

House BILL NO. 472

INTRODUCED BY *Knox* *Gostfeld* *Hager* *Swanson* ORR
Raney *Hertel* *Skus* *Rehlein* *Swanson* *Ohls* *Beal*

A BILL FOR AN ACT ENTITLED: "AN ACT ALLOWING AN EXISTING APPROPRIATIVE WATER RIGHT TO
M. Hansen *Jayla Coy* *MERCER* *HARP*
BE TEMPORARILY CHANGED TO INSTREAM FLOW TO BENEFIT THE FISHERY RESOURCE; ESTABLISHING

ADDITIONAL CRITERIA FOR AND LIMITATIONS ON CHANGES TO INSTREAM FLOW TO BENEFIT THE
FISHERY RESOURCE; AMENDING SECTIONS 85-2-402 AND, 85-2-407, MCA; AND PROVIDING A
TERMINATION DATE." *GRINOE* *Foster* *Storall* *Heuting*

Bob Brown

STATEMENT OF INTENT

This legislation, jointly developed by representatives from the agricultural, recreation, and conservation communities, is intended to authorize the temporary use of existing water rights for instream flow to benefit the fishery resource. In establishing the use of water rights for authorized instream flow to benefit the fishery resource, it is the intent of the legislature that the authorization respect and work within the prior appropriation water rights system.

This legislation creates an opportunity for citizens to voluntarily enter into agreements to lease existing water rights to protect fisheries and allows persons who own water rights to change the use of that water to instream flow to benefit the fishery resource.

To monitor and review the implementation of this instream flow program, the legislature directs the office of the governor, to convene, on an ongoing and regular basis, a working group that includes representatives from the agricultural, recreation, and conservation communities. This working group shall consult with the department of natural resources and conservation on relevant changes in water use and shall submit a report to the governor and the legislature in 2001 outlining the status of the program.

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

NEW SECTION. Section 1. Temporary change authorization for instream flow -- additional requirements. (1) The department shall accept and process an application for a temporary change in appropriation rights to maintain or enhance instream flow to benefit the fishery resource under the provisions of 85-2-402, 85-2-407, and this section.



HB 472
INTRODUCED BILL

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

3 (i) change the purpose of a consumptive use water right to instream flow for the benefit of the
4 fishery resource; or

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

7 (b) For the purpose of this section, "person" means and is limited to an individual, association,
8 partnership, or corporation.

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

11 (a) the temporary change authorization for water to maintain and enhance instream flow to benefit
12 the fishery resource, as measured at a specific point, will not adversely affect the water rights of other
13 persons; and

14 (b) the amount of water for the proposed use is needed to maintain or enhance instream flows to
15 benefit the fishery resource.

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

19 (5) For the purpose of identifying and consulting with individuals or groups that may be affected
20 by the proposed change authorization, the applicant shall, 30 days before submitting the application to the
21 department, publish notice of the proposed change authorization in a local newspaper of general circulation
22 in the county or counties affected.

23 (6) Only the owner of the water right may seek enforcement of the temporary change authorization
24 or object under 85-2-308.

25 (7) A temporary change authorization under this section does not create a right of access across
26 private property or any infringement of private property rights.

27
28 **Section 2.** Section 85-2-402, MCA, is amended to read:

29 **"85-2-402. (Temporary) Changes in appropriation rights.** (1) An appropriator may not make a
30 change in an appropriation right except, as permitted under this section, by applying for and receiving the

1 approval of the department or, if applicable, of the legislature. An applicant shall submit a correct and
2 complete application.

3 (2) Except as provided in subsections (4) through (6), the department shall approve a change in
4 appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are
5 met:

6 (a) The proposed use will not adversely affect the water rights of other persons or other planned
7 uses or developments for which a permit has been issued or for which water has been reserved.

8 (b) Except for a lease authorization pursuant to 85-2-436 ~~that~~ or a temporary change authorization
9 for instream use to benefit the fishery resource pursuant to [section 1] when either authorization does not
10 require appropriation works, the proposed means of diversion, construction, and operation of the
11 appropriation works are adequate.

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

13 (d) ~~The~~ Except for a lease authorization pursuant to 85-2-436 or a temporary change authorization
14 pursuant to [section 1] for instream flow to benefit the fishery resource, the applicant has a possessory
15 interest, or the written consent of the person with the possessory interest, in the property where the water
16 is to be put to beneficial use.

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

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

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

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

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

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

30 (b) the proposed change is a reasonable use. A finding of reasonable use must be based on a

1 consideration of:

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

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

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

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

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

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

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

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

17 (b) the department then petitions the legislature and the legislature affirms the decision of the
18 department after one or more public hearings.

