

1 HOUSE BILL NO. 432

2 INTRODUCED BY J. DARLING, W. GALT, W. MCKAMEY, D. HARVEY, K. WALSH, R. MINER, J.

3 COHENOUR

4
5 A BILL FOR AN ACT ENTITLED: "AN ACT REVISING WATER LAWS CONCERNING EXCEPTIONS TO THE
6 CHANGE IN APPROPRIATION RIGHT PROCESS; PROVIDING RULEMAKING AUTHORITY; AND
7 AMENDING SECTIONS 3-7-224, 85-2-309, 85-2-402, AND 85-2-407, MCA."

8
9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

10
11 NEW SECTION. Section 1. Changes in appropriation rights -- exceptions. (1) (a) An appropriator
12 may change an appropriation right without the prior approval of the department for the purpose of constructing
13 a redundant water supply well in a public water supply system as defined in 75-6-102 if the redundant water
14 supply well:

15 (i) withdraws water from the same source aquifer as the original well; and

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

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

19 (c) (i) Within 60 days of completion of a redundant water supply well and the infrastructure
20 necessary to use the well, the appropriator shall file a correct and complete notice of change in appropriation
21 right for redundant water supply well construction with the department on a form provided by the department. If
22 the redundant water supply well is located on national forest system lands, the notice is not correct and
23 complete under this subsection (1)(c)(i) 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 redundant water supply well.

26 (ii) The department may not issue an authorization of a change in appropriation right until a correct
27 and complete notice of change in appropriation right for redundant water supply well construction has been filed
28 with the department.

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

(i) the appropriation right is for:

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

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

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

(iii) the rate and volume of the appropriation from the replacement well are equal to or less than that of the well being replaced and the distance between the replacement well and the well being replaced is no greater than 200 feet;

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

(v) a timely, correct, and complete notice of change in appropriation right for a replacement well is submitted to the department as provided in subsection (2)(b).

(b) The appropriator shall file a correct and complete notice of change in appropriation right for a replacement well with the department on a form provided by the department within 60 days after completion of a replacement well and appropriation of ground water for a beneficial use.

(c) For each well that is replaced under this subsection (2), the appropriator shall follow the well abandonment procedures, standards, and rules adopted by the board of water well contractors pursuant to 37-43-202.

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

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

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

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

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

1 water right holders;

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

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

6 (vii) the existing point of diversion has been used in the 10 years prior to the notice for change of
7 appropriation right for a replacement point of diversion;

8 (viii) the change will not increase access to water availability, change the method of irrigation, if
9 applicable, or increase the amount of water diverted, used, or consumed; and

10 (ix) a timely, correct, and complete notice of change in appropriation right for a replacement point
11 of diversion is submitted to the department as provided in subsection (3)(b).

12 (b) The appropriator shall file a correct and complete notice of change in appropriation right for a
13 replacement point of diversion with the department on a form provided by the department within 60 days after
14 completion of a replacement in point of diversion.

15 (4) (a) A municipality as defined in 7-1-4121 or a county water and sewer district organized under
16 Title 7, chapter 13, part 22, may change the place of use for an unperfected municipal use permit or water
17 reservation without the prior approval of the department if:

18 (i) the flow rate authorized by the permit or water reservation will not be exceeded;

19 (ii) the volume authorized by the permit or water reservation will not be exceeded;

20 (iii) the place of use is within:

21 (A) the municipality's land use plan and future land use map boundary duly adopted by the
22 municipality pursuant to Title 76, chapter 25;

23 (B) the municipality's growth policy boundary duly adopted by the municipality pursuant to Title 76,
24 chapter 1; or

25 (C) a county water and sewer district's service area boundary adopted under Title 7, chapter 13,
26 part 23;

27 (iv) all water being diverted by the system is being measured ~~and reported annually to the~~
28 department; and

(v) there are no other changes to the water right or rights.

(b) The appropriator shall file a correct and complete notice of change in appropriation right for municipal use with the department on a form provided by the department within 180 days of annexation by a municipality under Title 7, chapter 2, ~~part 47~~, or addition of land to a county water and sewer district under Title 7, chapter 13, part 23.

