12 months of the time that the request was made. The department shall extend the time allowed
11 to develop a plan identifying projects for using a district's reservation as long as the conservation district makes
12 a good faith effort, within its staffing and budget limitations, to develop a plan.

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

18 (9) A state water reservation issued under this section may not adversely affect any rights in
19 existence at that time. The department may issue a state water reservation subject to terms, conditions,
20 restrictions, and limitations it considers necessary to satisfy the criteria of this section.

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

24 (b) The department shall provide the water policy interim committee a summary of the reviews
25 before September 15, 2026, in accordance with 5-11-210.

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

28 (i) extend the time period to complete the appropriation of water;

1 (ii) modify the reservation; or

2 (iii) revoke the reservation.

3 (d) Any undeveloped water made available as a result of a revocation or modification under this

4 subsection (10) is available for appropriation by others pursuant to this part.

5 (11) Except as provided in 85-20-1401, the department may modify an existing or future order
6 originally adopted to reserve water for the purpose of maintaining minimum flow, level, or quality of water, so as
7 to reallocate the state water reservation or portion of the reservation to an applicant who is a qualified reservant
8 under this section. Reallocation of water reserved pursuant to a state water reservation may be made by the
9 department following notice and hearing if the department finds that all or part of the reservation is not required
10 for its purpose and that the need for the reallocation has been shown by the applicant to outweigh the need
11 shown by the original reservant. Reallocation of reserved water may not adversely affect the priority date of the
12 reservation, and the reservation retains its priority date despite reallocation to a different entity for a different
13 use. The department may not reallocate water reserved under this section on any stream or river more
14 frequently than once every 5 years.

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

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

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

28 (15) The department shall undertake a program to educate the public, other state agencies, and

1 political subdivisions of the state as to the benefits of the state water reservation process and the procedures to
2 be followed to secure the reservation of water. The department shall provide technical assistance to other state
3 agencies and political subdivisions in applying for reservations under this section.

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

6

7 **Section 10.** Section 85-2-402, MCA, is amended to read:

8 **"85-2-402. Changes in appropriation rights -- definition.** (1) (a) The right to make a change in
9 appropriation right subject to the provisions of this section in an existing water right, a permit, or a state water
10 reservation is recognized and confirmed. In a change in appropriation right proceeding under this section, there
11 is no presumption that an applicant for a change in appropriation right cannot establish lack of adverse effect
12 prior to the adjudication of other rights in the source of supply pursuant to this chapter. Except as provided in
13 85-2-410 and subsections (15) and (16) of this section, an appropriator may not make a change in an
14 appropriation right without the approval of the department or, if applicable, of the legislature. An applicant shall
15 submit a correct and complete application.

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

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

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

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

1 this section, adverse effects analysis is specific to the proposed change in appropriation right and a
2 determination that water is not legally available pursuant to 85-2-311 does not necessarily mean that an
3 adverse effect will occur.

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

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

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

10 (d) The applicant has a possessory interest, or the written consent of the person with the
11 possessory interest, in the property where the water is to be put to beneficial use or, if the proposed change
12 involves a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any
13 written special use authorization required by federal law to occupy, use, or traverse national forest system lands
14 for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water.

15 This subsection (2)(d) does not apply to:

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

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

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

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

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

27 (4) The department may not approve a change in purpose of use or place of use of an
28 appropriation of 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water unless

1 the appropriator proves by a preponderance of evidence that:

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

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

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

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

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

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

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

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

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

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

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

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

1 ~~out-of-state use may occur:~~

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

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

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

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

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

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

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

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

19 (iv) ~~the existing legal demands of water rights placed on the applicant's supply in the state where the~~
20 ~~applicant intends to use the water.~~

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

24 (7) For any application for a change in appropriation right involving 4,000 or more acre-feet of
25 water a year and 5.5 or more cubic feet per second of water, the applicant shall pay a fee of \$1,000 for each
26 application. The department shall give notice of the proposed change in appropriation right in accordance
27 with 85-2-307 and shall hold one or more hearings in accordance with 85-2-309 prior to its approval or denial of
28 the proposed change in appropriation right. The department shall provide notice and may hold one or more

1 hearings upon any other proposed change in appropriation right if it determines that the proposed change in
2 appropriation right might adversely affect the rights of other persons[, except for any right for which a written
3 consent to approval has been filed pursuant to subsection (19) in connection with the application].

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

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

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

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

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

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

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

28 (15) (a) An appropriator may change an appropriation right for a replacement well without the prior

1 approval of the department if:

2 (i) the appropriation right is for:

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

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

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

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

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

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

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

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

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

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

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

26 (iii) The department may not issue an authorization of a change in appropriation right until a correct
27 and complete notice of replacement well has been filed with the department. The department shall return a
28 defective notice to the appropriator, along with a description of defects in the notice. The appropriator shall

1 refile a corrected and completed notice of replacement well within 30 days of notification of defects or within a
2 further time as the department may allow, not to exceed 6 months.

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

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

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

8 (c) The provisions of this subsection (15) do not apply to an appropriation right abandoned under
9 85-2-404.

