

## 1 SENATE BILL NO. 97

2 INTRODUCED BY GROSSFIELD

3 BY REQUEST OF THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION  
4

5 A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING THE WATER LAWS TO CLARIFY THAT  
6 THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION MAY ISSUE WATER PERMITS AND  
7 CHANGE AUTHORIZATIONS PRIOR TO THE COMPLETION OF AN ADJUDICATION IN A SOURCE OF  
8 SUPPLY; CLARIFYING THAT WATER RESERVED UNDER STATE LAW IS NOT SYNONYMOUS WITH  
9 FEDERAL AND INDIAN RESERVED WATER RIGHTS UNDER FEDERAL LAW; AMENDING SECTIONS  
10 85-2-101, 85-2-102, 85-2-217, 85-2-228, 85-2-301, 85-2-302, 85-2-311, 85-2-313, 85-2-316, 85-2-321,  
11 85-2-329, 85-2-331, 85-2-336, 85-2-340, 85-2-341, 85-2-342, 85-2-401, AND 85-2-402, MCA; AND  
12 PROVIDING AN IMMEDIATE EFFECTIVE DATE AND A RETROACTIVE APPLICABILITY DATE."  
13

14 WHEREAS, the Montana Supreme Court, in In the Matter of the Application for Beneficial Water  
15 Use Permit Nos. 66459-76L, Ciotti; 64988-q76L, Starnier; and Application for Change of Appropriation  
16 Water Right No. G15152-s761, Pope, which was decided August 22, 1996, held that an applicant for a  
17 permit or change of use authorization on the Flathead Indian Reservation may not as a matter of law meet  
18 the applicant's burden of proof to establish that the proposed use will not interfere unreasonably with  
19 planned uses or developments for which water has been reserved until the Confederated Salish and  
20 Kootenai Tribes' federal reserved water rights are quantified; and

21 WHEREAS, in 1973, Montana enacted comprehensive legislation referred to as the Montana Water  
22 Use Act of 1973, codified in Title 85, chapter 2, to implement Article IX, section 3(4), of the Montana  
23 Constitution, which requires that the Legislature provide for the administration, control, and regulation of  
24 water rights and establish a system of centralized records of all water rights, and to implement Article IX  
25 making the water of the state subject to appropriation for beneficial use by its citizens; and

26 WHEREAS, Title 85, chapter 2, as amended, provides for the comprehensive adjudication of water  
27 rights and the continued development of Montana's water resources through a permit and change  
28 authorization process; and

29 WHEREAS, historically in Montana, water has been developed, water use rights acquired, and  
30 changes in water use completed in the absence of the adjudication of water rights in a source of supply;

1 and

2 WHEREAS, since July 1, 1973, it has been the intent of the Legislature that provisional permits and  
3 change authorizations be issued pursuant to statutory standards in the absence of a completed adjudication  
4 in a source of supply; and

5 WHEREAS, the dissent filed with the Montana Supreme Court decision raises a concern that the  
6 majority decision may be interpreted to apply statewide, but that interpretation does not reflect the intent  
7 of the Legislature to allow for the continued wise and efficient use of Montana's water resources and  
8 Montana's growing economy as required under Title 85, chapter 2.

9

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

11

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

13 "85-2-101. Declaration of policy and purpose. (1) Pursuant to Article IX of the Montana  
14 constitution, the legislature declares that any use of water is a public use and that the waters within the  
15 state are the property of the state for the use of its people and are subject to appropriation for beneficial  
16 uses as provided in this chapter.

17 (2) A purpose of this chapter is to implement Article IX, section 3(4), of the Montana constitution,  
18 which requires that the legislature provide for the administration, control, and regulation of water rights and  
19 establish a system of centralized records of all water rights. The legislature declares that this system of  
20 centralized records recognizing and establishing all water rights is essential for the documentation,  
21 protection, preservation, and future beneficial use and development of Montana's water for the state and  
22 its citizens and for the continued development and completion of the comprehensive state water plan.

23 (3) It is the policy of this state and a purpose of this chapter to encourage the wise use of the  
24 state's water resources by making them available for appropriation consistent with this chapter and to  
25 provide for the wise utilization, development, and conservation of the waters of the state for the maximum  
26 benefit of its people with the least possible degradation of the natural aquatic ecosystems. In pursuit of this  
27 policy, the state encourages the development of facilities ~~which~~ that store and conserve waters for  
28 beneficial use, for the maximization of the use of those waters in Montana, for the stabilization of ~~stream~~  
29 flows streamflows, and for ground water recharge.

30 (4) Pursuant to Article IX, section 3(1), of the Montana constitution, it is further the policy of this

1 state and a purpose of this chapter to recognize and confirm all existing rights to the use of any waters for  
2 any useful or beneficial purpose.

3 (5) It is the intent of the legislature that the statutory determinations for issuing new water use  
4 permits and authorizing changes do not require the adjudication of all water rights in the source of supply.  
5 The legislature recognizes the unique character and nature of water resources of the state. Because water  
6 is a resource that is subject to use and reuse, such as through return flows, and because at most times all  
7 water rights on a source will not be exercised to their full extent simultaneously, it is recognized that an  
8 adjudication is not a water availability study. Consequently, the legislature has provided an administrative  
9 forum for the factual investigation into whether water is available for new uses and changes both before  
10 and after the completion of an adjudication in the source of supply. To allow for orderly permitting in the  
11 absence of a complete adjudication in the source of supply, permits issued under this chapter are  
12 provisional. A provisional permit is subject to reduction, modification, or revocation by the department as  
13 provided in 85-2-313 upon completion of the general adjudication.

14 (6) It is the intent of the legislature that the establishment of a moratorium under 85-2-302 does  
15 not limit, expand, alter, or waive state jurisdiction to administer water rights within the exterior boundaries  
16 of an Indian reservation."

17  
18 **Section 2.** Section 85-2-102, MCA, is amended to read:

19 **"85-2-102. (Temporary) Definitions.** Unless the context requires otherwise, in this chapter, the  
20 following definitions apply:

21 (1) "Appropriate" means to:

22 (a) divert, impound, or withdraw (including by stock for stock water) a quantity of water;

23 (b) in the case of a public agency, reserve water in accordance with 85-2-316;

24 (c) in the case of the department of fish, wildlife, and parks, lease water in accordance with  
25 85-2-436; or

26 (d) in the Upper Clark Fork River basin, maintain and enhance streamflows to benefit the fishery  
27 resource in accordance with 85-2-439.

28 (2) "Beneficial use", unless otherwise provided, means:

29 (a) a use of water for the benefit of the appropriator, other persons, or the public, including but  
30 not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining,

1 municipal, power, and recreational uses;

2 (b) a use of water appropriated by the department for the state water leasing program under  
3 85-2-141 and of water leased under a valid lease issued by the department under 85-2-141;

4 (c) a use of water by the department of fish, wildlife, and parks pursuant to a lease authorized  
5 under 85-2-436; or

6 (d) a use of water to maintain and enhance streamflows to benefit the fishery resource in the Upper  
7 Clark Fork River basin as part of the Upper Clark Fork River basin instream flow pilot program authorized  
8 under 85-2-439.

9 (3) "Certificate" means a certificate of water right issued by the department.

10 (4) "Change in appropriation right" means a change in the place of diversion, the place of use, the  
11 purpose of use, or the place of storage.

12 (5) "Commission" means the fish, wildlife, and parks commission provided for in 2-15-3402.

13 (6) "Correct and complete" means that the information required to be submitted conforms to the  
14 standard of substantial credible information and that all of the necessary parts of the form requiring the  
15 information have been filled in with the required information.

16 (7) "Declaration" means the declaration of an existing right filed with the department under section  
17 8, Chapter 452, Laws of 1973.

18 (8) "Department" means the department of natural resources and conservation provided for in Title  
19 2, chapter 15, part 33.

20 (9) "Existing right" or "existing water right" means a right to the use of water that would be  
21 protected under the law as it existed prior to July 1, 1973. The term includes federal non-Indian and Indian  
22 reserved water rights created under federal law and water rights created under state law.

23 (10) "Ground water" means any water that is beneath the ground surface.

24 (11) "Late claim" means a claim to an existing right forfeited pursuant to the conclusive  
25 presumption of abandonment under 85-2-226.

26 (12) "Permit" means the permit to appropriate issued by the department under 85-2-301 through  
27 85-2-303 and 85-2-306 through 85-2-314.

28 (13) "Person" means an individual, association, partnership, corporation, state agency, political  
29 subdivision, the United States or any agency of the United States, or any other entity.

30 (14) "Political subdivision" means any county, incorporated city or town, public corporation, or

1 district created pursuant to state law or other public body of the state empowered to appropriate water.  
 2 The term does not mean a private corporation, association, or group.

3 (15) "Salvage" means to make water available for beneficial use from an existing valid appropriation  
 4 through application of water-saving methods.

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

8 ~~(16)~~(17) "Substantial credible information" means probable, believable facts sufficient to support  
 9 a reasonable legal theory upon which the department should proceed with the action requested by the  
 10 person providing the information.

11 ~~(17)~~(18) "Waste" means the unreasonable loss of water through the design or negligent operation  
 12 of an appropriation or water distribution facility or the application of water to anything but a beneficial use.

13 ~~(18)~~(19) "Water" means all water of the state, surface and subsurface, regardless of its character  
 14 or manner of occurrence, including but not limited to geothermal water, diffuse surface water, and sewage  
 15 effluent.

16 ~~(19)~~(20) "Water division" means a drainage basin as defined in 3-7-102.

17 ~~(20)~~(21) "Water judge" means a judge as provided for in Title 3, chapter 7.

18 ~~(21)~~(22) "Water master" means a master as provided for in Title 3, chapter 7.

19 ~~(22)~~(23) "Watercourse" means any naturally occurring stream or river from which water is diverted  
 20 for beneficial uses. It does not include ditches, culverts, or other ~~manmade~~ constructed waterways.

21 ~~(23)~~(24) "Well" means any artificial opening or excavation in the ground, however made, by which  
 22 ground water is sought or can be obtained or through which it flows under natural pressures or is artificially  
 23 withdrawn. (Terminates June 30, 1999--sec. 4, Ch. 740, L. 1991.)

24 **85-2-102. (Effective July 1, 1999) Definitions.** Unless the context requires otherwise, in this  
 25 chapter, the following definitions apply:

26 (1) "Appropriate" means:

27 (a) to divert, impound, or withdraw (including by stock for stock water) a quantity of water;

28 (b) in the case of a public agency, to reserve water in accordance with 85-2-316; or

29 (c) in the Upper Clark Fork River basin, to maintain and enhance streamflows to benefit the fishery  
 30 resource in accordance with 85-2-439.

- 1           (2) "Beneficial use", unless otherwise provided, means:
- 2           (a) a use of water for the benefit of the appropriator, other persons, or the public, including but
- 3 not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining,
- 4 municipal, power, and recreational uses;
- 5           (b) a use of water appropriated by the department for the state water leasing program under
- 6 85-2-141 and of water leased under a valid lease issued by the department under 85-2-141; or
- 7           (c) a use of water to maintain and enhance streamflows to benefit the fishery resource in the Upper
- 8 Clark Fork River basin as part of the Upper Clark Fork River basin instream flow pilot program authorized
- 9 under 85-2-439.
- 10          (3) "Certificate" means a certificate of water right issued by the department.
- 11          (4) "Change in appropriation right" means a change in the place of diversion, the place of use, the
- 12 purpose of use, or the place of storage.
- 13          (5) "Correct and complete" means that the information required to be submitted conforms to the
- 14 standard of substantial credible information and that all of the necessary parts of the form requiring the
- 15 information have been filled in with the required information.
- 16          (6) "Declaration" means the declaration of an existing right filed with the department under section
- 17 8, Chapter 452, Laws of 1973.
- 18          (7) "Department" means the department of natural resources and conservation provided for in Title
- 19 2, chapter 15, part 33.
- 20          (8) "Existing right" or "existing water right" means a right to the use of water that would be
- 21 protected under the law as it existed prior to July 1, 1973. The term includes federal non-Indian and Indian
- 22 reserved water rights created under federal law and water rights created under state law.
- 23          (9) "Ground water" means any water that is beneath the ground surface.
- 24          (10) "Late claim" means a claim to an existing right forfeited pursuant to the conclusive
- 25 presumption of abandonment under 85-2-226.
- 26          (11) "Permit" means the permit to appropriate issued by the department under 85-2-301 through
- 27 85-2-303 and 85-2-306 through 85-2-314.
- 28          (12) "Person" means an individual, association, partnership, corporation, state agency, political
- 29 subdivision, the United States or any agency of the United States, or any other entity.
- 30          (13) "Political subdivision" means any county, incorporated city or town, public corporation, or

1 district created pursuant to state law or other public body of the state empowered to appropriate water.  
 2 The term does not mean a private corporation, association, or group.

3 (14) "Salvage" means to make water available for beneficial use from an existing valid appropriation  
 4 through application of water-saving methods.

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

8 ~~(15)~~(16) "Substantial credible information" means probable, believable facts sufficient to support  
 9 a reasonable legal theory upon which the department should proceed with the action requested by the  
 10 person providing the information.

11 ~~(16)~~(17) "Waste" means the unreasonable loss of water through the design or negligent operation  
 12 of an appropriation or water distribution facility or the application of water to anything but a beneficial use.

13 ~~(17)~~(18) "Water" means all water of the state, surface and subsurface, regardless of its character  
 14 or manner of occurrence, including but not limited to geothermal water, diffuse surface water, and sewage  
 15 effluent.