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

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

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

1 of subsection (2) or (4) are met;

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

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

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

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

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

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

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

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

18 (7) For any application for a change in appropriation right involving 4,000 or more acre-feet of
19 water a year and 5.5 or more cubic feet per second of water, the department shall give notice of the
20 proposed change in accordance with 85-2-307 and shall hold one or more hearings in accordance with
21 85-2-309 prior to its approval or denial of the proposed change. The department shall provide notice and
22 may hold one or more hearings upon any other proposed change if it determines that a change might
23 adversely affect the rights of other persons.

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

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

1 appropriation works describing how the appropriation was completed.

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

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

9 (12) A person holding an issued permit or change approval that has not been perfected may change
10 the place of diversion, place of use, purpose of use, or place of storage by filing an application for change
11 pursuant to this section.

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

17 (14) The department may adopt rules to implement the provisions of this section. (Terminates June
18 30, 1999--sec. 4, Ch. 740, L. 1991.)

19 **85-2-402. (Effective July 1, 1999) Changes in appropriation rights.** (1) An appropriator may not
20 make a change in an appropriation right except, as permitted under this section, by applying for and
21 receiving the approval of the department or, if applicable, of the legislature. An applicant shall submit a
22 correct and complete application.

23 (2) Except as provided in subsections (4) through (6), the department shall approve a change in
24 appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are
25 met:

26 (a) The proposed use will not adversely affect the water rights of other persons or other planned
27 uses or developments for which a permit has been issued or for which water has been reserved.

28 (b) ~~The~~ Except for a temporary change authorization pursuant to [section 1] that does not require
29 appropriation works, the proposed means of diversion, construction, and operation of the appropriation
30 works are adequate.

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

2 (d) ~~The Except for a temporary change authorization pursuant to [section 1] for instream flow to~~
3 ~~benefit the fishery resource, the~~ applicant has a possessory interest, or the written consent of the person
4 with the possessory interest, in the property where the water is to be put to beneficial use.

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

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

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

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

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

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

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

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

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

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

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

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

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

30 (5) The department may not approve a change in purpose of use or place of use for a diversion that

1 results in 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water being
2 consumed unless:

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

5 (b) the department then petitions the legislature and the legislature affirms the decision of the
6 department after one or more public hearings.

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

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

18 (i) depending on the volume of water diverted or consumed, the applicable criteria and procedures
19 of subsection (2) or (4) 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 appropriator has proved by clear and convincing evidence that the
24 requirements of subsections (6)(b)(ii) and (6)(b)(iii) will be met, the department and, if applicable, the
25 legislature shall consider the following factors:

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

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

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

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

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

6 (7) For any application for a change in appropriation right involving 4,000 or more acre-feet of
7 water a year and 5.5 or more cubic feet per second of water, the department shall give notice of the
8 proposed change in accordance with 85-2-307 and shall hold one or more hearings in accordance with
9 85-2-309 prior to its approval or denial of the proposed change. The department shall provide notice and
10 may hold one or more hearings upon any other proposed change if it determines that such a change might
11 adversely affect the rights of other persons.

12 (8) The department or the legislature, if applicable, may approve a change subject to such terms,
13 conditions, restrictions, and limitations as it considers necessary to satisfy the criteria of this section,
14 including limitations on the time for completion of the change. The department may extend time limits
15 specified in the change approval under the applicable criteria and procedures of 85-2-312(3).

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

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

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

27 (12) A person holding an issued permit or change approval that has not been perfected may change
28 the place of diversion, place of use, purpose of use, or place of storage by filing an application for change
29 pursuant to this section.

30 (13) A change in appropriation right contrary to the provisions of this section is invalid. An officer,

1 agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an
2 unauthorized change in appropriation right. A person or corporation may not, directly or indirectly,
3 personally or through an agent, officer, or employee, attempt to change an appropriation right except in
4 accordance with this section.

5 (14) The department may adopt rules to implement the provisions of this section."
6

7 **Section 3.** Section 85-2-407, MCA, is amended to read:

8 **"85-2-407. Temporary changes in appropriation right.** (1) An appropriator may not make a
9 temporary change in appropriation right for ~~his~~ the appropriator's use or another's use except with
10 department approval in accordance with 85-2-402 and this section.