10 (d) For each well that is replaced under this subsection (15), the appropriator shall follow the well
11 abandonment procedures, standards, and rules adopted by the board of water well contractors pursuant to 37-
12 43-202.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

24 (b) (i) Within 60 days after completion of a replacement point of diversion, the appropriator shall file
25 a notice of replacement point of diversion with the department on a form provided by the department.

26 (ii) The department shall review the notice of replacement point of diversion and shall issue an
27 authorization of a change in an appropriation right if all of the criteria in subsection (18)(a) have been met and
28 the notice is correct and complete. The department may inspect the diversion to confirm that the criteria under

1 subsection (18)(a) have been met. If the department issues an authorization of a change in an appropriation
2 right for a replacement point of diversion, the department shall prepare a notice of the authorization and provide
3 notice of the authorization in the same manner as required in 85-2-307 for applications.

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

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

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

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

15 (c) The provisions of this subsection (18) do not apply to an appropriation right abandoned under
16 85-2-404.

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

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

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

28 (iii) The burden of proof to prove lack of adverse effect at the hearing is on the appropriator

1 changing the point of diversion.

2 [(19) The department may not conduct an adverse effects analysis on a water right if the water right
3 holder files a written consent to approval of an application for a change in appropriation right.] (Bracketed
4 language in subsections (1)(c), (2), (7), and (19) terminates September 30, 2023--sec. 8, Ch. 243, L. 2017.)"

5

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

7 **"85-2-402. Changes in appropriation rights -- definition.** (1) (a) The right to make a change in
8 appropriation right subject to the provisions of this section in an existing water right, a permit, or a state water
9 reservation is recognized and confirmed. In a change in appropriation right proceeding under this section, there
10 is no presumption that an applicant for a change in appropriation right cannot establish lack of adverse effect
11 prior to the adjudication of other rights in the source of supply pursuant to this chapter. Except as provided in
12 85-2-410 and subsections (15) and (16) of this section, an appropriator may not make a change in an
13 appropriation right without the approval of the department or, if applicable, of the legislature. An applicant shall
14 submit a correct and complete application.

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

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

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

25 (a) The proposed change in appropriation right will not adversely affect the use of the existing
26 water rights of other persons or other perfected or planned uses or developments for which a permit or
27 certificate has been issued or for which a state water reservation has been issued under part 3. For purposes of
28 this section, adverse effects analysis is specific to the proposed change in appropriation right and a

1 determination that water is not legally available pursuant to 85-2-311 does not necessarily mean that an
2 adverse effect will occur.

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

5 (i) a change in appropriation right for instream flow pursuant to 85-2-320 or 85-2-436;

6 (ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or

7 (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.

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

9 (d) The applicant has a possessory interest, or the written consent of the person with the
10 possessory interest, in the property where the water is to be put to beneficial use or, if the proposed change
11 involves a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any
12 written special use authorization required by federal law to occupy, use, or traverse national forest system lands
13 for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water.

14 This subsection (2)(d) does not apply to:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18 (iv) the existing legal demands of water rights placed on the applicant's supply in the state where
19 the applicant intends to use the water.

20 (c) When applying for a change in appropriation right to withdraw and transport water for use
21 outside the state, the applicant shall:

22 (i) submit to and comply with the laws of the state of Montana governing the appropriation and
23 use of water; and

24 (ii) pay a fee of \$100,000 an acre foot for water approved for lease out of state; or

25 (iii) pay a fee of \$1 million an acre foot for water approved for transfer out of state.

26 (7) For any application for a change in appropriation right involving 4,000 or more acre-feet of
27 water a year and 5.5 or more cubic feet per second of water, the department shall give notice of the proposed
28 change in appropriation right in accordance with 85-2-307 and shall hold one or more hearings in accordance

1 with 85-2-309 prior to its approval or denial of the proposed change in appropriation right. The department shall
2 provide notice and may hold one or more hearings upon any other proposed change in appropriation right if it
3 determines that the proposed change in appropriation right might adversely affect the rights of other persons[,
4 except for any right for which a written consent to approval has been filed pursuant to subsection (19) in
5 connection with the application].

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

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

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

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

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

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

- 1 (14) The department may adopt rules to implement the provisions of this section.
- 2 (15) (a) An appropriator may change an appropriation right for a replacement well without the prior
3 approval of the department if:
- 4 (i) the appropriation right is for:
- 5 (A) ground water outside the boundaries of a controlled ground water area; or
- 6 (B) ground water inside the boundaries of a controlled ground water area and if the provisions of
7 the rule establishing the controlled ground water area do not restrict a change in appropriation right;
- 8 (ii) the change in appropriation right is to replace an existing well and the existing well will no
9 longer be used;
- 10 (iii) the rate and volume of the appropriation from the replacement well are equal to or less than
11 that of the well being replaced and do not exceed:
- 12 (A) 450 gallons a minute for a municipal well; or
- 13 (B) 35 gallons a minute and 10 acre-feet a year for all other wells;
- 14 (iv) the water from the replacement well is appropriated from the same aquifer as the water
15 appropriated from the well being replaced; and
- 16 (v) a timely, correct and complete notice of replacement well is submitted to the department as
17 provided in subsection (15)(b).
- 18 (b) (i) After completion of a replacement well and appropriation of ground water for a beneficial
19 use, the appropriator shall file a notice of replacement well with the department on a form provided by the
20 department.
- 21 (ii) (A) The department shall review the notice of replacement well and shall issue an authorization
22 of a change in an appropriation right if all of the criteria in subsection (15)(a) have been met and the notice is
23 correct and complete.
- 24 (B) If the replacement well is located on national forest system lands, the notice is not correct and
25 complete under this subsection (15) until the appropriator has submitted proof of any written special use
26 authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of
27 constructing the replacement well.
- 28 (iii) The department may not issue an authorization of a change in appropriation right until a correct