16 ~~(18)~~(19) "Water division" means a drainage basin as defined in 3-7-102.

17 ~~(19)~~(20) "Water judge" means a judge as provided for in Title 3, chapter 7.

18 ~~(20)~~(21) "Water master" means a master as provided for in Title 3, chapter 7.

19 ~~(21)~~(22) "Watercourse" means any naturally occurring stream or river from which water is diverted  
 20 for beneficial uses. It does not include ditches, culverts, or other ~~manmade~~ constructed waterways.

21 ~~(22)~~(23) "Well" means any artificial opening or excavation in the ground, however made, by which  
 22 ground water is sought or can be obtained or through which it flows under natural pressures or is artificially  
 23 withdrawn. (Terminates June 30, 2005--sec. 14, Ch. 487, L. 1995.)

24 **85-2-102. (Effective July 1, 2005) Definitions.** Unless the context requires otherwise, in this  
 25 chapter, the following definitions apply:

26 (1) "Appropriate" means to:

27 (a) divert, impound, or withdraw (including by stock for stock water) a quantity of water;

28 (b) in the case of a public agency, to reserve water in accordance with 85-2-316; or

29 (c) in the case of the department of fish, wildlife, and parks, to lease water in accordance with

30 85-2-436.

1 (2) "Beneficial use", unless otherwise provided, means:

2 (a) a use of water for the benefit of the appropriator, other persons, or the public, including but  
3 not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining,  
4 municipal, power, and recreational uses;

5 (b) a use of water appropriated by the department for the state water leasing program under  
6 85-2-141 and of water leased under a valid lease issued by the department under 85-2-141; and

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8 under 85-2-436.

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13 (6) "Correct and complete" means that the information required to be submitted conforms to the  
14 standard of substantial credible information and that all of the necessary parts of the form requiring the  
15 information have been filled in with the required information.

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17 8, Chapter 452, Laws of 1973.

18 (8) "Department" means the department of natural resources and conservation provided for in Title  
19 2, chapter 15, part 33.

20 (9) "Existing right" or "existing water right" means a right to the use of water that would be  
21 protected under the law as it existed prior to July 1, 1973. The term includes federal non-Indian and Indian  
22 reserved water rights created under federal law and water rights created under state law.

23 (10) "Ground water" means any water that is beneath the ground surface.

24 (11) "Late claim" means a claim to an existing right forfeited pursuant to the conclusive  
25 presumption of abandonment under 85-2-226.

26 (12) "Permit" means the permit to appropriate issued by the department under 85-2-301 through  
27 85-2-303 and 85-2-306 through 85-2-314.

28 (13) "Person" means an individual, association, partnership, corporation, state agency, political  
29 subdivision, the United States or any agency ~~thereof~~ of the United States, or any other entity.

30 (14) "Political subdivision" means any county, incorporated city or town, public corporation, or



1 district created pursuant to state law or other public body of the state empowered to appropriate water.  
 2 The term does not mean a private corporation, association, or group.

3 (15) "Salvage" means to make water available for beneficial use from an existing valid appropriation  
 4 through application of water-saving methods.

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

8 ~~(16)~~(17) "Substantial credible information" means probable, believable facts sufficient to support  
 9 a reasonable legal theory upon which the department should proceed with the action requested by the  
 10 person providing the information.

11 ~~(17)~~(18) "Waste" means the unreasonable loss of water through the design or negligent operation  
 12 of an appropriation or water distribution facility or the application of water to anything but a beneficial use.

13 ~~(18)~~(19) "Water" means all water of the state, surface and subsurface, regardless of its character  
 14 or manner of occurrence, including but not limited to geothermal water, diffuse surface water, and sewage  
 15 effluent.

16 ~~(19)~~(20) "Water division" means a drainage basin as defined in 3-7-102.

17 ~~(20)~~(21) "Water judge" means a judge as provided for in Title 3, chapter 7.

18 ~~(21)~~(22) "Water master" means a master as provided for in Title 3, chapter 7.

19 ~~(22)~~(23) "Watercourse" means any naturally occurring stream or river from which water is diverted  
 20 for beneficial uses. It does not include ditches, culverts, or other ~~manmade~~ constructed waterways.

21 ~~(23)~~(24) "Well" means any artificial opening or excavation in the ground, however made, by which  
 22 ground water is sought or can be obtained or through which it flows under natural pressures or is artificially  
 23 withdrawn."  
 24

25 **Section 3.** Section 85-2-217, MCA, is amended to read:

26 **"85-2-217. Suspension of adjudication.** While negotiations for the conclusion of a compact under  
 27 part 7 are being pursued, all proceedings to generally adjudicate reserved Indian water rights and federal  
 28 reserved water rights of those tribes and federal agencies ~~which~~ that are negotiating are suspended. The  
 29 obligation to file water rights claims for those federal non-Indian and Indian reserved rights is also  
 30 suspended. This suspension ~~shall be~~ is effective until July 1, 1999, as long as negotiations are continuing

1 or ratification of a completed compact is being sought. If approval by the state legislature and tribes or  
 2 federal agencies has not been accomplished by July 1, 1999, the suspension ~~shall~~ must terminate on that  
 3 date. Upon termination of the suspension of this part, the tribes and the federal agencies ~~shall be~~ are  
 4 subject to the special filing requirements of 85-2-702(3) and all other requirements of the state water  
 5 adjudication system provided for in Title 85, chapter 2. Those tribes and federal agencies that choose not  
 6 to negotiate their federal non-Indian and Indian reserved water rights are subject to the full operation of the  
 7 state adjudication system and may not benefit from the suspension provisions of this section."  
 8

9 **Section 4.** Section 85-2-228, MCA, is amended to read:

10 **"85-2-228. Federal reserved water rights with priority date of July 1, 1973, or later -- process and**  
 11 **adjudication -- purpose.** (1) The purpose of this section is to ensure that a federal reserved water right with  
 12 a priority date of July 1, 1973, or later ~~be~~ is subject to the same process and adjudication as a federal  
 13 reserved water right with a priority date before July 1, 1973.

14 (2) Under authority granted to the states by 43 U.S.C. 666, a federal reserved water right that has  
 15 a priority date of July 1, 1973, or later and that is asserted by a federal agency is subject to the claim filing  
 16 requirements and all other applicable requirements of the state water adjudication system provided for in  
 17 Title 85, chapter 2, parts 2 and 7.

18 (3) At the request of a federal agency, the reserved water rights compact commission may  
 19 negotiate to conclude a compact under Title 85, chapter 2, part 7, for a federal reserved water right with  
 20 a priority date of July 1, 1973, or later.

21 (4) Whenever necessary, a water judge may reopen any decree issued pursuant to Title 85, chapter  
 22 2, to process the asserted or negotiated federal reserved water right."  
 23

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

25 **"85-2-301. Right to appropriate -- recognition and confirmation of permits issued after July 1,**  
 26 **1973.** (1) After July 1, 1973, a person may not appropriate water except as provided in this chapter. A  
 27 person may ~~only~~ appropriate water only for a beneficial use.

28 (2) (a) Only the department may appropriate water by permit in either of the following instances:

29 (i) for transport outside the following river basins:

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

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

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

3 (D) the Little Missouri River and its tributaries to its confluence with Lake Sakakawea in North  
4 Dakota;

5 (E) the Missouri River and its tributaries to its confluence with the Yellowstone River in North  
6 Dakota; and

7 (F) the Yellowstone River and its tributaries to its confluence with the Missouri River in North  
8 Dakota; or

9 (ii) whenever water in excess of 4,000 acre-feet a year and 5.5 cubic feet per second, for any use,  
10 is to be consumed.

11 (b) Water for these purposes or in these amounts may be leased from the department by any  
12 person under the provisions of 85-2-141.

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

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

17

18 **Section 6.** Section 85-2-302, MCA, is amended to read:

19 **"85-2-302. Application for permit. (1)** Except as otherwise provided in ~~(1) through (3)~~ of  
20 85-2-306 (1) through (3), a person may not appropriate water or commence construction of diversion,  
21 impoundment, withdrawal, or distribution works ~~therefor~~ for water except by applying for and receiving a  
22 permit from the department. The application ~~shall~~ must be made on a form prescribed by the department.  
23 The department shall make the forms available through its offices and the offices of the county clerk and  
24 recorders. The applicant shall submit a correct and complete application. The department shall return a  
25 defective application for correction or completion, together with the reasons for returning it. An application  
26 does not lose priority of filing because of defects if the application is corrected, completed, and refiled with  
27 the department within 30 days after its return to the applicant or within a further time as the department  
28 may allow. If an application is not corrected and completed within 30 days or within a further time as the  
29 department allows, up to 3 months, the priority date of the application ~~shall~~ must be the date of refileing the  
30 application with the corrections with the department. An application not corrected within 3 months ~~shall~~

1 must be terminated.

2 (2) Prior to final adjudication and while negotiations for the conclusion of a compact under part 7  
 3 are being pursued or until July 1, 2003, whichever occurs first, there is a moratorium on the processing  
 4 of permit applications for surface water on an affected Indian reservation."

5

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

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

13 (a) ~~there are unappropriated waters in the source of supply~~ is water physically available at the  
 14 proposed point of diversion:

15 ~~(i) at times when the water can be put to the use proposed by the applicant;~~

16 ~~(ii) in the amount that the applicant seeks to appropriate; and~~

17 ~~(iii) during the period in which the applicant seeks to appropriate, in the amount requested and that~~  
 18 ~~is reasonably available;~~

19 (b) the water rights of a prior appropriator will not be adversely affected. In this subsection (1)(b),  
 20 adverse effect must be determined based on a consideration of:

21 (i) whether water can reasonably be considered legally available based on the records of the  
 22 department and other evidence provided to the department; and

23 (ii) an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of  
 24 the water will be controlled so the water right of a prior appropriator will be satisfied;

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

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

28 ~~(e) the proposed use will not interfere unreasonably with other planned uses or developments for~~  
 29 ~~which a permit has been issued or for which water has been reserved;~~

30 ~~(f)(e)~~ the applicant has a possessory interest, or the written consent of the person with the

1 possessory interest, in the property where the water is to be put to beneficial use;

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

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

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

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

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

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

17 ~~(b) the rights of a prior appropriator will not be adversely affected;~~

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

20 (i) the existing demands on the state water supply, as well as projected demands, such as  
21 reservations of water for future beneficial purposes, including municipal water supplies, irrigation systems,  
22 and minimum streamflows 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 beneficial uses in the source of  
25 supply;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

28           (5) To meet the preponderance of evidence standard in this section, the applicant, in addition to  
29 other evidence demonstrating that the criteria of subsection (1) have been met, shall submit hydrologic or  
30 other evidence, including but not limited to water supply data, field reports, and other information

1 developed by the applicant, the department, the U.S. geological survey, or the U.S. natural resources  
2 conservation service and other specific field studies.

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

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

12 **Section 8.** Section 85-2-313, MCA, is amended to read:

13 "**85-2-313. Provisional permit.** A permit issued prior to a final determination of existing water  
14 rights is provisional and is subject to that final determination. ~~The~~ Upon petition, the amount of the  
15 appropriation granted in a provisional permit ~~shall~~ must be reduced ~~or~~, modified, or revoked by the  
16 department in a show cause hearing where when necessary to protect and guarantee existing water rights  
17 determined in the final decree. Because a provisional permit is issued on a reasonable determination of legal  
18 availability under 85-2-311(1)(b), in a show cause hearing under this section, legal availability must be  
19 determined on a consideration of the final decree in the affected basin or subbasin. A person may not obtain  
20 any vested right to an appropriation obtained under a provisional permit by virtue of construction of  
21 diversion works, purchase of equipment to apply water, planting of crops, or other action where the permit  
22 would have been denied or modified if the final decree had been available to the department."  
23

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

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

30 (2) (a) Water may be reserved for existing or future beneficial uses in the basin where it is reserved,

1 as described by the following basins:

- 2 (i) the Clark Fork River and its tributaries to its confluence with Lake Pend Oreille in Idaho;
- 3 (ii) the Kootenai River and its tributaries to its confluence with Kootenay Lake in British Columbia;
- 4 (iii) the St. Mary River and its tributaries to its confluence with the Oldman River in Alberta;
- 5 (iv) the Little Missouri River and its tributaries to its confluence with Lake Sakakawea in North
- 6 Dakota;
- 7 (v) the Missouri River and its tributaries to its confluence with the Yellowstone River in North
- 8 Dakota; and
- 9 (vi) the Yellowstone River and its tributaries to its confluence with the Missouri River in North
- 10 Dakota.

11 (b) A state water reservation may be made for an existing or future beneficial use outside the basin

12 where the diversion occurs only if stored water is not reasonably available for water leasing under 85-2-141

13 and the proposed use would occur in a basin designated in subsection (2)(a).

14 (3) Upon receiving a correct and complete application, the department shall proceed in accordance

15 with 85-2-307 through 85-2-309. After the hearing provided for in 85-2-309, the department shall decide

16 whether to reserve the water for the applicant. The department's costs of giving notice, holding the

17 hearing, conducting investigations, and making records incurred in acting upon the application to reserve

18 water, except the cost of salaries of the department's personnel, must be paid by the applicant. In addition,

19 a reasonable proportion of the department's cost of preparing an environmental impact statement must be

20 paid by the applicant unless waived by the department upon a showing of good cause by the applicant.