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

13 (3) An authorization for a temporary change in appropriation right may be renewed by the
14 department for a period not to exceed 10 years. Renewal of an authorization for a temporary change in
15 appropriation right requires application to the department by the appropriator. Upon application, the
16 department shall notify other appropriators potentially affected by the renewal and shall allow 30 days for
17 submission of new evidence of adverse effects to other water rights. A temporary change authorization may
18 not be renewed by the department if it determines that the right of an appropriator, other than an
19 appropriator described in subsection (7), is adversely affected.

20 (4) During the term of the original temporary change authorization, the department may modify or
21 revoke its authorization for a temporary change if it determines that the right of an appropriator, other than
22 an appropriator described in subsection (7), is adversely affected. Except for objections during the initial
23 temporary change application process and objections during the temporary change renewal process, an
24 appropriator may object once during the term of a temporary change permit.

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

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

30 (7) A person issued a water use permit with a priority of appropriation after the date of filing of

1 an application for a temporary change in appropriation right under this section may not object to the
2 exercise of the temporary change according to its terms, the renewal of the authorization for the temporary
3 change, or the reversion of the appropriation right to its permanent purpose, place of use, point of
4 diversion, or place of storage. Persons described in this subsection must be notified of the existence of any
5 temporary change authorizations from the same source of supply.

6 (8) If a water right for which a temporary change has been approved is transferred as an
7 appurtenance of real property, the temporary change remains in effect unless another change in
8 appropriation right is authorized by the department."
9

10 NEW SECTION. **Section 4. Temporary change validity -- limitations.** All temporary changes
11 authorized under [section 1] entered into prior to June 30, 2005, remain valid until the expiration date of
12 the temporary change. A temporary change authorized under [section 1] may not be renewed or otherwise
13 extended after June 30, 2005.
14

15 NEW SECTION. **Section 5. Codification instruction.** [Sections 1 and 4] are intended to be codified
16 as an integral part of Title 85, chapter 2, part 4, and the provisions of Title 85, chapter 2, part 4, apply to
17 [sections 1 and 4].
18

19 NEW SECTION. **Section 6. Termination.** [Sections 1, 2, and 4] terminate June 30, 2005.
20

-END-

STATE OF MONTANA - FISCAL NOTE

Fiscal Note for HB0472, as introduced

DESCRIPTION OF PROPOSED LEGISLATION:

An act allowing an existing appropriative water right to be temporarily changed to instream flow to benefit the fishery resource; establishing additional criteria for and limitations on changes to instream flow to benefit the fishery resource.

ASSUMPTIONS:

1. The resulting increase in temporary change applications will not require additional staff and resources for the Department of Natural Resources and Conservation (DNRC) to process.
2. The responsibilities of the working group provided for in the act would require a minimal amount of time and could be handled by an existing council or committee.
3. The Department of Fish, Wildlife and Parks' current water leasing program is unaffected by this bill.

FISCAL IMPACT:

No fiscal impact anticipated.

Dave Lewis 2-15-95
DAVE LEWIS, BUDGET DIRECTOR DATE
Office of Budget and Program Planning

Dick Knox 2/15/95
DICK KNOX, PRIMARY SPONSOR DATE

Fiscal Note for HB0472, as introduced

HB 472

1 HOUSE BILL NO. 472

2 INTRODUCED BY KNOX, GROSFIELD, HARPER, MESAROS, ORR, RANEY, HERTEL, STANG, RÉHBEIN,
3 SWANSON, OHS, BECK, M. HANSON, TAYLOR, CRIPPEN, MERCER, HARP, ELLIS, GRINDE, FOSTER,
4 STOVALL, KEATING, BROWN, HIBBARD

5
6 A BILL FOR AN ACT ENTITLED: "AN ACT ALLOWING AN EXISTING APPROPRIATIVE WATER RIGHT TO
7 BE TEMPORARILY CHANGED TO INSTREAM FLOW TO BENEFIT THE FISHERY RESOURCE; ESTABLISHING
8 ADDITIONAL CRITERIA FOR AND LIMITATIONS ON CHANGES TO INSTREAM FLOW TO BENEFIT THE
9 FISHERY RESOURCE; AMENDING SECTIONS 85-2-402 AND 85-2-407, MCA; AND PROVIDING A
10 TERMINATION DATE."

11
12 STATEMENT OF INTENT

13 This legislation, jointly developed by representatives from the agricultural, recreation, and
14 conservation communities, is intended to authorize the temporary use of existing water rights for instream
15 flow to benefit the fishery resource. In establishing the use of water rights for authorized instream flow
16 to benefit the fishery resource, it is the intent of the legislature that the authorization respect and work
17 within the prior appropriation water rights system.

18 This legislation creates an opportunity for citizens to voluntarily enter into agreements to lease
19 existing water rights to protect fisheries and allows persons who own water rights to TEMPORARILY
20 change the use of that water to instream flow to benefit the fishery resource.