(c) A notice of change in appropriation right for municipal use may include a change in place of use for a water right that is not an unperfected permit or water reservation if:

(i) the criteria in subsection (4)(a) are satisfied for each unperfected permit and water reservation;

(ii) the criteria in subsection (4)(a) are satisfied for each additional water right being changed;

(iii) the unperfected volume of the unperfected permit or water reservation is adequate to satisfy the additional water use needs of the entire additional place of use;

(iv) the existing place of use is the same for all rights being changed; and

(v) all rights being changed share the same common distribution system.

(5) (a) An appropriator with a water right for stock use may add, ~~or move,~~ OR REMOVE stock tanks without the prior approval of the department if:

(i) stock tanks are added to a water right for livestock direct from source;

(ii) ~~additional stock tanks are added to~~ OR REMOVED FROM an existing stock watering system; or

(iii) stock tanks are moved on an existing stock watering system.

(b) The following requirements must be met for a change filed under this subsection (5):

(i) the diverted flow rate of the stock watering system may not exceed the historical diverted flow rate of the stock watering system. If stock tanks are being added to a livestock direct from source water right, the maximum flow rate for the diversion to the tanks may not exceed 35 gallons a minute.

(ii) the number of stock animal units that will be watered on the system may not exceed the historical number of stock animal units watered;

(iii) the stock watering system infrastructure is adequate to control diversions and prevent waste of water; and

(iv) the appropriator has a possessory interest or the written consent of a person with a possessory interest in the property where the water is to be put to beneficial use or, if the proposed change involves a point

1 of diversion, conveyance, or place of use on national forest system lands, the appropriator has any written
2 special use authorization required by federal law to occupy, use, or traverse national forest system lands for the
3 purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water.

4 (c) The appropriator shall file a correct and complete notice of change in appropriation right for
5 stock tanks with the department on a form provided by the department within 60 days after stock tanks are
6 added or moved.

7 (d) A temporary change in appropriation right for stock tanks may be authorized in accordance with
8 85-2-407.

9 (6) (a) If the department determines a notice of change in appropriation filed pursuant to
10 subsections (1) through (5) is not correct and complete, the department shall return the notice to the
11 appropriator, along with a notification describing the defects. A notice of change in appropriation right that is not
12 corrected and completed within 60 days of the notification is terminated.

13 (b) Within 90 days of determining a notice of change in appropriation right is correct and complete,
14 the department shall determine if the applicable criteria for issuance of a change in appropriation right are
15 satisfied, and:

16 (i) if the department determines that the notice of change in appropriation right satisfies the
17 applicable criteria in subsection (1), (2), (3), (4), or (5), the department shall issue an authorization of a change
18 in appropriation right; or

19 (ii) if the department determines that the notice of change in appropriation right does not satisfy
20 the criteria in subsection (1), (2), (3), (4), or (5), the department shall notify the appropriator, and the
21 appropriator shall submit an application for a change in appropriation right to the department pursuant to 85-2-
22 402.

23 (7) (a) If an authorization of a change in appropriation right is issued under subsection ~~(3), (4), or~~
24 ~~(5)~~, the department shall prepare a public notice that includes a summary of the change in appropriation right.
25 The public notice must state that within no more than 45 days after the date of publication, a person may file
26 with the department a written objection to the authorization of the change in appropriation right. The department
27 shall publish the notice once in a newspaper of general circulation in the area of the source.

28 (b) The department shall also serve the notice by first-class mail on:

(i) an appropriator of water or applicant for or holder of a permit who, according to the records of the department, may be affected by the proposed appropriation;

(ii) any purchaser under contract for deed as defined in 70-20-115 of property that according to the records of the department may be affected by the proposed appropriation; and

(iii) any public agency that has reserved waters in the source under 85-2-316.

(c) The department may, in the department's discretion, also serve notice on any state agency or other person the department believes may be interested in or affected by the proposed appropriation.

(d) The department shall file in the department's records proof of service by affidavit of the publisher in cases of notice by publication and by affidavit of the department in cases of service by mail.

(8) (a) An objector to a change authorization issued under subsection ~~(3), (4), or (5)~~ shall file a correct and complete objection on a form prescribed by the department on or before the date specified in the notice provided under subsection (7).

(i) A person has standing to file an objection under this subsection (8) if the property, water rights, or interests of the person would be adversely affected by the proposed change.

(ii) The department shall adopt rules delineating the components of a correct and complete objection.

(iii) The department shall notify the objector of any defect in an objection. An objection not corrected or completed within 15 business days from the date of notification of the defect is terminated.