21 (4) (a) The department may not adopt an order reserving water unless the applicant establishes to

22 the satisfaction of the department by a preponderance of evidence:

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

27 (b) In determining the public interest under subsection (4)(a)(iv), the department may not adopt an

28 order reserving water for withdrawal and transport for use outside the state unless the applicant proves by

29 clear and convincing evidence that:

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



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

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

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

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

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

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

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

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

20 (6) The department shall limit any state water reservations after May 9, 1979, for maintenance of  
21 minimum flow, level, or quality of water that it awards at any point on a stream or river to a maximum of  
22 50% of the average annual flow of record on gauged streams. Ungauged streams can be allocated at the  
23 discretion of the department.

24 (7) After the adoption of an order reserving waters, the department may reject an application and  
25 refuse a permit for the appropriation of reserved waters or may issue the permit subject to terms and  
26 conditions that it considers necessary for the protection of the objectives of the reservation.

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

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

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

13 (9) Except as provided in 85-2-331, the priority of appropriation of a state water reservation and  
14 the relative priority of the reservation to permits with a later priority of appropriation must be determined  
15 according to this subsection (9), as follows:

16 (a) A state water reservation under this section has a priority of appropriation dating from the filing  
17 with the department of a notice of intention to apply for a state water reservation in a basin in which no  
18 other notice of intention to apply is currently pending. The notice of intention to apply must specify the  
19 basin in which the applicant is seeking a state water reservation.

20 (b) Upon receiving a notice of intention to apply for a state water reservation, the department shall  
21 identify all potential state water reservation applicants in the basin specified in the notice and notify each  
22 potential applicant of the opportunity to submit an application and to receive a state water reservation with  
23 the priority of appropriation as described in subsection (9)(a).

24 (c) To receive the priority of appropriation described in subsection (9)(a), the applicant shall submit  
25 a correct and complete state water reservation application within 1 year after the filing of the notice of  
26 intention to apply. Upon a showing of good cause, the department may extend the time for preparing the  
27 application.

28 (d) The department may by order subordinate a state water reservation to a permit issued pursuant  
29 to this part if:

30 (i) the permit application was accepted by the department before the date of the order granting the

1 reservation; and

2 (ii) the effect of subordinating the reservation to one or more permits does not interfere substantially  
3 with the purpose of the reservation.

4 (e) The department shall by order establish the relative priority of state water reservations approved  
5 under this section that have the same day of priority. A state water reservation may not adversely affect  
6 any rights in existence at that time.

7 (10) The department shall, periodically but at least once every 10 years, review existing state water  
8 reservations to ensure that the objectives of the ~~reservation~~ reservations are being met. When the  
9 objectives of ~~the~~ a state water reservation are not being met, the department may extend, revoke, or  
10 modify the reservation. Any undeveloped water made available as a result of a revocation or modification  
11 under this subsection is available for appropriation by others pursuant to this part.

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

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

26 (13) A state water reservation may be transferred to another entity qualified to hold a reservation  
27 under subsection (1). Only the entity holding the reservation may initiate a transfer. The transfer occurs  
28 upon the filing of a water right transfer certificate with the department, together with an affidavit from the  
29 entity receiving the reservation establishing that the entity is a qualified reservant under subsection (1), that  
30 the entity agrees to comply with the requirements of this section and the conditions of the reservation, and

1 that the entity can meet the objectives of the reservation as granted. If the transfer of a state water  
2 reservation involves a change in an appropriation right, the necessary approvals must be acquired pursuant  
3 to subsection (12).

4 (14) Nothing in this section vests the department with the authority to alter a water right that is  
5 not a state water reservation.

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

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

12

13 **Section 10.** Section 85-2-321, MCA, is amended to read:

14 **"85-2-321. Milk River basin -- suspension of action on permits -- proposal -- priority in adjudication**  
15 **process.** (1) (a) In order to balance the need for the continued development of Montana's water and for  
16 protection of existing rights in the Milk River basin, the department may suspend action on a class of  
17 applications or may close a source in the basin and refuse to accept a class of applications, or both, for a  
18 permit under this part to appropriate from that source in the basin.

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

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

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

23 (A) any new appropriation from the source for the class of applications will adversely affect the  
24 rights of a prior appropriation from the source; or

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

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

30 (2) After April 8, 1985, the chief water judge shall make issuance of a temporary preliminary

1 decree in the Milk River basin the highest priority in the adjudication of existing water rights pursuant to  
2 Title 85, chapter 2, part 2."

3

4 **Section 11.** Section 85-2-329, MCA, is amended to read:

5 **"85-2-329. Definitions.** Unless the context requires otherwise, in 85-2-330 and this section, the  
6 following definitions apply:

7 (1) "Application" means an application for a beneficial water use permit pursuant to 85-2-302 or  
8 a state water reservation pursuant to 85-2-316.

9 (2) "Ground water" means water that is beneath the land surface or beneath the bed of a stream,  
10 lake, reservoir, or other body of surface water and that is not immediately or directly connected to surface  
11 water.

12 (3) "Nonconsumptive use" means a beneficial use of water that does not cause a reduction in the  
13 source of supply and in which substantially all of the water returns without delay to the source of supply,  
14 causing little or no disruption in stream conditions.

15 (4) "Teton River basin" means the drainage area of the Teton River and its tributaries above the  
16 confluence of the Teton and Marias Rivers."

17

18 **Section 12.** Section 85-2-331, MCA, is amended to read:

19 **"85-2-331. Reservations within Missouri River basin and Little Missouri River basin.** (1) The state,  
20 ~~or~~ an agency or political subdivision of the state, or the United States or an agency of the United States  
21 that desires to apply for a state water reservation ~~of water~~ in the Missouri River basin or in the Little  
22 Missouri River basin shall file an application pursuant to 85-2-316 no later than:

23 (a) July 1, 1989, for reservation of water above Fort Peck dam; or

24 (b) July 1, 1991, for reservation of water below Fort Peck dam and in the Little Missouri River  
25 basin.

26 (2) Subject to legislative appropriation, the department shall provide technical and financial  
27 assistance to other state agencies and political subdivisions in applying for state water reservations within  
28 the Missouri River basin and the Little Missouri River basin.

29 (3) (a) The department shall make a final determination in accordance with 85-2-316 on all  
30 applications filed before July 1, 1989, for state water reservations ~~of water~~ in the Missouri River basin

1 above Fort Peck dam.

2 (b) The department shall make a final determination in accordance with 85-2-316 on all applications  
3 filed before July 1, 1991, for state water reservations ~~of water~~ in the Missouri River basin below Fort Peck  
4 dam and in the Little Missouri River basin.

5 (c) The department shall determine which applications or portions of applications are considered  
6 to be above or below Fort Peck dam.

7 (4) ~~Water~~ State water reservations approved by the department under this section have a priority  
8 date of July 1, 1985, in the Missouri River basin and a priority date of July 1, 1989, in the Little Missouri  
9 River basin. If the department issues a permit under Title 85, chapter 2, part 3, prior to the granting of a  
10 state water reservation under this section, the department may subordinate the state water reservation to  
11 the permit if it finds that the subordination does not interfere substantially with the purpose of any state  
12 water reservation. The department shall by order establish the relative priority of applications approved  
13 under this section."

14

15 **Section 13.** Section 85-2-336, MCA, is amended to read:

16 "**85-2-336. Basin closure -- exception.** (1) As provided in 85-2-319 and subject to the provisions  
17 of subsection (2) of this section, the department may not process or grant an application for a permit to  
18 appropriate water within the Upper Clark Fork River basin.

19 (2) The provisions of subsection (1) do not apply to:

20 (a) an application for a permit to appropriate ground water;

21 (b) an application filed prior to January 1, 2000, for a permit to appropriate water to conduct  
22 response actions or remedial actions pursuant to the federal Comprehensive Environmental Response,  
23 Compensation, and Liability Act of 1980, as amended, or Title 75, chapter 10, part 7, at sites designated  
24 as of January 1, 1994. The total flow rates for all permits issued under this subsection (2)(b) may not  
25 exceed 10 cubic feet per second. A permit issued to conduct response actions or remedial actions may not  
26 be used for dilution and must be limited to a term not to exceed the necessary time to complete the  
27 response or remedial action, and the permit may not be transferred to any person for any purpose other  
28 than the designated response or remedial action;

29 (c) an application for a permit to appropriate water for stock use;

30 (d) an application to store water; or

1 (e) an application for power generation at existing hydroelectric dams. The department may not  
2 approve a permit for power generation if approval results in additional consumption of water.

3 (3) Applications for state water reservations in the Upper Clark Fork River basin filed pursuant to  
4 85-2-316 and pending as of May 1, 1991, have a priority date of May 1, 1991. The filing of a state water  
5 reservation application does not provide standing to object under 85-2-402.

6 (4) The department may not process or approve applications for state water reservations ~~of water~~  
7 in the Upper Clark Fork River basin filed pursuant to 85-2-316."

8  
9 **Section 14.** Section 85-2-340, MCA, is amended to read:

10 **"85-2-340. Definitions.** Unless the context requires otherwise, in 85-2-341 and this section, the  
11 following definitions apply:

12 (1) "Application" means an application for a beneficial water use permit pursuant to 85-2-302 or  
13 a state water reservation pursuant to 85-2-316.

14 (2) "Ground water" means water that is beneath the land surface or beneath the bed of a stream,  
15 lake, reservoir, or other body of surface water and that is not immediately or directly connected to surface  
16 water.

17 (3) "Jefferson River basin" means the drainage area of the Jefferson River and its tributaries above  
18 the confluence of the Jefferson and Missouri Rivers.

19 (4) "Madison River basin" means the drainage area of the Madison River and its tributaries above  
20 the confluence of the Madison and Jefferson Rivers.

21 (5) "Nonconsumptive use" means a beneficial use of water that does not cause a reduction in the  
22 source of supply and in which substantially all of the water returns without delay to the source of supply,  
23 causing little or no disruption in stream conditions."

24  
25 **Section 15.** Section 85-2-341, MCA, is amended to read:

26 **"85-2-341. Basin closure -- exceptions.** (1) As provided in 85-2-319 and subject to the provisions  
27 of subsection (2) of this section, the department may not process or grant an application for a permit to  
28 appropriate water or for a state water reservation to reserve water within the Jefferson River basin or  
29 Madison River basin.

30 (2) The provisions of subsection (1) do not apply to:

- 1 (a) an application for a permit to appropriate ground water;  
 2 (b) an application for a permit to appropriate water for a nonconsumptive use;  
 3 (c) an application for a permit to appropriate water for domestic, municipal, or stock use;  
 4 (d) an application to store water during high spring flows; or  
 5 (e) temporary emergency appropriations as provided for in 85-2-113(3)."

6

7 **Section 16.** Section 85-2-342, MCA, is amended to read:8 **"85-2-342. Definitions.** Unless the context requires otherwise, in 85-2-343 and this section, the  
 9 following definitions apply:10 (1) "Application" means an application for a beneficial water use permit pursuant to 85-2-302 or  
 11 a state water reservation pursuant to 85-2-316.12 (2) "Ground water" means water that is beneath the land surface or beneath the bed of a stream,  
 13 lake, reservoir, or other body of surface water and that is not immediately or directly connected to surface  
 14 water.15 (3) "Nonconsumptive use" means a beneficial use of water that does not cause a reduction in the  
 16 source of supply and in which substantially all of the water returns without delay to the source of supply,  
 17 causing little or no disruption in stream conditions.18 (4) "Upper Missouri River basin" means the drainage area of the Missouri River and its tributaries  
 19 above Morony dam."

20

21 **Section 17.** Section 85-2-401, MCA, is amended to read:22 **"85-2-401. Priority -- recognition and confirmation of changes in appropriations issued after July**  
 23 **1, 1973.** (1) As between appropriators, the first in time is the first in right. Priority of appropriation does  
 24 not include the right to prevent changes by later appropriators in the condition of water occurrence, such  
 25 as the increase or decrease of streamflow or the lowering of a water table, artesian pressure, or water level,  
 26 if the prior appropriator can reasonably exercise ~~his~~ the water right under the changed conditions.27 (2) Priority of appropriation made under this chapter dates from the filing of an application for a  
 28 permit with the department, except as otherwise provided in 85-2-301 through 85-2-303, 85-2-306,  
 29 85-2-310(3), and 85-2-313.30 (3) Priority of appropriation perfected before July 1, 1973, ~~shall~~ must be determined as provided



1 in part 2 of this chapter.

2 (4) All changes in appropriation rights actions of the department after July 1, 1973, are recognized  
3 and confirmed subject to this part and any terms, conditions, and limitations placed on a change in  
4 appropriation authorization by the department."

5

6 **Section 18.** Section 85-2-402, MCA, is amended to read:

7 **"85-2-402. (Temporary) Changes in appropriation rights.** (1) The right to make a change subject  
8 to the provisions of this section in an existing water right, a permit, or a state water reservation is  
9 recognized and confirmed. In a change proceeding under this section, there is no presumption that an  
10 applicant for a change in appropriation right cannot establish lack of adverse effect prior to the adjudication  
11 of other rights in the source of supply pursuant to this chapter. An applicant for a change in appropriation  
12 right must be given the opportunity to establish lack of adverse effect as an evidentiary matter by showing  
13 by reference to the applicant's own existing water right and historic water use practices that the proposed  
14 change in appropriation right will not increase the amount of water consumed or adversely alter the timing  
15 or pattern of flow for perfected uses in the source of the supply. An appropriator may not make a change  
16 in an appropriation right except, as permitted under this section, by applying for and receiving the approval  
17 of the department or, if applicable, of the legislature. An applicant shall submit a correct and complete  
18 application.