21 To monitor and review the implementation of this instream flow program, the legislature directs the
22 office of the governor, to convene, on an ongoing and regular basis, a working group that includes
23 representatives from the agricultural, recreation, and conservation communities. This working group shall
24 consult with the department of natural resources and conservation on relevant changes in water use and
25 shall submit a report to the governor and the legislature in 2001 outlining the status of the program.

26
27 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

28
29 NEW SECTION. Section 1. Temporary change authorization for instream flow -- additional
30 requirements. (1) The department shall accept and process an application for a temporary change in

1 appropriation rights to maintain or enhance instream flow to benefit the fishery resource under the
2 provisions of 85-2-402, 85-2-407, and this section.

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

5 (i) change the purpose of a consumptive use water right to instream flow for the benefit of the
6 fishery resource; or

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

9 (b) For the purpose of this section, "person" means and is limited to an individual, association,
10 partnership, or corporation.

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

13 (a) the temporary change authorization for water to maintain and enhance instream flow to benefit
14 the fishery resource, as measured at a specific point, will not adversely affect the water rights of other
15 persons; and

16 (b) the amount of water for the proposed use is needed to maintain or enhance instream flows to
17 benefit the fishery resource.

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

21 (5) For the purpose of identifying and consulting with individuals or groups that may be affected
22 by the proposed change authorization, the applicant shall, 30 days before submitting the application to the
23 department, publish notice of the proposed change authorization in a local newspaper of general circulation
24 in the county or counties affected.

25 (6) Only the owner of the water right may seek enforcement of the temporary change authorization
26 or object under 85-2-308.

27 (7) A temporary change authorization under this section does not create a right of access across
28 private property or ALLOW any infringement of private property rights.

29

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

1 **"85-2-402. (Temporary) Changes in appropriation rights.** (1) An appropriator may not make a
2 change in an appropriation right except, as permitted under this section, by applying for and receiving the
3 approval of the department or, if applicable, of the legislature. An applicant shall submit a correct and
4 complete application.

5 (2) Except as provided in subsections (4) through (6), the department shall approve a change in
6 appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are
7 met:

8 (a) The proposed use will not adversely affect the water rights of other persons or other planned
9 uses or developments for which a permit has been issued or for which water has been reserved.

10 (b) ~~Except for a lease authorization pursuant to 85-2-436 that~~ or a temporary change authorization
11 for instream use to benefit the fishery resource pursuant to [section 1] when either authorization does not
12 require appropriation works, the proposed means of diversion, construction, and operation of the
13 appropriation works are adequate.

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

15 (d) ~~The~~ Except for a lease authorization pursuant to 85-2-436 or a temporary change authorization
16 pursuant to [section 1] for instream flow to benefit the fishery resource, the applicant has a possessory
17 interest, or the written consent of the person with the possessory interest, in the property where the water
18 is to be put to beneficial use.

19 (e) If the change in appropriation right involves salvaged water, the proposed water-saving methods
20 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 permitholder 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 met
25 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
27 be met.

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

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

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

4 (i) the existing demands on the state water supply, as well as projected demands for water for
5 future beneficial purposes, including municipal water supplies, irrigation systems, and minimum streamflows
6 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 that
15 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 criteria
18 in subsections (2) and (4) are met; and

19 (b) the department then petitions the legislature and the legislature affirms the decision of the
20 department after one or more public hearings.

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

28 (b) The department and, if applicable, the legislature may not approve a change in appropriation
29 right for the withdrawal and transportation of appropriated water for use outside the state unless the
30 appropriator proves by clear and convincing evidence and, if applicable, the legislature approves after one

1 or more public hearings that:

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

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

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

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

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

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

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

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

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

20 (7) For any application for a change in appropriation right involving 4,000 or more acre-feet of
21 water a year and 5.5 or more cubic feet per second of water, the department shall give notice of the
22 proposed change in accordance with 85-2-307 and shall hold one or more hearings in accordance with
23 85-2-309 prior to its approval or denial of the proposed change. The department shall provide notice and
24 may hold one or more hearings upon any other proposed change if it determines that a change might
25 adversely affect the rights of other persons.

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

30 (9) Upon actual application of water to the proposed beneficial use within the time allowed, the

1 appropriator shall notify the department that the appropriation has been completed. The notification must
2 contain a certified statement by a person with experience in the design, construction, or operation of
3 appropriation works describing how the appropriation was completed.