(iv) An objection is valid if the objector has standing, has filed a correct and complete objection within the prescribed time, and has stated the applicable information required under this subsection (8) and the rules of the department.

(v) An objection must state facts indicating that the change in appropriation right:

(A) will adversely affect the use of the water rights of the objector or of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under Title 85, chapter 2, part 3; or

(B) does not satisfy the applicable criteria set forth in subsection ~~(3), (4), or (5)~~.

(b) If a valid objection is filed, the department shall hold a contested case hearing pursuant to 85-2-309. The contested case hearing is limited to those issues for which a correct and complete objection is filed.

The appropriator changing the water right bears the burden of proof of lack of adverse effect or any of the criteria for which a correct and complete objection is filed.

(c) If the department determines after a contested case hearing on the objection that the rights of other appropriators have been or will be adversely affected or that the change in appropriation right does not satisfy the criteria set forth in subsection ~~(3), (4), or (5)~~, the department may revoke the change in appropriation right or make the change subject to terms, conditions, restrictions, or limitations necessary to protect the rights of other appropriators.

Section 2. Section 3-7-224, MCA, is amended to read:

"3-7-224. (Temporary) Jurisdiction of chief water judge and associate water judge. (1) The chief water judge and the associate water judge may, at the discretion of the chief justice of the Montana supreme court, also serve as water judge for one of the water divisions.

(2) The chief water judge and the associate water judge have jurisdiction over cases certified to the district court under 85-2-309, all matters relating to the determination of existing water rights within the boundaries of the state of Montana, and all petitions for judicial review filed with the water court under 2-4-702.

(3) With regard to the consideration of a matter within the chief water judge's jurisdiction, the chief water judge and the associate water judge have the same powers as a district court judge. The chief water judge and the associate water judge may issue orders, on the motion of an interested party or on the judge's own motion, that may reasonably be required to allow the judge to fulfill the judge's responsibilities, including but not limited to requiring the joinder of persons not parties to the administrative hearing being conducted by the department pursuant to 85-2-309 or 85-2-402 as considered necessary to resolve any factual or legal issue certified pursuant to 85-2-309(2). (Terminates September 30, 2025--sec. 6, Ch. 126, L. 2017.)

3-7-224. (Effective October 1, 2025) Jurisdiction of chief water judge and associate water judge. (1) The chief water judge and the associate water judge may, at the discretion of the chief justice of the Montana supreme court, also serve as water judge for one of the water divisions.

(2) The chief water judge and the associate water judge have jurisdiction over cases certified to the district court under 85-2-309 and all matters relating to the determination of existing water rights within the boundaries of the state of Montana.

(3) With regard to the consideration of a matter within the chief water judge's jurisdiction, the chief water judge and the associate water judge have the same powers as a district court judge. The chief water judge and the associate water judge may issue orders, on the motion of an interested party or on the judge's own motion, that may reasonably be required to allow the judge to fulfill the judge's responsibilities, including but not limited to requiring the joinder of persons not parties to the administrative hearing being conducted by the department pursuant to 85-2-309, ~~or 85-2-402~~, or [section 1] as considered necessary to resolve any factual or legal issue certified pursuant to 85-2-309(2)."

Section 3. Section 85-2-309, MCA, is amended to read:

"85-2-309. Hearings on objections -- jurisdiction. (1) If the department determines that an objection to an application for a permit under 85-2-311, ~~or an application for a change in appropriation right under 85-2-402~~, or a notice of change in appropriation right under [section 1] states a valid objection, it shall hold a contested case hearing, pursuant to Title 2, chapter 4, part 6, on the objection within 90 days from the date set by the department for the filing of objections after serving notice of the hearing by first-class mail upon the applicant and the objector, unless the department certifies an issue to the district court for determination by a water judge under subsection (2). The department may consolidate hearings if more than one objection is filed to an application. The department may extend the 90-day deadline for good cause shown or upon request of the applicant and all objectors. The department shall file in its records proof of the service by affidavit of the department.

(2) (a) At any time prior to commencement or before the conclusion of a hearing as provided in subsection (1), the department may in its discretion certify to the district court all factual and legal issues involving the adjudication or determination of the water rights at issue in the hearing, including but not limited to issues of abandonment, quantification, or relative priority dates. Certified controversies must be given priority by a water judge over all other adjudication matters.

(b) If the department fails to certify an issue as provided in this section after a timely request by a party to the hearing, the department shall include its denial to certify as part of the record of the hearing.