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

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

26 (b) Except for a lease authorization pursuant to 85-2-436, a temporary change authorization for  
27 instream use to benefit the fishery resource pursuant to 85-2-408, or water use pursuant to 85-2-439 when  
28 authorization does not require appropriation works, the proposed means of diversion, construction, and  
29 operation of the appropriation works are adequate.

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

1 (d) Except for a lease authorization pursuant to 85-2-436 or a temporary change authorization  
2 pursuant to 85-2-408 for instream flow to benefit the fishery resource, the applicant has a possessory  
3 interest, or the written consent of the person with the possessory interest, in the property where the water  
4 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 permitholder 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; and

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

14 (a) 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 (b) In determining whether the appropriator has proved by clear and convincing evidence that the  
24 requirements of subsections (6)(a)(ii) and (6)(a)(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 (c) 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 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 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. (Terminates June  
 6 30, 1999--sec. 4, Ch. 740, L. 1991.)

7 **85-2-402. (Effective July 1, 1999) Changes in appropriation rights.** (1) The right to make a change  
 8 subject to the provisions of this section in an existing water right, a permit, or a state water reservation  
 9 is recognized and confirmed. In a change proceeding under this section, there is no presumption that an  
 10 applicant for a change in appropriation right cannot establish lack of adverse effect prior to the adjudication  
 11 of other rights in the source of supply pursuant to this chapter. An applicant for a change in appropriation  
 12 right must be given the opportunity to establish lack of adverse effect as an evidentiary matter by showing  
 13 by reference to the applicant's own existing water right and historic water use practices that the proposed  
 14 change in appropriation right will not increase the amount of water consumed or adversely alter the timing  
 15 or pattern of flow for perfected uses in the source of the supply. An appropriator may not make a change  
 16 in an appropriation right except, as permitted under this section, by applying for and receiving the approval  
 17 of the department or, if applicable, of the legislature. An applicant shall submit a correct and complete  
 18 application.

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

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

26 (b) Except for a temporary change authorization pursuant to 85-2-408 or for water use pursuant  
 27 to 85-2-439 that does not require appropriation works, the proposed means of diversion, construction, and  
 28 operation of the appropriation works are adequate.

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

30 (d) Except for a temporary change authorization pursuant to 85-2-408 for instream flow to benefit

1 the fishery resource, the applicant has a possessory interest, or the written consent of the person with the  
2 possessory interest, in the property where the water is to be put to beneficial use.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

28 (13) A change in appropriation right contrary to the provisions of this section is invalid. An officer,  
29 agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an  
30 unauthorized change in appropriation right. A person or corporation may not, directly or indirectly,



1 personally or through an agent, officer, or employee, attempt to change an appropriation right except in  
2 accordance with this section.

3 (14) The department may adopt rules to implement the provisions of this section. (Terminates June  
4 30, 2005--sec. 6, Ch. 322, L. 1995.)

5 **85-2-402. (Effective July 1, 2005) Changes in appropriation rights.** (1) The right to make a  
6 change subject to the provisions of this section in an existing water right, a permit, or a state water  
7 reservation is recognized and confirmed. In a change proceeding under this section, there is no  
8 presumption that an applicant for a change in appropriation right cannot establish lack of adverse effect  
9 prior to the adjudication of other rights in the source of supply pursuant to this chapter. An applicant for  
10 a change in appropriation right must be given the opportunity to establish lack of adverse effect as an  
11 evidentiary matter by showing by reference to the applicant's own existing water right and historic water  
12 use practices that the proposed change in appropriation right will not increase the amount of water  
13 consumed or adversely alter the timing or pattern of flow for perfected uses in the source of the supply.

14 An appropriator may not make a change in an appropriation right except, as permitted under this section,  
15 by applying for and receiving the approval of the department or, if applicable, of the legislature. An  
16 applicant shall submit a correct and complete application.

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

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

24 (b) The proposed means of diversion, construction, and operation of the appropriation works are  
25 adequate.

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

27 (d) The applicant has a possessory interest, or the written consent of the person with the  
28 possessory interest, in the property where the water is to be put to beneficial use.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

30           (7) For any application for a change in appropriation right involving 4,000 or more acre-feet of

1 water a year and 5.5 or more cubic feet per second of water, the department shall give notice of the  
2 proposed change in accordance with 85-2-307 and shall hold one or more hearings in accordance with  
3 85-2-309 prior to its approval or denial of the proposed change. The department shall provide notice and  
4 may hold one or more hearings upon any other proposed change if it determines that such a change might  
5 adversely affect the rights of other persons.

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

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

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

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

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

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

29 (14) The department may adopt rules to implement the provisions of this section."  
30



1 SENATE BILL NO. 97

2 INTRODUCED BY GROSFIELD

3 BY REQUEST OF THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

4  
5 A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING THE WATER LAWS TO CLARIFY THAT  
6 THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION MAY ISSUE WATER PERMITS AND  
7 CHANGE AUTHORIZATIONS PRIOR TO THE COMPLETION OF AN ADJUDICATION IN A SOURCE OF  
8 SUPPLY; CLARIFYING THAT WATER RESERVED UNDER STATE LAW IS NOT SYNONYMOUS WITH  
9 FEDERAL AND INDIAN RESERVED WATER RIGHTS UNDER FEDERAL LAW; ALLOWING THE DEPARTMENT  
10 TO NEGOTIATE INTERIM AGREEMENTS WITH TRIBAL GOVERNMENTS; AMENDING SECTIONS 85-2-101,  
11 85-2-102, 85-2-217, 85-2-228, 85-2-301, 85-2-302, 85-2-311, 85-2-313, 85-2-316, 85-2-321, 85-2-329,  
12 85-2-331, 85-2-336, 85-2-340, 85-2-341, 85-2-342, 85-2-401, AND 85-2-402, MCA; AND PROVIDING  
13 AN IMMEDIATE EFFECTIVE DATE AND A RETROACTIVE APPLICABILITY DATE."  
14

15 WHEREAS, the Montana Supreme Court, in In the Matter of the Application for Beneficial Water  
16 Use Permit Nos. 66459-76L, Ciotti; 64988-g76L, Starner; and Application for Change of Appropriation  
17 Water Right No. G15152-s761, Pope, which was decided August 22, 1996, held that an applicant for a  
18 permit or change of use authorization on the Flathead Indian Reservation may not as a matter of law meet  
19 the applicant's burden of proof to establish that the proposed use will not interfere unreasonably with  
20 planned uses or developments for which water has been reserved until the Confederated Salish and  
21 Kootenai Tribes' federal reserved water rights are quantified; and

22 WHEREAS, in 1973, Montana enacted comprehensive legislation referred to as the Montana Water  
23 Use Act of 1973, codified in Title 85, chapter 2, to implement Article IX, section 3(4), of the Montana  
24 Constitution, which requires that the Legislature provide for the administration, control, and regulation of  
25 water rights and establish a system of centralized records of all water rights, and to implement Article IX  
26 making the water of the state subject to appropriation for beneficial use by its citizens; and

27 WHEREAS, Title 85, chapter 2, as amended, provides for the comprehensive adjudication of water  
28 rights and the continued development of Montana's water resources through a permit and change  
29 authorization process; and

30 WHEREAS, historically in Montana, water has been developed, water use rights acquired, and

**SECOND READING**

1 changes in water use completed in the absence of the adjudication of water rights in a source of supply;  
2 and

3 WHEREAS, since July 1, 1973, it has been the intent of the Legislature that provisional permits and  
4 change authorizations be issued pursuant to statutory standards in the absence of a completed adjudication  
5 in a source of supply; and

6 WHEREAS, the dissent filed with the Montana Supreme Court decision raises a concern that the  
7 majority decision may be interpreted to apply statewide, but that interpretation does not reflect the intent  
8 of the Legislature to allow for the continued wise and efficient use of Montana's water resources and  
9 Montana's growing economy as required under Title 85, chapter 2.

10 STATEMENT OF INTENT

11 THE LEGISLATURE INTENDS THAT THE MONTANA SUPREME COURT'S DECISION IN IN THE  
12 MATTER OF THE APPLICATION FOR BENEFICIAL WATER USE PERMIT NOS. 66459-76L, CIOTTI,  
13 64988-G76L, STARNER; AND APPLICATION FOR CHANGE OF APPROPRIATION WATER RIGHT NO.  
14 G15152-S761, POPE, 53 ST. REP. 777 AT 784, 923 P.2D 1073, BE NEGATED BY THE PASSAGE AND  
15 APPROVAL OF THIS BILL. THE LEGISLATURE FURTHER INTENDS THAT THE DISTRICT COURT DECISION  
16 IN UNITED STATES V. DNRC (1ST JUDICIAL DISTRICT, MONTANA, JUNE 15, 1987), NO. 50612, (SEE  
17 ALSO THE CONCURRING OPINION IN THE MONTANA SUPREME COURT'S DECISION IN IN THE MATTER  
18 OF THE APPLICATION FOR BENEFICIAL WATER USE PERMIT NOS. 66459-76L CIOTTI, 64988-G76L,  
19 STARNER; AND APPLICATION FOR CHANGE OF APPROPRIATION WATER RIGHT NO. G15152-S761,  
20 POPE, 53 ST. REP. 777 AT 784, 923 P.2D 1073) BE NEGATED BY THE PASSAGE AND APPROVAL OF  
21 THIS BILL, SPECIFICALLY BY THE PASSAGE AND APPROVAL OF THE AMENDMENTS TO 85-2-311. A  
22 STATEMENT OF INTENT IS DESIRED FOR THIS BILL IN ORDER TO PROVIDE GUIDANCE TO THE  
23 DEPARTMENT UNDER 85-2-311 CONCERNING IMPLEMENTATION AND INTERPRETATION OF THE  
24 PHYSICAL AVAILABILITY OF WATER AND REASONABLE LEGAL AVAILABILITY OF WATER CRITERIA.  
25 TO FIND THAT WATER IS AVAILABLE FOR THE ISSUANCE OF A PERMIT, THE DEPARTMENT SHALL  
26 REQUIRE A THREE-STEP ANALYSIS INVOLVING THE FOLLOWING FACTORS: IDENTIFY PHYSICAL WATER  
27 AVAILABILITY, IDENTIFY EXISTING LEGAL DEMANDS ON THE SOURCE OF SUPPLY, AND COMPARE AND  
28 ANALYZE THE PHYSICAL WATER SUPPLY AT THE PROPOSED POINT OF DIVERSION WITH THE EXISTING  
29 LEGAL DEMANDS ON THE SOURCE OF SUPPLY. THE THREE-STEP ANALYSIS MUST BE AS GENERALLY  
30 DESCRIBED IN THE PAMPHLET "INFORMATION AND INSTRUCTIONS FOR APPLICATION FOR BENEFICIAL

1 WATER USE PERMIT, FORM NO. 600INS, FORM NO. 600 AND CRITERIA ADDENDUM A", PUBLISHED  
2 BY THE MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION.

3  
4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

5  
6 **Section 1.** Section 85-2-101, MCA, is amended to read:

7 **"85-2-101. Declaration of policy and purpose.** (1) Pursuant to Article IX of the Montana  
8 constitution, the legislature declares that any use of water is a public use and that the waters within the  
9 state are the property of the state for the use of its people and are subject to appropriation for beneficial  
10 uses as provided in this chapter.

11 (2) A purpose of this chapter is to implement Article IX, section 3(4)<sub>2</sub> of the Montana constitution,  
12 which requires that the legislature provide for the administration, control, and regulation of water rights and  
13 establish a system of centralized records of all water rights. The legislature declares that this system of  
14 centralized records recognizing and establishing all water rights is essential for the documentation,  
15 protection, preservation, and future beneficial use and development of Montana's water for the state and  
16 its citizens and for the continued development and completion of the comprehensive state water plan.

17 (3) It is the policy of this state and a purpose of this chapter to encourage the wise use of the  
18 state's water resources by making them available for appropriation consistent with this chapter and to  
19 provide for the wise utilization, development, and conservation of the waters of the state for the maximum  
20 benefit of its people with the least possible degradation of the natural aquatic ecosystems. In pursuit of this  
21 policy, the state encourages the development of facilities ~~which~~ that store and conserve waters for  
22 beneficial use, for the maximization of the use of those waters in Montana, for the stabilization of ~~stream~~  
23 ~~flows~~ streamflows, and for ground water recharge.

24 (4) Pursuant to Article IX, section 3(1)<sub>2</sub> of the Montana constitution, it is further the policy of this  
25 state and a purpose of this chapter to recognize and confirm all existing rights to the use of any waters for  
26 any useful or beneficial purpose.

27 (5) It is the intent of the legislature that the statutory determinations for issuing new water use  
28 permits and authorizing changes do not require the adjudication of all water rights in the source of supply.  
29 The legislature recognizes the unique character and nature of water resources of the state. Because water  
30 is a resource that is subject to use and reuse, such as through return flows, and because at most times all



1 water rights on a source will not be exercised to their full extent simultaneously, it is recognized that an  
 2 adjudication is not a water availability study. Consequently, the legislature has provided an administrative  
 3 forum for the factual investigation into whether water is available for new uses and changes both before  
 4 and after the completion of an adjudication in the source of supply. To allow for orderly permitting in the  
 5 absence of a complete adjudication in the source of supply, permits issued under this chapter are  
 6 provisional. A provisional permit is subject to reduction, modification, or revocation by the department as  
 7 provided in 85-2-313 upon completion of the general adjudication.