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

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

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

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

19 (14) The department may adopt rules to implement the provisions of this section. (Terminates June
20 30, 1999--sec. 4, Ch. 740, L. 1991.)

21 **85-2-402. (Effective July 1, 1999) Changes in appropriation rights.** (1) An appropriator may not
22 make a change in an appropriation right except, as permitted under this section, by applying for and
23 receiving the approval of the department or, if applicable, of the legislature. An applicant shall submit a
24 correct and complete application.

25 (2) Except as provided in subsections (4) through (6), the department shall approve a change in
26 appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are
27 met:

28 (a) The proposed use will not adversely affect the water rights of other persons or other planned
29 uses or developments for which a permit has been issued or for which water has been reserved.

30 (b) The Except for a temporary change authorization pursuant to [section 1] that does not require

1 appropriation works, the proposed means of diversion, construction, and operation of the appropriation
2 works are adequate.

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

4 (d) ~~The~~ Except for a temporary change authorization pursuant to [section 1] for instream flow to
5 benefit the fishery resource, the applicant has a possessory interest, or the written consent of the person
6 with the possessory interest, in the property where the water is to be put to beneficial use.

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

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

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

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

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

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

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

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

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

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

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

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

30 (vi) the probable significant adverse environmental impacts of the proposed use of water as

1 determined by the department pursuant to Title 75, chapter 1, or Title 75, chapter 20.

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

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

7 (b) the department then petitions the legislature and the legislature affirms the decision of the
8 department after one or more public hearings.

9 (6) (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 reserved water rights held by the United States for federal reserved lands and in trust for
12 the various Indian tribes within the state's boundaries. Although the state of Montana also recognizes that,
13 under appropriate conditions, the out-of-state transportation and use of its public waters are not in conflict
14 with the public welfare of its citizens or the conservation of its waters, the following criteria must be met
15 before out-of-state use may occur:

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

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

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

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

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

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

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

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

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

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

8 (7) For any application for a change in appropriation right involving 4,000 or more acre-feet of
9 water a year and 5.5 or more cubic feet per second of water, the department shall give notice of the
10 proposed change in accordance with 85-2-307 and shall hold one or more hearings in accordance with
11 85-2-309 prior to its approval or denial of the proposed change. The department shall provide notice and
12 may hold one or more hearings upon any other proposed change if it determines that such a change might
13 adversely affect the rights of other persons.

14 (8) The department or the legislature, if applicable, may approve a change subject to such terms,
15 conditions, restrictions, and limitations as it considers necessary to satisfy the criteria of this section,
16 including limitations on the time for completion of the change. The department may extend time limits
17 specified in the change approval under the applicable criteria and procedures of 85-2-312(3).

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

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

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

29 (12) A person holding an issued permit or change approval that has not been perfected may change
30 the place of diversion, place of use, purpose of use, or place of storage by filing an application for change

1 pursuant to this section.

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

7 (14) The department may adopt rules to implement the provisions of this section."
8

9 **Section 3.** Section 85-2-407, MCA, is amended to read:

10 **"85-2-407. Temporary changes in appropriation right.** (1) An appropriator may not make a
11 temporary change in appropriation right for ~~his~~ the appropriator's use or another's use except with
12 department approval in accordance with 85-2-402 and this section.

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

15 (3) An authorization for a temporary change in appropriation right may be renewed by the
16 department for a period not to exceed 10 years. Renewal of an authorization for a temporary change in
17 appropriation right requires application to the department by the appropriator. Upon application, the
18 department shall notify other appropriators potentially affected by the renewal and shall allow 30 days for
19 submission of new evidence of adverse effects to other water rights. A temporary change authorization may
20 not be renewed by the department if it determines that the right of an appropriator, other than an
21 appropriator described in subsection (7), is adversely affected.

22 (4) (A) During the term of the original temporary change authorization, the department may modify
23 or revoke its authorization for a temporary change if it determines that the right of an appropriator, other
24 than an appropriator described in subsection (7), is adversely affected. ~~Except for objections during the~~
25 ~~initial temporary change application process and objections during the temporary change renewal process,~~
26 ~~an appropriator may object once during the term of a temporary change permit.~~

27 (B) AN APPROPRIATOR, OTHER THAN AN APPROPRIATOR IDENTIFIED IN SUBSECTION (7), MAY
28 OBJECT:

29 (I) DURING THE INITIAL TEMPORARY CHANGE APPLICATION PROCESS;

30 (II) DURING THE TEMPORARY CHANGE RENEWAL PROCESS; AND

1 (III) ONCE DURING THE TERM OF THE TEMPORARY CHANGE PERMIT.