1 and complete notice of replacement well has been filed with the department. The department shall return a
2 defective notice to the appropriator, along with a description of defects in the notice. The appropriator shall
3 refile a corrected and completed notice of replacement well within 30 days of notification of defects or within a
4 further time as the department may allow, not to exceed 6 months.

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

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

7 and

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

10 (c) The provisions of this subsection (15) do not apply to an appropriation right abandoned under
11 85-2-404.

12 (d) For each well that is replaced under this subsection (15), the appropriator shall follow the well
13 abandonment procedures, standards, and rules adopted by the board of water well contractors pursuant to 37-
14 43-202.

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

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

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

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

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

24 (c) Within 60 days of completion of a redundant water supply well, the appropriator shall file a
25 notice of construction of the well with the department on a form provided by the department. The department
26 may return a defective notice of construction to the appropriator for correction and completion. If the redundant
27 water supply well is located on national forest system lands, the notice is not correct and complete under this
28 subsection until the appropriator has submitted proof of any written special use authorization required by

1 federal law to occupy, use, or traverse national forest system lands for the purpose of constructing the
2 redundant water supply well.

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

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

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

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

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

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

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

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

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

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

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

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

26 (b) (i) Within 60 days after completion of a replacement point of diversion, the appropriator shall file
27 a notice of replacement point of diversion with the department on a form provided by the department.

28 (ii) The department shall review the notice of replacement point of diversion and shall issue an

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

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

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

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

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

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

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

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

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

1 other appropriators.

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

4 [(19) The department may not conduct an adverse effects analysis on a water right if the water right
5 holder files a written consent to approval of an application for a change in appropriation right.] (Bracketed
6 language in subsections (1)(c), (2), (7), and (19) terminates September 30, 2023--sec. 8, Ch. 243, L. 2017.)"

7

8 **Section 12.** Section 85-2-403, MCA, is amended to read:

9 **"85-2-403. Transfer of appropriation right.** (1) The right to use water shall pass with a conveyance
10 of the land or transfer by operation of law, unless specifically exempted ~~therefrom~~. All transfers of interests in
11 appropriation rights shall be without loss of priority. The right to use water does not include a right to transfer or
12 lease the water out of state.

13 (2) Failure to comply with the provisions of 85-2-402 does not render a conveyance or reservation
14 of a water right void, but the right may not be used until the department has approved the change. This
15 subsection applies retroactively, within the meaning of 1-2-109, to a conveyance or reservation made after July
16 1, 1973."

17

18 **Section 13.** Section 85-2-403, MCA, is amended to read:

19 **"85-2-403. Transfer of appropriation right.** (1) The right to use water shall pass with a conveyance
20 of the land or transfer by operation of law, unless specifically exempted therefrom. All transfers of interests in
21 appropriation rights shall be without loss of priority. The right to use water does not include a right to transfer or
22 lease the water out of state, unless approved by the department.

23 (2) Failure to comply with the provisions of 85-2-402 does not render a conveyance or reservation
24 of a water right void, but the right may not be used until the department has approved the change. This
25 subsection applies retroactively, within the meaning of 1-2-109, to a conveyance or reservation made after July
26 1, 1973."

27

28 NEW SECTION. **Section 14. Notification to tribal governments.** The secretary of state shall send a

1 copy of [this act] to each federally recognized tribal government in Montana.

2

3 **NEW SECTION. Section 15. Effective dates.** (1) Except as provided in subsection (2), [this act] is

4 effective on passage and approval.

5 (2) [Sections 2, 4, 7, 9, 11, and 13] are effective January 1, 2048.

6

7 **NEW SECTION. Section 16. Contingent voidness.** (1) If a court of competent jurisdiction
8 determines the that any part of [sections 1, 3, 5, 6, 8, 10, or 12] is unconstitutional or otherwise unenforceable,
9 then the amendments made to those sections are void.

10 (2) The department of natural resources and conservation shall notify the code commissioner
11 within 10 days of this contingency being met.

12 (3) Upon the meeting of this contingency, the code commissioner shall strike the amendments
13 made to those sections so those sections read as they existed on the day before [the effective date] of those
14 sections.

15

16 **NEW SECTION. Section 17. Applicability.** [This act] applies to water transfers made after [the
17 effective date of this act].

18

19 **NEW SECTION. Section 18. Termination.** [Sections 1, 3, 6, 8, 10, and 12] terminate December 31,
20 2047.

21

- END -