8 (6) It is the intent of the legislature that the establishment of a moratorium under 85-2-302 does  
 9 not limit, expand, alter, or waive state jurisdiction to administer water rights within the exterior boundaries  
 10 of an Indian reservation."

11  
 12 **Section 2.** Section 85-2-102, MCA, is amended to read:

13 **"85-2-102. (Temporary) Definitions.** Unless the context requires otherwise, in this chapter, the  
 14 following definitions apply:

15 (1) "Appropriate" means to:

16 (a) divert, impound, or withdraw (including by stock for stock water) a quantity of water;

17 (b) in the case of a public agency, reserve water in accordance with 85-2-316;

18 (c) in the case of the department of fish, wildlife, and parks, lease water in accordance with  
 19 85-2-436; or

20 (d) in the Upper Clark Fork River basin, maintain and enhance streamflows to benefit the fishery  
 21 resource in accordance with 85-2-439.

22 (2) "Beneficial use", unless otherwise provided, means:

23 (a) a use of water for the benefit of the appropriator, other persons, or the public, including but  
 24 not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining,  
 25 municipal, power, and recreational uses;

26 (b) a use of water appropriated by the department for the state water leasing program under  
 27 85-2-141 and of water leased under a valid lease issued by the department under 85-2-141;

28 (c) a use of water by the department of fish, wildlife, and parks pursuant to a lease authorized  
 29 under 85-2-436; or

30 (d) a use of water to maintain and enhance streamflows to benefit the fishery resource in the Upper

1 Clark Fork River basin as part of the Upper Clark Fork River basin instream flow pilot program authorized  
2 under 85-2-439.

3 (3) "Certificate" means a certificate of water right issued by the department.

4 (4) "Change in appropriation right" means a change in the place of diversion, the place of use, the  
5 purpose of use, or the place of storage.

6 (5) "Commission" means the fish, wildlife, and parks commission provided for in 2-15-3402.

7 (6) "Correct and complete" means that the information required to be submitted conforms to the  
8 standard of substantial credible information and that all of the necessary parts of the form requiring the  
9 information have been filled in with the required information.

10 (7) "Declaration" means the declaration of an existing right filed with the department under section  
11 8, Chapter 452, Laws of 1973.

12 (8) "Department" means the department of natural resources and conservation provided for in Title  
13 2, chapter 15, part 33.

14 (9) "Existing right" or "existing water right" means a right to the use of water that would be  
15 protected under the law as it existed prior to July 1, 1973. The term includes federal non-Indian and Indian  
16 reserved water rights created under federal law and water rights created under state law.

17 (10) "Ground water" means any water that is beneath the ground surface.

18 (11) "Late claim" means a claim to an existing right forfeited pursuant to the conclusive  
19 presumption of abandonment under 85-2-226.

20 (12) "Permit" means the permit to appropriate issued by the department under 85-2-301 through  
21 85-2-303 and 85-2-306 through 85-2-314.

22 (13) "Person" means an individual, association, partnership, corporation, state agency, political  
23 subdivision, the United States or any agency of the United States, or any other entity.

24 (14) "Political subdivision" means any county, incorporated city or town, public corporation, or  
25 district created pursuant to state law or other public body of the state empowered to appropriate water.  
26 The term does not mean a private corporation, association, or group.

27 (15) "Salvage" means to make water available for beneficial use from an existing valid appropriation  
28 through application of water-saving methods.

29 (16) "State water reservation" means a water right created under state law after July 1, 1973, that  
30 reserves water for existing or future beneficial uses or that maintains a minimum flow, level, or quality of

1 water throughout the year or at periods or for defined lengths of time.

2 ~~(16)~~(17) "Substantial credible information" means probable, believable facts sufficient to support  
3 a reasonable legal theory upon which the department should proceed with the action requested by the  
4 person providing the information.

5 ~~(17)~~(18) "Waste" means the unreasonable loss of water through the design or negligent operation  
6 of an appropriation or water distribution facility or the application of water to anything but a beneficial use.

7 ~~(18)~~(19) "Water" means all water of the state, surface and subsurface, regardless of its character  
8 or manner of occurrence, including but not limited to geothermal water, diffuse surface water, and sewage  
9 effluent.

10 ~~(19)~~(20) "Water division" means a drainage basin as defined in 3-7-102.

11 ~~(20)~~(21) "Water judge" means a judge as provided for in Title 3, chapter 7.

12 ~~(21)~~(22) "Water master" means a master as provided for in Title 3, chapter 7.

13 ~~(22)~~(23) "Watercourse" means any naturally occurring stream or river from which water is diverted  
14 for beneficial uses. It does not include ditches, culverts, or other ~~manmade~~ constructed waterways.

15 ~~(23)~~(24) "Well" means any artificial opening or excavation in the ground, however made, by which  
16 ground water is sought or can be obtained or through which it flows under natural pressures or is artificially  
17 withdrawn. (Terminates June 30, 1999--sec. 4, Ch. 740, L. 1991.)

18 **85-2-102. (Effective July 1, 1999) Definitions.** Unless the context requires otherwise, in this  
19 chapter, the following definitions apply:

20 (1) "Appropriate" means:

21 (a) to divert, impound, or withdraw (including by stock for stock water) a quantity of water;

22 (b) in the case of a public agency, to reserve water in accordance with 85-2-316; or

23 (c) in the Upper Clark Fork River basin, to maintain and enhance streamflows to benefit the fishery  
24 resource in accordance with 85-2-439.

25 (2) "Beneficial use", unless otherwise provided, means:

26 (a) a use of water for the benefit of the appropriator, other persons, or the public, including but  
27 not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining,  
28 municipal, power, and recreational uses;

29 (b) a use of water appropriated by the department for the state water leasing program under  
30 85-2-141 and of water leased under a valid lease issued by the department under 85-2-141; or

1 (c) a use of water to maintain and enhance streamflows to benefit the fishery resource in the Upper  
2 Clark Fork River basin as part of the Upper Clark Fork River basin instream flow pilot program authorized  
3 under 85-2-439.

4 (3) "Certificate" means a certificate of water right issued by the department.

5 (4) "Change in appropriation right" means a change in the place of diversion, the place of use, the  
6 purpose of use, or the place of storage.

7 (5) "Correct and complete" means that the information required to be submitted conforms to the  
8 standard of substantial credible information and that all of the necessary parts of the form requiring the  
9 information have been filled in with the required information.

10 (6) "Declaration" means the declaration of an existing right filed with the department under section  
11 8, Chapter 452, Laws of 1973.

12 (7) "Department" means the department of natural resources and conservation provided for in Title  
13 2, chapter 15, part 33.

14 (8) "Existing right" or "existing water right" means a right to the use of water that would be  
15 protected under the law as it existed prior to July 1, 1973. The term includes federal non-Indian and Indian  
16 reserved water rights created under federal law and water rights created under state law.

17 (9) "Ground water" means any water that is beneath the ground surface.

18 (10) "Late claim" means a claim to an existing right forfeited pursuant to the conclusive  
19 presumption of abandonment under 85-2-226.

20 (11) "Permit" means the permit to appropriate issued by the department under 85-2-301 through  
21 85-2-303 and 85-2-306 through 85-2-314.

22 (12) "Person" means an individual, association, partnership, corporation, state agency, political  
23 subdivision, the United States or any agency of the United States, or any other entity.

24 (13) "Political subdivision" means any county, incorporated city or town, public corporation, or  
25 district created pursuant to state law or other public body of the state empowered to appropriate water.  
26 The term does not mean a private corporation, association, or group.

27 (14) "Salvage" means to make water available for beneficial use from an existing valid appropriation  
28 through application of water-saving methods.

29 (15) "State water reservation" means a water right created under state law after July 1, 1973, that  
30 reserves water for existing or future beneficial uses or that maintains a minimum flow, level, or quality of

1 water throughout the year or at periods or for defined lengths of time.

2 ~~(15)~~(16) "Substantial credible information" means probable, believable facts sufficient to support  
3 a reasonable legal theory upon which the department should proceed with the action requested by the  
4 person providing the information.

5 ~~(16)~~(17) "Waste" means the unreasonable loss of water through the design or negligent operation  
6 of an appropriation or water distribution facility or the application of water to anything but a beneficial use.

7 ~~(17)~~(18) "Water" means all water of the state, surface and subsurface, regardless of its character  
8 or manner of occurrence, including but not limited to geothermal water, diffuse surface water, and sewage  
9 effluent.

10 ~~(18)~~(19) "Water division" means a drainage basin as defined in 3-7-102.

11 ~~(19)~~(20) "Water judge" means a judge as provided for in Title 3, chapter 7.

12 ~~(20)~~(21) "Water master" means a master as provided for in Title 3, chapter 7.

13 ~~(21)~~(22) "Watercourse" means any naturally occurring stream or river from which water is diverted  
14 for beneficial uses. It does not include ditches, culverts, or other ~~manmade~~ constructed waterways.

15 ~~(22)~~(23) "Well" means any artificial opening or excavation in the ground, however made, by which  
16 ground water is sought or can be obtained or through which it flows under natural pressures or is artificially  
17 withdrawn. (Terminates June 30, 2005--sec. 14, Ch. 487, L. 1995.)

18 **85-2-102. (Effective July 1, 2005) Definitions.** Unless the context requires otherwise, in this  
19 chapter, the following definitions apply:

20 (1) "Appropriate" means to:

21 (a) divert, impound, or withdraw (including by stock for stock water) a quantity of water;

22 (b) in the case of a public agency, to reserve water in accordance with 85-2-316; or

23 (c) in the case of the department of fish, wildlife, and parks, to lease water in accordance with  
24 85-2-436.

25 (2) "Beneficial use", unless otherwise provided, means:

26 (a) a use of water for the benefit of the appropriator, other persons, or the public, including but  
27 not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining,  
28 municipal, power, and recreational uses;

29 (b) a use of water appropriated by the department for the state water leasing program under  
30 85-2-141 and of water leased under a valid lease issued by the department under 85-2-141; and

1 (c) a use of water by the department of fish, wildlife, and parks pursuant to a lease authorized  
2 under 85-2-436.

3 (3) "Certificate" means a certificate of water right issued by the department.

4 (4) "Change in appropriation right" means a change in the place of diversion, the place of use, the  
5 purpose of use, or the place of storage.

6 (5) "Commission" means the fish, wildlife, and parks commission provided for in 2-15-3402.

7 (6) "Correct and complete" means that the information required to be submitted conforms to the  
8 standard of substantial credible information and that all of the necessary parts of the form requiring the  
9 information have been filled in with the required information.

10 (7) "Declaration" means the declaration of an existing right filed with the department under section  
11 8, Chapter 452, Laws of 1973.

12 (8) "Department" means the department of natural resources and conservation provided for in Title  
13 2, chapter 15, part 33.

14 (9) "Existing right" or "existing water right" means a right to the use of water that would be  
15 protected under the law as it existed prior to July 1, 1973. The term includes federal non-Indian and Indian  
16 reserved water rights created under federal law and water rights created under state law.

17 (10) "Ground water" means any water that is beneath the ground surface.

18 (11) "Late claim" means a claim to an existing right forfeited pursuant to the conclusive  
19 presumption of abandonment under 85-2-226.

20 (12) "Permit" means the permit to appropriate issued by the department under 85-2-301 through  
21 85-2-303 and 85-2-306 through 85-2-314.

22 (13) "Person" means an individual, association, partnership, corporation, state agency, political  
23 subdivision, the United States or any agency ~~thereof~~ of the United States, or any other entity.

24 (14) "Political subdivision" means any county, incorporated city or town, public corporation, or  
25 district created pursuant to state law or other public body of the state empowered to appropriate water.  
26 The term does not mean a private corporation, association, or group.

27 (15) "Salvage" means to make water available for beneficial use from an existing valid appropriation  
28 through application of water-saving methods.

29 (16) "State water reservation" means a water right created under state law after July 1, 1973, that  
30 reserves water for existing or future beneficial uses or that maintains a minimum flow, level, or quality of

1 water throughout the year or at periods or for defined lengths of time.

2 ~~(16)~~(17) "Substantial credible information" means probable, believable facts sufficient to support  
3 a reasonable legal theory upon which the department should proceed with the action requested by the  
4 person providing the information.

5 ~~(17)~~(18) "Waste" means the unreasonable loss of water through the design or negligent operation  
6 of an appropriation or water distribution facility or the application of water to anything but a beneficial use.

7 ~~(18)~~(19) "Water" means all water of the state, surface and subsurface, regardless of its character  
8 or manner of occurrence, including but not limited to geothermal water, diffuse surface water, and sewage  
9 effluent.

10 ~~(19)~~(20) "Water division" means a drainage basin as defined in 3-7-102.

11 ~~(20)~~(21) "Water judge" means a judge as provided for in Title 3, chapter 7.

12 ~~(21)~~(22) "Water master" means a master as provided for in Title 3, chapter 7.

13 ~~(22)~~(23) "Watercourse" means any naturally occurring stream or river from which water is diverted  
14 for beneficial uses. It does not include ditches, culverts, or other ~~manmade~~ constructed waterways.

15 ~~(23)~~(24) "Well" means any artificial opening or excavation in the ground, however made, by which  
16 ground water is sought or can be obtained or through which it flows under natural pressures or is artificially  
17 withdrawn."