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

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

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

13 (8) If a water right for which a temporary change has been approved is transferred as an
14 appurtenance of real property, the temporary change remains in effect unless another change in
15 appropriation right is authorized by the department."
16

17 NEW SECTION. **Section 4. Temporary change validity -- limitations.** All temporary changes
18 authorized under [section 1] entered into prior to June 30, 2005, remain valid until the expiration date of
19 the temporary change. A temporary change authorized under [section 1] may not be renewed or otherwise
20 extended after June 30, 2005.
21

22 NEW SECTION. **Section 5. Codification instruction.** [Sections 1 and 4] are intended to be codified
23 as an integral part of Title 85, chapter 2, part 4, and the provisions of Title 85, chapter 2, part 4, apply to
24 [sections 1 and 4].
25

26 NEW SECTION. **Section 6. Termination.** [Sections 1, 2, and 4] terminate June 30, 2005.

27 -END-

1 HOUSE BILL NO. 472

2 INTRODUCED BY KNOX, GROSFIELD, HARPER, MESAROS, ORR, RANEY, HERTEL, STANG, REHBEIN,
3 SWANSON, OHS, BECK, M. HANSON, TAYLOR, CRIPPEN, MERCER, HARP, ELLIS, GRINDE, FOSTER,
4 STOVAL, KEATING, BROWN, HIBBARD

5
6 A BILL FOR AN ACT ENTITLED: "AN ACT ALLOWING AN EXISTING APPROPRIATIVE WATER RIGHT TO
7 BE TEMPORARILY CHANGED TO INSTREAM FLOW TO BENEFIT THE FISHERY RESOURCE; ESTABLISHING
8 ADDITIONAL CRITERIA FOR AND LIMITATIONS ON CHANGES TO INSTREAM FLOW TO BENEFIT THE
9 FISHERY RESOURCE; AMENDING SECTIONS 85-2-402 AND 85-2-407, MCA; AND PROVIDING A
10 TERMINATION DATE."

THERE ARE NO CHANGES IN THIS BILL AND IT WILL
NOT BE REPRINTED. PLEASE REFER TO SECOND
READING COPY (YELLOW) FOR COMPLETE TEXT.

1 HOUSE BILL NO. 472

2 INTRODUCED BY KNOX, GROSFIELD, HARPER, MESAROS, ORR, RANEY, HERTEL, STANG, REHBEIN,
3 SWANSON, OHS, BECK, M. HANSON, TAYLOR, CRIPPEN, MERCER, HARP, ELLIS, GRINDE, FOSTER,
4 STOVALL, KEATING, BROWN, HIBBARD

5
6 A BILL FOR AN ACT ENTITLED: "AN ACT ALLOWING AN EXISTING APPROPRIATIVE WATER RIGHT TO
7 BE TEMPORARILY CHANGED TO INSTREAM FLOW TO BENEFIT THE FISHERY RESOURCE; ESTABLISHING
8 ADDITIONAL CRITERIA FOR AND LIMITATIONS ON CHANGES TO INSTREAM FLOW TO BENEFIT THE
9 FISHERY RESOURCE; AMENDING SECTIONS 85-2-402 AND 85-2-407, MCA; AND PROVIDING A
10 TERMINATION DATE."

11
12 STATEMENT OF INTENT

13 This legislation, jointly developed by representatives from the agricultural, recreation, and
14 conservation communities, is intended to authorize the temporary use of existing water rights for instream
15 flow to benefit the fishery resource. In establishing the use of water rights for authorized instream flow
16 to benefit the fishery resource, it is the intent of the legislature that the authorization respect and work
17 within the prior appropriation water rights system.

18 This legislation creates an opportunity for citizens to voluntarily enter into agreements to lease
19 existing water rights to protect fisheries and allows persons who own water rights to TEMPORARILY
20 change the use of that water to instream flow to benefit the fishery resource.

21 To monitor and review the implementation of this instream flow program, the legislature directs the
22 office of the governor, to convene, on an ongoing and regular basis, a working group that includes
23 representatives from the agricultural, recreation, and conservation communities. This working group shall
24 consult with the department of natural resources and conservation on relevant changes in water use and
25 shall submit a report to the governor and the legislature in 2001 outlining the status of the program.

26
27 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

28
29 NEW SECTION. Section 1. Temporary change authorization for instream flow -- additional
30 requirements. (1) The department shall accept and process an application for a temporary change in

1 appropriation rights to maintain or enhance instream flow to benefit the fishery resource under the
2 provisions of 85-2-402, 85-2-407, and this section.