(c) Upon determination of the issues certified to it by the department, the court shall remand the matter to the department for further processing of the application under this chapter.

(3) Subsection (2) does not apply in the case of a matter considered at a hearing under this section pursuant to 85-2-316 or 85-2-322."

Section 4. Section 85-2-402, MCA, is amended to read:

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

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

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

(a) The proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under part 3. For purposes of this section, adverse effects analysis is specific to the proposed change in appropriation right and a determination that water is not legally available pursuant to 85-2-311 does not necessarily mean that an adverse effect will occur.

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

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

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

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

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

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

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

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

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

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

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

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

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

- (i) the existing legal demands of water rights on the state water supply, as well as projected legal

1 demands of water rights for future beneficial purposes, including municipal water supplies, irrigation systems,
2 and minimum streamflows for the protection of existing water rights and aquatic life;

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

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

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

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

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

10 (5) The department may not approve a change in purpose of use or place of use for a diversion
11 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
12 consumed unless:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 procedures of 85-2-312.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- (i) — the existing point of diversion is inoperable due to natural causes or deteriorated infrastructure;
- (ii) — there are no other changes to the water right;
- (iii) — the capacity of the diversion is not increased;
- (iv) — there are no points of diversion or intervening water rights between the existing point of diversion and the replacement point of diversion or the appropriator obtains written waivers from all intervening water right holders;
- (v) — the replacement point of diversion is on the same surface water source and is located as close as reasonably practicable to the existing point of diversion;
- (vi) — the replacement point of diversion replaces an existing point of diversion and the existing point of diversion will no longer be used;
- (vii) — the appropriator can show that the existing point of diversion has been used in the 10 years prior to the notice for change of appropriation right for a replacement point of diversion;
- (viii) — the appropriator can show the change will not increase access to water availability, change the method of irrigation, if applicable, or increase the amount of water diverted, used, or consumed; and
- (ix) — a timely, correct and complete notice of replacement point of diversion is submitted to the department as provided in subsection (18)(b).
- (b) — (i) Within 60 days after completion of a replacement point of diversion, the appropriator shall file a notice of replacement point of diversion with the department on a form provided by the department.
- (ii) — The department shall review the notice of replacement point of diversion and shall issue an authorization of a change in an appropriation right if all of the criteria in subsection (18)(a) have been met and the notice is correct and complete. The department may inspect the diversion to confirm that the criteria under subsection (18)(a) have been met. If the department issues an authorization of a change in an appropriation right for a replacement point of diversion, the department shall prepare a notice of the authorization and provide notice of the authorization in the same manner as required in 85-2-307 for applications.
- (iii) — The department may not issue an authorization of a change in appropriation right until a correct and complete notice of replacement point of diversion has been filed with the department. The department shall return a defective notice to the appropriator, along with a description of defects in the notice. The appropriator shall refile a corrected and completed notice of replacement point of diversion within 30 days of notification of

defects or within a further time as the department may allow, not to exceed 6 months.

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

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

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

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

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

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

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

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

Section 5. Section 85-2-407, MCA, is amended to read:

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

(2) Except as provided in subsection (9), a temporary change in appropriation right may be

1 approved for a period not to exceed 10 years. A temporary change in appropriation right may be approved for
2 consecutive or intermittent use.

3 (3) An authorization for a temporary change in appropriation right may be renewed by the
4 department for a period not to exceed 10 years. There is no limitation on the number of renewals the
5 appropriator may seek. Renewal of an authorization for a temporary change in appropriation right requires
6 notice to the department by the appropriator. Upon receipt of the notice, the department shall notify other
7 appropriators potentially affected by the renewal and shall allow 90 days for submission of new evidence of
8 adverse effects to other water rights. A temporary change authorization may not be renewed by the department
9 if it determines that the right of an appropriator, other than an appropriator described in subsection (7), is
10 adversely affected.

11 (4) (a) During the term of the original temporary change authorization, the department may modify
12 or revoke its authorization for a temporary change if it determines that the right of an appropriator, other than an
13 appropriator described in subsection (7), is adversely affected.

14 (b) An appropriator, other than an appropriator identified in subsection (7), may object:

15 (i) during the initial temporary change application process;

16 (ii) during the temporary change renewal process; and

17 (iii) once during the term of the temporary change permit.

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

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

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

8

11 - END -