18

19 **Section 3.** Section 85-2-217, MCA, is amended to read:

20 **"85-2-217. Suspension of adjudication.** While negotiations for the conclusion of a compact under  
21 part 7 are being pursued, all proceedings to generally adjudicate reserved Indian water rights and federal  
22 reserved water rights of those tribes and federal agencies ~~which~~ that are negotiating are suspended. The  
23 obligation to file water rights claims for those federal non-Indian and Indian reserved rights is also  
24 suspended. This suspension ~~shall be~~ is effective until July 1, 1999, as long as negotiations are continuing  
25 or ratification of a completed compact is being sought. If approval by the state legislature and tribes or  
26 federal agencies has not been accomplished by July 1, 1999, the suspension ~~shall~~ must terminate on that  
27 date. Upon termination of the suspension of this part, the tribes and the federal agencies ~~shall be~~ are  
28 subject to the special filing requirements of 85-2-702(3) and all other requirements of the state water  
29 adjudication system provided for in Title 85, chapter 2. Those tribes and federal agencies that choose not  
30 to negotiate their federal non-Indian and Indian reserved water rights are subject to the full operation of the

1 state adjudication system and may not benefit from the suspension provisions of this section."

2

3 **Section 4.** Section 85-2-228, MCA, is amended to read:

4 **"85-2-228. Federal reserved water rights with priority date of July 1, 1973, or later -- process and**  
 5 **adjudication -- purpose.** (1) The purpose of this section is to ensure that a federal reserved water right with  
 6 a priority date of July 1, 1973, or later ~~be~~ is subject to the same process and adjudication as a federal  
 7 reserved water right with a priority date before July 1, 1973.

8 (2) Under authority granted to the states by 43 U.S.C. 666, a federal reserved water right that has  
 9 a priority date of July 1, 1973, or later and that is asserted by a federal agency is subject to the claim filing  
 10 requirements and all other applicable requirements of the state water adjudication system provided for in  
 11 Title 85, chapter 2, parts 2 and 7.

12 (3) At the request of a federal agency, the reserved water rights compact commission may  
 13 negotiate to conclude a compact under Title 85, chapter 2, part 7, for a federal reserved water right with  
 14 a priority date of July 1, 1973, or later.

15 (4) Whenever necessary, a water judge may reopen any decree issued pursuant to Title 85, chapter  
 16 2, to process the asserted or negotiated federal reserved water right."

17

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

19 **"85-2-301. Right to appropriate -- recognition and confirmation of permits issued after July 1,**  
 20 **1973.** (1) After July 1, 1973, a person may not appropriate water except as provided in this chapter. A  
 21 person may ~~only~~ appropriate water only for a beneficial use.

22 (2) (a) Only the department may appropriate water by permit in either of the following instances:

23 (i) for transport outside the following river basins:

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

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

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

27 (D) the Little Missouri River and its tributaries to its confluence with Lake Sakakawea in North

28 Dakota;

29 (E) the Missouri River and its tributaries to its confluence with the Yellowstone River in North

30 Dakota; and



1 (F) the Yellowstone River and its tributaries to its confluence with the Missouri River in North  
2 Dakota; or

3 (ii) whenever water in excess of 4,000 acre-feet a year and 5.5 cubic feet per second, for any use,  
4 is to be consumed.

5 (b) Water for these purposes or in these amounts may be leased from the department by any  
6 person under the provisions of 85-2-141.

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

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

11

12 **Section 6.** Section 85-2-302, MCA, is amended to read:

13 **"85-2-302. Application for permit.** (1) Except as otherwise provided in ~~(1) through (3)~~ of  
14 85-2-306 (1) through (3), a person may not appropriate water or commence construction of diversion,  
15 impoundment, withdrawal, or distribution works ~~therefor~~ for water except by applying for and receiving a  
16 permit from the department. The application ~~shall~~ must be made on a form prescribed by the department.  
17 The department shall make the forms available through its offices and the offices of the county clerk and  
18 recorders. The applicant shall submit a correct and complete application. The department shall return a  
19 defective application for correction or completion, together with the reasons for returning it. An application  
20 does not lose priority of filing because of defects if the application is corrected, completed, and refiled with  
21 the department within 30 days after its return to the applicant or within a further time as the department  
22 may allow. If an application is not corrected and completed within 30 days or within a further time as the  
23 department allows, up to 3 months, the priority date of the application ~~shall~~ must be the date of refiled the  
24 application with the corrections with the department. An application not corrected within 3 months ~~shall~~  
25 must be terminated.

26 (2) Prior to final adjudication and while negotiations for the conclusion of a compact under part 7  
27 are being pursued or until July 1, 2003, whichever occurs first, there is a moratorium on the processing  
28 of permit applications for surface water on an affected Indian reservation."

29

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

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

7           (a) ~~there are unappropriated waters in the source of supply~~ is water physically available at the  
 8 proposed point of diversion:

9           ~~(i) at times when the water can be put to the use proposed by the applicant;~~

10          ~~(ii) in the amount that the applicant seeks to appropriate; and~~

11          ~~(iii) during the period in which the applicant seeks to appropriate, in the amount requested and that~~  
 12 ~~is reasonably available;~~

13          (b) the water rights of a prior appropriator UNDER AN EXISTING WATER RIGHT, A CERTIFICATE,  
 14 A PERMIT, OR A STATE WATER RESERVATION will not be adversely affected. In this subsection (1)(b),  
 15 adverse effect must be determined based on a consideration of:

16          ~~(i) whether water can reasonably be considered~~ IS REASONABLY legally available DURING THE  
 17 PERIOD IN WHICH THE APPLICANT SEEKS TO APPROPRIATE, IN THE AMOUNT REQUESTED, based on  
 18 the records of the department and other evidence provided to the department; and

19          ~~(ii) an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of~~  
 20 the water will be controlled so the water right of a prior appropriator will be satisfied;.

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

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

24          ~~(e) the proposed use will not interfere unreasonably with other planned uses or developments for~~  
 25 ~~which a permit has been issued or for which water has been reserved;~~

26          ~~(f)(e)~~ the applicant has a possessory interest, or the written consent of the person with the  
 27 possessory interest, in the property where the water is to be put to beneficial use;

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

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

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

3           (2) The applicant is required to prove that the criteria in subsections ~~4)(g)~~ (1)(f) through ~~4)(i)~~ (1)(h)  
4 have been met only if a valid objection is filed. A valid objection must contain substantial credible  
5 information establishing to the satisfaction of the department that the criteria in subsection ~~4)(g)~~ (1)(f),  
6 ~~4)(h)~~ (1)(g), or ~~4)(i)~~ (1)(h), as applicable, may not be met. For the criteria set forth in subsection ~~4)(h)~~  
7 (1)(g), only the department of environmental quality or a local water quality district established under Title  
8 7, chapter 13, part 45, may file a valid objection.

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

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

13           ~~(b) the rights of a prior appropriator will not be adversely affected;~~

14           ~~(c)(b)~~ the proposed appropriation is a reasonable use. A finding must be based on a consideration  
15 of the following:

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

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

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

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

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

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

27           (4) (a) The state of Montana has long recognized the importance of conserving its public waters  
28 and the necessity to maintain adequate water supplies for the state's water requirements, including  
29 requirements for federal non-Indian and Indian reserved water rights held by the United States for federal  
30 reserved lands and in trust for the various Indian tribes within the state's boundaries. Although the state

1 of Montana also recognizes that, under appropriate conditions, the out-of-state transportation and use of  
2 its public waters are not in conflict with the public welfare of its citizens or the conservation of its waters,  
3 the criteria in this subsection (4) must be met before out-of-state use may occur.

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

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

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

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

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

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

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

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

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

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

24 (5) To meet the preponderance of evidence standard in this section, the applicant, in addition to  
25 other evidence demonstrating that the criteria of subsection (1) have been met, shall submit hydrologic or  
26 other evidence, including but not limited to water supply data, field reports, and other information  
27 developed by the applicant, the department, the U.S. geological survey, or the U.S. natural resources  
28 conservation service and other specific field studies.

29 (6) An appropriation, diversion, impoundment, use, restraint, or attempted appropriation, diversion,  
30 impoundment, use, or restraint contrary to the provisions of this section is invalid. An officer, agent,

1 agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized  
 2 appropriation, diversion, impoundment, use, or other restraint. A person or corporation may not, directly  
 3 or indirectly, personally or through an agent, officer, or employee, attempt to appropriate, divert, impound,  
 4 use, or otherwise restrain or control waters within the boundaries of this state except in accordance with  
 5 this section.

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

8 **Section 8.** Section 85-2-313, MCA, is amended to read:

9 "**85-2-313. Provisional permit.** A permit issued prior to a final determination of existing water  
 10 rights is provisional and is subject to that final determination. ~~The~~ Upon petition, the amount of the  
 11 appropriation granted in a provisional permit ~~shall~~ must be reduced ~~or~~, modified, or revoked by the  
 12 department in FOLLOWING a show cause hearing where when IN WHICH IT IS DETERMINED THAT  
 13 REDUCTION, MODIFICATION, OR REVOCATION IS necessary to protect and guarantee existing water  
 14 rights determined in the final decree. Because a provisional permit is issued on a reasonable determination  
 15 of legal availability under 85-2-311(1)(b), in a show cause hearing under this section, legal availability must  
 16 be determined on a consideration of the final decree in the affected basin or subbasin. A person may not  
 17 obtain any vested right to an appropriation obtained under a provisional permit by virtue of construction  
 18 of diversion works, purchase of equipment to apply water, planting of crops, or other action where the  
 19 permit would have been denied or modified if the final decree had been available to the department."  
 20

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

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

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

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

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

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

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

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

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

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

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

18 (4) (a) The department may not adopt an order reserving water unless the applicant establishes to  
19 the satisfaction of the department by a preponderance of evidence:

20 (i) the purpose of the reservation;

21 (ii) the need for the reservation;

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

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

24 (b) In determining the public interest under subsection (4)(a)(iv), the department may not adopt an  
25 order reserving water for withdrawal and transport for use outside the state unless the applicant proves by  
26 clear and convincing evidence that:

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

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

30 (c) In determining whether the applicant has proved by clear and convincing evidence that the

1 requirements of subsections (4)(b)(i) and (4)(b)(ii) are met, the department shall consider the following  
2 factors:

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

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

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

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

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

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

17 (6) The department shall limit any state water reservations after May 9, 1979, for maintenance of  
18 minimum flow, level, or quality of water that it awards at any point on a stream or river to a maximum of  
19 50% of the average annual flow of record on gauged streams. Ungauged streams can be allocated at the  
20 discretion of the department.

21 (7) After the adoption of an order reserving waters, the department may reject an application and  
22 refuse a permit for the appropriation of reserved waters or may issue the permit subject to terms and  
23 conditions that it considers necessary for the protection of the objectives of the reservation.

24 (8) (a) A person desiring to use water reserved to a conservation district for agricultural purposes  
25 shall make application for the use with the district, and the district, upon approval of the application, shall  
26 inform the department of the approved use and issue the applicant an authorization for the use. The  
27 department shall maintain records of all uses of water reserved to conservation districts and be responsible,  
28 when requested by the districts, for rendering technical and administrative assistance within the  
29 department's staffing and budgeting limitations in the preparation and processing of the applications for  
30 the conservation districts. The department shall, within its staffing and budgeting limitations, complete any

1 feasibility study requested by the districts within 12 months of the time that the request was made. The  
2 department shall extend the time allowed to develop a plan identifying projects for using a district's  
3 reservation as long as the conservation district makes a good faith effort, within its staffing and budget  
4 limitations, to develop a plan.

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

10 (9) Except as provided in 85-2-331, the priority of appropriation of a state water reservation and  
11 the relative priority of the reservation to permits with a later priority of appropriation must be determined  
12 according to this subsection (9), as follows:

13 (a) A state water reservation under this section has a priority of appropriation dating from the filing  
14 with the department of a notice of intention to apply for a state water reservation in a basin in which no  
15 other notice of intention to apply is currently pending. The notice of intention to apply must specify the  
16 basin in which the applicant is seeking a state water reservation.

17 (b) Upon receiving a notice of intention to apply for a state water reservation, the department shall  
18 identify all potential state water reservation applicants in the basin specified in the notice and notify each  
19 potential applicant of the opportunity to submit an application and to receive a state water reservation with  
20 the priority of appropriation as described in subsection (9)(a).

21 (c) To receive the priority of appropriation described in subsection (9)(a), the applicant shall submit  
22 a correct and complete state water reservation application within 1 year after the filing of the notice of  
23 intention to apply. Upon a showing of good cause, the department may extend the time for preparing the  
24 application.

25 (d) The department may by order subordinate a state water reservation to a permit issued pursuant  
26 to this part if:

27 (i) the permit application was accepted by the department before the date of the order granting the  
28 reservation; and

29 (ii) the effect of subordinating the reservation to one or more permits does not interfere substantially  
30 with the purpose of the reservation.



1 (e) The department shall by order establish the relative priority of state water reservations approved  
2 under this section that have the same day of priority. A state water reservation may not adversely affect  
3 any rights in existence at that time.

4 (10) The department shall, periodically but at least once every 10 years, review existing state water  
5 reservations to ensure that the objectives of the ~~reservation~~ reservations are being met. When the  
6 objectives of ~~the~~ a state water reservation are not being met, the department may extend, revoke, or  
7 modify the reservation. Any undeveloped water made available as a result of a revocation or modification  
8 under this subsection is available for appropriation by others pursuant to this part.

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

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

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

1 (14) Nothing in this section vests the department with the authority to alter a water right that is  
2 not a state water reservation.