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

5 (i) change the purpose of a consumptive use water right to instream flow for the benefit of the
6 fishery resource; or

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

9 (b) For the purpose of this section, "person" means and is limited to an individual, association,
10 partnership, or corporation.

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

13 (a) the temporary change authorization for water to maintain and enhance instream flow to benefit
14 the fishery resource, as measured at a specific point, will not adversely affect the water rights of other
15 persons; and

16 (b) the amount of water for the proposed use is needed to maintain or enhance instream flows to
17 benefit the fishery resource.

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

21 (5) For the purpose of identifying and consulting with individuals or groups that may be affected
22 by the proposed change authorization, the applicant shall, 30 days before submitting the application to the
23 department, publish notice of the proposed change authorization in a local newspaper of general circulation
24 in the county or counties affected.

25 (6) Only the owner of the water right may seek enforcement of the temporary change authorization
26 or object under 85-2-308.

27 (7) A temporary change authorization under this section does not create a right of access across
28 private property or ALLOW any infringement of private property rights.

29

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

1 **"85-2-402. (Temporary) Changes in appropriation rights.** (1) An appropriator may not make a
2 change in an appropriation right except, as permitted under this section, by applying for and receiving the
3 approval of the department or, if applicable, of the legislature. An applicant shall submit a correct and
4 complete application.

5 (2) Except as provided in subsections (4) through (6), the department shall approve a change in
6 appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are
7 met:

8 (a) The proposed use will not adversely affect the water rights of other persons or other planned
9 uses or developments for which a permit has been issued or for which water has been reserved.

10 (b) Except for a lease authorization pursuant to 85-2-436 ~~that~~ or a temporary change authorization
11 for instream use to benefit the fishery resource pursuant to [section 1] when either authorization does not
12 require appropriation works, the proposed means of diversion, construction, and operation of the
13 appropriation works are adequate.

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

15 (d) ~~The~~ Except for a lease authorization pursuant to 85-2-436 or a temporary change authorization
16 pursuant to [section 1] for instream flow to benefit the fishery resource, the applicant has a possessory
17 interest, or the written consent of the person with the possessory interest, in the property where the water
18 is to be put to beneficial use.

19 (e) If the change in appropriation right involves salvaged water, the proposed water-saving methods
20 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 met
25 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
27 be met.

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

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

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

4 (i) the existing demands on the state water supply, as well as projected demands for water for
5 future beneficial purposes, including municipal water supplies, irrigation systems, and minimum streamflows
6 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 that
15 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 criteria
18 in subsections (2) and (4) are met; and

19 (b) the department then petitions the legislature and the legislature affirms the decision of the
20 department after one or more public hearings.

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

28 (b) The department and, if applicable, the legislature may not approve a change in appropriation
29 right for the withdrawal and transportation of appropriated water for use outside the state unless the
30 appropriator proves by clear and convincing evidence and, if applicable, the legislature approves after one

1 or more public hearings that:

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

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

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

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

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

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

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

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

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

20 (7) For any application for a change in appropriation right involving 4,000 or more acre-feet of
21 water a year and 5.5 or more cubic feet per second of water, the department shall give notice of the
22 proposed change in accordance with 85-2-307 and shall hold one or more hearings in accordance with
23 85-2-309 prior to its approval or denial of the proposed change. The department shall provide notice and
24 may hold one or more hearings upon any other proposed change if it determines that a change might
25 adversely affect the rights of other persons.

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

30 (9) Upon actual application of water to the proposed beneficial use within the time allowed, the

1 appropriator shall notify the department that the appropriation has been completed. The notification must
2 contain a certified statement by a person with experience in the design, construction, or operation of
3 appropriation works describing how the appropriation was completed.

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

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

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

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

19 (14) The department may adopt rules to implement the provisions of this section. (Terminates June
20 30, 1999--sec. 4, Ch. 740, L. 1991.)

21 **85-2-402. (Effective July 1, 1999) Changes in appropriation rights.** (1) An appropriator may not
22 make a change in an appropriation right except, as permitted under this section, by applying for and
23 receiving the approval of the department or, if applicable, of the legislature. An applicant shall submit a
24 correct and complete application.

25 (2) Except as provided in subsections (4) through (6), the department shall approve a change in
26 appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are
27 met:

28 (a) The proposed use will not adversely affect the water rights of other persons or other planned
29 uses or developments for which a permit has been issued or for which water has been reserved.

30 (b) ~~The~~ Except for a temporary change authorization pursuant to [section 1] that does not require

1 appropriation works, the proposed means of diversion, construction, and operation of the appropriation
2 works are adequate.

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

4 (d) ~~The~~ Except for a temporary change authorization pursuant to [section 1] for instream flow to
5 benefit the fishery resource, the applicant has a possessory interest, or the written consent of the person
6 with the possessory interest, in the property where the water is to be put to beneficial use.

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

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

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

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

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

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

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

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

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

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

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

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

30 (vi) the probable significant adverse environmental impacts of the proposed use of water as

1 determined by the department pursuant to Title 75, chapter 1, or Title 75, chapter 20.

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

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

7 (b) the department then petitions the legislature and the legislature affirms the decision of the
8 department after one or more public hearings.

9 (6) (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 reserved water rights held by the United States for federal reserved lands and in trust for
12 the various Indian tribes within the state's boundaries. Although the state of Montana also recognizes that,
13 under appropriate conditions, the out-of-state transportation and use of its public waters are not in conflict
14 with the public welfare of its citizens or the conservation of its waters, the following criteria must be met
15 before out-of-state use may occur:

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

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

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

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

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

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

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

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

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

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

8 (7) For any application for a change in appropriation right involving 4,000 or more acre-feet of
9 water a year and 5.5 or more cubic feet per second of water, the department shall give notice of the
10 proposed change in accordance with 85-2-307 and shall hold one or more hearings in accordance with
11 85-2-309 prior to its approval or denial of the proposed change. The department shall provide notice and
12 may hold one or more hearings upon any other proposed change if it determines that such a change might
13 adversely affect the rights of other persons.

14 (8) The department or the legislature, if applicable, may approve a change subject to such terms,
15 conditions, restrictions, and limitations as it considers necessary to satisfy the criteria of this section,
16 including limitations on the time for completion of the change. The department may extend time limits
17 specified in the change approval under the applicable criteria and procedures of 85-2-312(3).

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

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

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

29 (12) A person holding an issued permit or change approval that has not been perfected may change
30 the place of diversion, place of use, purpose of use, or place of storage by filing an application for change

1 pursuant to this section.

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

7 (14) The department may adopt rules to implement the provisions of this section."
8

9 **Section 3.** Section 85-2-407, MCA, is amended to read:

10 **"85-2-407. Temporary changes in appropriation right.** (1) An appropriator may not make a
11 temporary change in appropriation right for ~~his~~ the appropriator's use or another's use except with
12 department approval in accordance with 85-2-402 and this section.

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

15 (3) An authorization for a temporary change in appropriation right may be renewed by the
16 department for a period not to exceed 10 years. Renewal of an authorization for a temporary change in
17 appropriation right requires application to the department by the appropriator. Upon application, the
18 department shall notify other appropriators potentially affected by the renewal and shall allow 30 days for
19 submission of new evidence of adverse effects to other water rights. A temporary change authorization may
20 not be renewed by the department if it determines that the right of an appropriator, other than an
21 appropriator described in subsection (7), is adversely affected.

22 (4) (A) During the term of the original temporary change authorization, the department may modify
23 or revoke its authorization for a temporary change if it determines that the right of an appropriator, other
24 than an appropriator described in subsection (7), is adversely affected. ~~Except for objections during the~~
25 ~~initial temporary change application process and objections during the temporary change renewal process,~~
26 ~~an appropriator may object once during the term of a temporary change permit.~~

27 (B) AN APPROPRIATOR, OTHER THAN AN APPROPRIATOR IDENTIFIED IN SUBSECTION (7), MAY
28 OBJECT:

29 (I) DURING THE INITIAL TEMPORARY CHANGE APPLICATION PROCESS;

30 (II) DURING THE TEMPORARY CHANGE RENEWAL PROCESS; AND

1 (III) ONCE DURING THE TERM OF THE TEMPORARY CHANGE PERMIT.

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

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

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

13 (8) If a water right for which a temporary change has been approved is transferred as an
14 appurtenance of real property, the temporary change remains in effect unless another change in
15 appropriation right is authorized by the department."
16

17 NEW SECTION. Section 4. Temporary change validity -- limitations. All temporary changes
18 authorized under [section 1] entered into prior to June 30, 2005, remain valid until the expiration date of
19 the temporary change. A temporary change authorized under [section 1] may not be renewed or otherwise
20 extended after June 30, 2005.
21

22 NEW SECTION. Section 5. Codification instruction. [Sections 1 and 4] are intended to be codified
23 as an integral part of Title 85, chapter 2, part 4, and the provisions of Title 85, chapter 2, part 4, apply to
24 [sections 1 and 4].
25

26 NEW SECTION. Section 6. Termination. [Sections 1, 2, and 4] terminate June 30, 2005.
27

-END-