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

7 (16) Water reserved under this section is not subject to the state water leasing program established  
8 under 85-2-141."  
9

10 **Section 10.** Section 85-2-321, MCA, is amended to read:

11 **"85-2-321. Milk River basin -- suspension of action on permits -- proposal -- priority in adjudication**  
12 **process.** (1) (a) In order to balance the need for the continued development of Montana's water and for  
13 protection of existing rights in the Milk River basin, the department may suspend action on a class of  
14 applications or may close a source in the basin and refuse to accept a class of applications, or both, for a  
15 permit under this part to appropriate from that source in the basin.

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

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

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

20 (A) any new appropriation from the source for the class of applications will adversely affect the  
21 rights of a prior appropriation from the source; or

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

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

27 (2) After April 8, 1985, the chief water judge shall make issuance of a temporary preliminary  
28 decree in the Milk River basin the highest priority in the adjudication of existing water rights pursuant to  
29 Title 85, chapter 2, part 2."  
30

1           **Section 11.** Section 85-2-329, MCA, is amended to read:

2           **"85-2-329. Definitions.** Unless the context requires otherwise, in 85-2-330 and this section, the  
3 following definitions apply:

4           (1) "Application" means an application for a beneficial water use permit pursuant to 85-2-302 or  
5 a state water reservation pursuant to 85-2-316.

6           (2) "Ground water" means water that is beneath the land surface or beneath the bed of a stream,  
7 lake, reservoir, or other body of surface water and that is not immediately or directly connected to surface  
8 water.

9           (3) "Nonconsumptive use" means a beneficial use of water that does not cause a reduction in the  
10 source of supply and in which substantially all of the water returns without delay to the source of supply,  
11 causing little or no disruption in stream conditions.

12           (4) "Teton River basin" means the drainage area of the Teton River and its tributaries above the  
13 confluence of the Teton and Marias Rivers."  
14

15           **Section 12.** Section 85-2-331, MCA, is amended to read:

16           **"85-2-331. Reservations within Missouri River basin and Little Missouri River basin.** (1) The state,  
17 ~~or~~ an agency or political subdivision of the state, or the United States or an agency of the United States  
18 that desires to apply for a state water reservation ~~of water~~ in the Missouri River basin or in the Little  
19 Missouri River basin shall file an application pursuant to 85-2-316 no later than:

20           (a) July 1, 1989, for reservation of water above Fort Peck dam; or

21           (b) July 1, 1991, for reservation of water below Fort Peck dam and in the Little Missouri River  
22 basin.

23           (2) Subject to legislative appropriation, the department shall provide technical and financial  
24 assistance to other state agencies and political subdivisions in applying for state water reservations within  
25 the Missouri River basin and the Little Missouri River basin.

26           (3) (a) The department shall make a final determination in accordance with 85-2-316 on all  
27 applications filed before July 1, 1989, for state water reservations ~~of water~~ in the Missouri River basin  
28 above Fort Peck dam.

29           (b) The department shall make a final determination in accordance with 85-2-316 on all applications  
30 filed before July 1, 1991, for state water reservations ~~of water~~ in the Missouri River basin below Fort Peck

1 dam and in the Little Missouri River basin.

2 (c) The department shall determine which applications or portions of applications are considered  
3 to be above or below Fort Peck dam.

4 (4) ~~Water~~ State water reservations approved by the department under this section have a priority  
5 date of July 1, 1985, in the Missouri River basin and a priority date of July 1, 1989, in the Little Missouri  
6 River basin. If the department issues a permit under Title 85, chapter 2, part 3, prior to the granting of a  
7 state water reservation under this section, the department may subordinate the state water reservation to  
8 the permit if it finds that the subordination does not interfere substantially with the purpose of any state  
9 water reservation. The department shall by order establish the relative priority of applications approved  
10 under this section."

11

12 **Section 13.** Section 85-2-336, MCA, is amended to read:

13 **"85-2-336. Basin closure -- exception.** (1) As provided in 85-2-319 and subject to the provisions  
14 of subsection (2) of this section, the department may not process or grant an application for a permit to  
15 appropriate water within the Upper Clark Fork River basin.

16 (2) The provisions of subsection (1) do not apply to:

17 (a) an application for a permit to appropriate ground water;

18 (b) an application filed prior to January 1, 2000, for a permit to appropriate water to conduct  
19 response actions or remedial actions pursuant to the federal Comprehensive Environmental Response,  
20 Compensation, and Liability Act of 1980, as amended, or Title 75, chapter 10, part 7, at sites designated  
21 as of January 1, 1994. The total flow rates for all permits issued under this subsection (2)(b) may not  
22 exceed 10 cubic feet per second. A permit issued to conduct response actions or remedial actions may not  
23 be used for dilution and must be limited to a term not to exceed the necessary time to complete the  
24 response or remedial action, and the permit may not be transferred to any person for any purpose other  
25 than the designated response or remedial action;

26 (c) an application for a permit to appropriate water for stock use;

27 (d) an application to store water; or

28 (e) an application for power generation at existing hydroelectric dams. The department may not  
29 approve a permit for power generation if approval results in additional consumption of water.

30 (3) Applications for state water reservations in the Upper Clark Fork River basin filed pursuant to

1 85-2-316 and pending as of May 1, 1991, have a priority date of May 1, 1991. The filing of a state water  
 2 reservation application does not provide standing to object under 85-2-402.

3 (4) The department may not process or approve applications for state water reservations ~~of water~~  
 4 in the Upper Clark Fork River basin filed pursuant to 85-2-316."

5  
 6 **Section 14.** Section 85-2-340, MCA, is amended to read:

7 **"85-2-340. Definitions.** Unless the context requires otherwise, in 85-2-341 and this section, the  
 8 following definitions apply:

9 (1) "Application" means an application for a beneficial water use permit pursuant to 85-2-302 or  
 10 a state water reservation pursuant to 85-2-316.

11 (2) "Ground water" means water that is beneath the land surface or beneath the bed of a stream,  
 12 lake, reservoir, or other body of surface water and that is not immediately or directly connected to surface  
 13 water.

14 (3) "Jefferson River basin" means the drainage area of the Jefferson River and its tributaries above  
 15 the confluence of the Jefferson and Missouri Rivers.

16 (4) "Madison River basin" means the drainage area of the Madison River and its tributaries above  
 17 the confluence of the Madison and Jefferson Rivers.

18 (5) "Nonconsumptive use" means a beneficial use of water that does not cause a reduction in the  
 19 source of supply and in which substantially all of the water returns without delay to the source of supply,  
 20 causing little or no disruption in stream conditions."

21  
 22 **Section 15.** Section 85-2-341, MCA, is amended to read:

23 **"85-2-341. Basin closure -- exceptions.** (1) As provided in 85-2-319 and subject to the provisions  
 24 of subsection (2) of this section, the department may not process or grant an application for a permit to  
 25 appropriate water or for a state water reservation to reserve water within the Jefferson River basin or  
 26 Madison River basin.

27 (2) The provisions of subsection (1) do not apply to:

28 (a) an application for a permit to appropriate ground water;

29 (b) an application for a permit to appropriate water for a nonconsumptive use;

30 (c) an application for a permit to appropriate water for domestic, municipal, or stock use;

- 1 (d) an application to store water during high spring flows; or  
 2 (e) temporary emergency appropriations as provided for in 85-2-113(3)."

3

4 **Section 16.** Section 85-2-342, MCA, is amended to read:

5 **"85-2-342. Definitions.** Unless the context requires otherwise, in 85-2-343 and this section, the  
 6 following definitions apply:

7 (1) "Application" means an application for a beneficial water use permit pursuant to 85-2-302 or  
 8 a state water reservation pursuant to 85-2-316.

9 (2) "Ground water" means water that is beneath the land surface or beneath the bed of a stream,  
 10 lake, reservoir, or other body of surface water and that is not immediately or directly connected to surface  
 11 water.

12 (3) "Nonconsumptive use" means a beneficial use of water that does not cause a reduction in the  
 13 source of supply and in which substantially all of the water returns without delay to the source of supply,  
 14 causing little or no disruption in stream conditions.

15 (4) "Upper Missouri River basin" means the drainage area of the Missouri River and its tributaries  
 16 above Morony dam."

17

18 **Section 17.** Section 85-2-401, MCA, is amended to read:

19 **"85-2-401. Priority -- recognition and confirmation of changes in appropriations issued after July**  
 20 **1, 1973.** (1) As between appropriators, the first in time is the first in right. Priority of appropriation does  
 21 not include the right to prevent changes by later appropriators in the condition of water occurrence, such  
 22 as the increase or decrease of streamflow or the lowering of a water table, artesian pressure, or water level,  
 23 if the prior appropriator can reasonably exercise ~~his~~ the water right under the changed conditions.

24 (2) Priority of appropriation made under this chapter dates from the filing of an application for a  
 25 permit with the department, except as otherwise provided in 85-2-301 through 85-2-303, 85-2-306,  
 26 85-2-310(3), and 85-2-313.

27 (3) Priority of appropriation perfected before July 1, 1973, ~~shall~~ must be determined as provided  
 28 in part 2 of this chapter.

29 (4) All changes in appropriation rights actions of the department after July 1, 1973, are recognized  
 30 and confirmed subject to this part and any terms, conditions, and limitations placed on a change in

1 appropriation authorization by the department."

2  
3 **Section 18.** Section 85-2-402, MCA, is amended to read:

4 **"85-2-402. (Temporary) Changes in appropriation rights.** (1) The right to make a change subject  
5 to the provisions of this section in an existing water right, a permit, or a state water reservation is  
6 recognized and confirmed. In a change proceeding under this section, there is no presumption that an  
7 applicant for a change in appropriation right cannot establish lack of adverse effect prior to the adjudication  
8 of other rights in the source of supply pursuant to this chapter. An applicant for a change in appropriation  
9 right must be given the opportunity to establish lack of adverse effect as an evidentiary matter by showing  
10 by reference to the applicant's own existing water right and historic water use practices that the proposed  
11 change in appropriation right will not increase the amount of water consumed or adversely alter the timing  
12 or pattern of flow for perfected uses in the source of the supply. An appropriator may not make a change  
13 in an appropriation right except, as permitted under this section, by applying for and receiving the approval  
14 of the department or, if applicable, of the legislature. An applicant shall submit a correct and complete  
15 application.

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

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

23 (b) Except for a lease authorization pursuant to 85-2-436, a temporary change authorization for  
24 instream use to benefit the fishery resource pursuant to 85-2-408, or water use pursuant to 85-2-439 when  
25 authorization does not require appropriation works, the proposed means of diversion, construction, and  
26 operation of the appropriation works are adequate.

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

28 (d) Except for a lease authorization pursuant to 85-2-436 or a temporary change authorization  
29 pursuant to 85-2-408 for instream flow to benefit the fishery resource, the applicant has a possessory  
30 interest, or the written consent of the person with the possessory interest, in the property where the water

1 is to be put to beneficial use.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



1 in subsections (2) and (4) are met; and

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

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

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

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

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

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

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

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

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

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

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

30 (c) When applying for a change in appropriation right to withdraw and transport water for use

1 outside the state, the applicant shall submit to and comply with the laws of the state of Montana governing  
2 the appropriation and use of water.

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

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

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

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

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

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

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

1 accordance with this section.

2 (14) The department may adopt rules to implement the provisions of this section. (Terminates June  
3 30, 1999--sec. 4, Ch. 740, L. 1991.)

4 **85-2-402. (Effective July 1, 1999) Changes in appropriation rights.** (1) The right to make a change  
5 subject to the provisions of this section in an existing water right, a permit, or a state water reservation  
6 is recognized and confirmed. In a change proceeding under this section, there is no presumption that an  
7 applicant for a change in appropriation right cannot establish lack of adverse effect prior to the adjudication  
8 of other rights in the source of supply pursuant to this chapter. An applicant for a change in appropriation  
9 right must be given the opportunity to establish lack of adverse effect as an evidentiary matter by showing  
10 by reference to the applicant's own existing water right and historic water use practices that the proposed  
11 change in appropriation right will not increase the amount of water consumed or adversely alter the timing  
12 or pattern of flow for perfected uses in the source of the supply. An appropriator may not make a change  
13 in an appropriation right except, as permitted under this section, by applying for and receiving the approval  
14 of the department or, if applicable, of the legislature. An applicant shall submit a correct and complete  
15 application.

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

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

23 (b) Except for a temporary change authorization pursuant to 85-2-408 or for water use pursuant  
24 to 85-2-439 that does not require appropriation works, the proposed means of diversion, construction, and  
25 operation of the appropriation works are adequate.

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

27 (d) Except for a temporary change authorization pursuant to 85-2-408 for instream flow to benefit  
28 the fishery resource, the applicant has a possessory interest, or the written consent of the person with the  
29 possessory interest, in the property where the water is to be put to beneficial use.

30 (e) If the change in appropriation right involves salvaged water, the proposed water-saving methods

1 will salvage at least the amount of water asserted by the applicant.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

30 (b) the department then petitions the legislature and the legislature affirms the decision of the

1 department after one or more public hearings.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 30, 2005--sec. 6, Ch. 322, L. 1995.)

2 **85-2-402. (Effective July 1, 2005) Changes in appropriation rights.** (1) The right to make a  
 3 change subject to the provisions of this section in an existing water right, a permit, or a state water  
 4 reservation is recognized and confirmed. In a change proceeding under this section, there is no  
 5 presumption that an applicant for a change in appropriation right cannot establish lack of adverse effect  
 6 prior to the adjudication of other rights in the source of supply pursuant to this chapter. An applicant for  
 7 a change in appropriation right must be given the opportunity to establish lack of adverse effect as an  
 8 evidentiary matter by showing by reference to the applicant's own existing water right and historic water  
 9 use practices that the proposed change in appropriation right will not increase the amount of water  
 10 consumed or adversely alter the timing or pattern of flow for perfected uses in the source of the supply.

11 An appropriator may not make a change in an appropriation right except, as permitted under this section,  
 12 by applying for and receiving the approval of the department or, if applicable, of the legislature. An  
 13 applicant shall submit a correct and complete application.

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

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

21 (b) The proposed means of diversion, construction, and operation of the appropriation works are  
 22 adequate.

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

24 (d) The applicant has a possessory interest, or the written consent of the person with the  
 25 possessory interest, in the property where the water is to be put to beneficial use.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

28 (6) The state of Montana has long recognized the importance of conserving its public waters and  
29 the necessity to maintain adequate water supplies for the state's water requirements, including  
30 requirements for reserved water rights held by the United States for federal reserved lands and in trust for



1 the various Indian tribes within the state's boundaries. Although the state of Montana also recognizes that,  
2 under appropriate conditions, the out-of-state transportation and use of its public waters are not in conflict  
3 with the public welfare of its citizens or the conservation of its waters, the following criteria must be met  
4 before out-of-state use may occur:

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

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

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

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

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

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

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

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

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

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

27 (7) For any application for a change in appropriation right involving 4,000 or more acre-feet of  
28 water a year and 5.5 or more cubic feet per second of water, the department shall give notice of the  
29 proposed change in accordance with 85-2-307 and shall hold one or more hearings in accordance with  
30 85-2-309 prior to its approval or denial of the proposed change. The department shall provide notice and

1 may hold one or more hearings upon any other proposed change if it determines that such a change might  
2 adversely affect the rights of other persons.

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

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

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

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

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

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

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

28 **NEW SECTION. SECTION 19. WATER ADMINISTRATION AGREEMENTS WITHIN INDIAN**  
29 **RESERVATIONS. (1) BECAUSE IT APPEARS TO BE TO THE COMMON ADVANTAGE OF THE STATE AND**  
30 **INDIAN TRIBES TO COOPERATE IN MATTERS INVOLVING THE PERMITTING AND USE OF WATER WITHIN**

1 THE EXTERIOR BOUNDARIES OF AN INDIAN RESERVATION PRIOR TO THE FINAL ADJUDICATION OF  
 2 INDIAN RESERVED WATER RIGHTS AND BECAUSE THE STATE DOES NOT INTEND BY ENACTMENT OF  
 3 THIS SECTION TO LIMIT, EXPAND, ALTER, OR WAIVE STATE JURISDICTION TO ADMINISTER WATER  
 4 RIGHTS WITHIN THE EXTERIOR BOUNDARIES OF AN INDIAN RESERVATION, PURSUANT TO THE  
 5 REQUIREMENTS OF TITLE 18, CHAPTER 11, THE DEPARTMENT MAY NEGOTIATE AND CONCLUDE AN  
 6 INTERIM AGREEMENT WITH THE TRIBAL GOVERNMENT OF ANY INDIAN TRIBE IN MONTANA PRIOR TO  
 7 FINAL ADJUDICATION OF INDIAN RESERVED WATER RIGHTS FOR THE PURPOSE OF IMPLEMENTING  
 8 A WATER ADMINISTRATION PLAN AND A PERMITTING PROCESS FOR THE ISSUANCE OF WATER  
 9 RIGHTS AND CHANGES IN WATER RIGHT USES WITHIN THE EXTERIOR BOUNDARIES OF AN INDIAN  
 10 RESERVATION.

11 (2) AN AGREEMENT ENTERED INTO PURSUANT TO SUBSECTION (1) MUST:

12 (A) PROVIDE FOR THE RETENTION OF EXCLUSIVE AUTHORITY BY THE STATE TO ISSUE  
 13 PERMITS TO APPLICANTS WHO ARE NOT MEMBERS OF THE TRIBE AND TO ISSUE CHANGE OF USE  
 14 AUTHORIZATIONS;

15 (B) PROVIDE THAT ANY PERMITS MUST BE ISSUED IN ACCORDANCE WITH THE CRITERIA  
 16 ESTABLISHED BY STATE LAW; AND

17 (C) PROVIDE THAT PERMITS MAY BE ONLY FOR NEW USES WITH A DATE OF PRIORITY IN  
 18 COMPLIANCE WITH STATE LAW.

19 (3) PRIOR TO CONCLUDING ANY AGREEMENT UNDER THIS SECTION, THE DEPARTMENT SHALL  
 20 HOLD PUBLIC MEETINGS, AFTER PROPER PUBLIC NOTICE OF THE MEETINGS HAS BEEN GIVEN AND THE  
 21 PROPOSED AGREEMENT HAS BEEN MADE AVAILABLE FOR PUBLIC REVIEW, TO AFFORD THE PUBLIC  
 22 AN OPPORTUNITY TO COMMENT ON THE CONTENTS OF THE AGREEMENT.

24 NEW SECTION. Section 20. Notification to tribal governments. The secretary of state shall send  
 25 a copy of [this act] to each tribal government located on the seven Montana reservations.

27 NEW SECTION. SECTION 21. CODIFICATION INSTRUCTION. [SECTION 19] IS INTENDED TO  
 28 BE CODIFIED AS AN INTEGRAL PART OF TITLE 85, CHAPTER 2, AND THE PROVISIONS OF TITLE 85,  
 29 CHAPTER 2, APPLY TO [SECTION 19].



## 1 SENATE BILL NO. 97

2 INTRODUCED BY GROSFIELD

3 BY REQUEST OF THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

4

5 A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING THE WATER LAWS TO CLARIFY THAT  
6 THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION MAY ISSUE WATER PERMITS AND  
7 CHANGE AUTHORIZATIONS PRIOR TO THE COMPLETION OF AN ADJUDICATION IN A SOURCE OF  
8 SUPPLY; CLARIFYING THAT WATER RESERVED UNDER STATE LAW IS NOT SYNONYMOUS WITH  
9 FEDERAL AND INDIAN RESERVED WATER RIGHTS UNDER FEDERAL LAW; ALLOWING THE DEPARTMENT  
10 TO NEGOTIATE INTERIM AGREEMENTS WITH TRIBAL GOVERNMENTS; AMENDING SECTIONS 85-2-101,  
11 85-2-102, 85-2-217, 85-2-228, 85-2-301, 85-2-302, 85-2-311, 85-2-313, 85-2-316, 85-2-321, 85-2-329,  
12 85-2-331, 85-2-336, 85-2-340, 85-2-341, 85-2-342, 85-2-401, AND 85-2-402, MCA; AND PROVIDING  
13 AN IMMEDIATE EFFECTIVE DATE AND A RETROACTIVE APPLICABILITY 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 SENATE BILL NO. 97

2 INTRODUCED BY GROSFIELD

3 BY REQUEST OF THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION  
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5 A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING THE WATER LAWS TO CLARIFY THAT  
6 THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION MAY ISSUE WATER PERMITS AND  
7 CHANGE AUTHORIZATIONS PRIOR TO THE COMPLETION OF AN ADJUDICATION IN A SOURCE OF  
8 SUPPLY; CLARIFYING THAT WATER RESERVED UNDER STATE LAW IS NOT SYNONYMOUS WITH  
9 FEDERAL AND INDIAN RESERVED WATER RIGHTS UNDER FEDERAL LAW; REQUIRING A WATER JUDGE  
10 TO GIVE PRIORITY OVER OTHER ADJUDICATION ISSUES TO ISSUES CERTIFIED TO THE DISTRICT  
11 COURT BY THE DEPARTMENT; ALLOWING THE DEPARTMENT TO NEGOTIATE INTERIM AGREEMENTS  
12 WITH TRIBAL GOVERNMENTS; AMENDING SECTIONS 85-2-101, 85-2-102, 85-2-217, 85-2-228,  
13 85-2-301, ~~85-2-302~~, 85-2-309, 85-2-311, 85-2-313, 85-2-316, 85-2-321, 85-2-329, 85-2-331, 85-2-336,  
14 85-2-340, 85-2-341, 85-2-342, 85-2-401, AND 85-2-402, MCA; AND PROVIDING AN IMMEDIATE  
15 EFFECTIVE DATE AND A RETROACTIVE APPLICABILITY DATE."  
16

17 WHEREAS, the Montana Supreme Court, in In the Matter of the Application for Beneficial Water  
18 Use Permit Nos. 66459-76L, Ciotti; 64988-g76L, Starner; and Application for Change of Appropriation  
19 Water Right No. G15152-s761, Pope, which was decided August 22, 1996, held that an applicant for a  
20 permit or change of use authorization on the Flathead Indian Reservation may not as a matter of law meet  
21 the applicant's burden of proof to establish that the proposed use will not interfere unreasonably with  
22 planned uses or developments for which water has been reserved until the Confederated Salish and  
23 Kootenai Tribes' federal reserved water rights are quantified; and

24 WHEREAS, in 1973, Montana enacted comprehensive legislation referred to as the Montana Water  
25 Use Act of 1973, codified in Title 85, chapter 2, to implement Article IX, section 3(4), of the Montana  
26 Constitution, which requires that the Legislature provide for the administration, control, and regulation of  
27 water rights and establish a system of centralized records of all water rights, and to implement Article IX  
28 making the water of the state subject to appropriation for beneficial use by its citizens; and

29 WHEREAS, Title 85, chapter 2, as amended, provides for the comprehensive adjudication of water  
30 rights and the continued development of Montana's water resources through a permit and change

1 authorization process; and

2 WHEREAS, historically in Montana, water has been developed, water use rights acquired, and  
3 changes in water use completed in the absence of the adjudication of water rights in a source of supply;  
4 and

5 WHEREAS, since July 1, 1973, it has been the intent of the Legislature that provisional permits and  
6 change authorizations be issued pursuant to statutory standards in the absence of a completed adjudication  
7 in a source of supply; and

8 WHEREAS, the dissent filed with the Montana Supreme Court decision raises a concern that the  
9 majority decision may be interpreted to apply statewide, but that interpretation does not reflect the intent  
10 of the Legislature to allow for the continued wise and efficient use of Montana's water resources and  
11 Montana's growing economy as required under Title 85, chapter 2.

12 STATEMENT OF INTENT

13 THE LEGISLATURE INTENDS THAT THE MONTANA SUPREME COURT'S DECISION IN IN THE  
14 MATTER OF THE APPLICATION FOR BENEFICIAL WATER USE PERMIT NOS. 66459-76L, CIOTTI,  
15 64988-G76L, STARNER; AND APPLICATION FOR CHANGE OF APPROPRIATION WATER RIGHT NO.  
16 G15152-S761, POPE, 53 ST. REP. 777 AT 784, 923 P.2D 1073, BE NEGATED BY THE PASSAGE AND  
17 APPROVAL OF THIS BILL. THE LEGISLATURE FURTHER INTENDS THAT THE PORTION OF THE DISTRICT  
18 COURT DECISION IN UNITED STATES V. DNRC (1ST JUDICIAL DISTRICT, MONTANA, JUNE 15, 1987),  
19 NO. 50612, (SEE ALSO THE CONCURRING OPINION IN THE MONTANA SUPREME COURT'S DECISION  
20 IN IN THE MATTER OF THE APPLICATION FOR BENEFICIAL WATER USE PERMIT NOS. 66459-76L CIOTTI,  
21 64988-G76L, STARNER; AND APPLICATION FOR CHANGE OF APPROPRIATION WATER RIGHT NO.  
22 G15152-S761, POPE, 53 ST. REP. 777 AT 784, 923 P.2D 1073), DETERMINING THAT IN THE ABSENCE  
23 OF A QUANTIFICATION OF EXISTING WATER RIGHTS, THE DEPARTMENT OF NATURAL RESOURCES  
24 AND CONSERVATION DOES NOT HAVE THE AUTHORITY TO ISSUE A PERMIT FOR A NEW WATER  
25 APPLICATION WHEN QUESTIONS OF SENIOR CONFLICTING CLAIMS ARE RAISED, BE NEGATED BY THE  
26 PASSAGE AND APPROVAL OF THIS BILL, SPECIFICALLY BY THE PASSAGE AND APPROVAL OF THE  
27 AMENDMENTS TO 85-2-311. A STATEMENT OF INTENT IS DESIRED FOR THIS BILL IN ORDER TO  
28 PROVIDE GUIDANCE TO THE DEPARTMENT UNDER 85-2-311 CONCERNING IMPLEMENTATION AND  
29 INTERPRETATION OF THE PHYSICAL AVAILABILITY OF WATER AND REASONABLE LEGAL AVAILABILITY  
30 OF WATER CRITERIA. TO FIND THAT WATER IS AVAILABLE FOR THE ISSUANCE OF A PERMIT, THE

1 DEPARTMENT SHALL REQUIRE A THREE-STEP ANALYSIS INVOLVING THE FOLLOWING FACTORS:  
 2 IDENTIFY PHYSICAL WATER AVAILABILITY, IDENTIFY EXISTING LEGAL DEMANDS ON THE SOURCE OF  
 3 SUPPLY, AND COMPARE AND ANALYZE THE PHYSICAL WATER SUPPLY AT THE PROPOSED POINT OF  
 4 DIVERSION WITH THE EXISTING LEGAL DEMANDS ON THE SOURCE OF SUPPLY. THE THREE-STEP  
 5 ANALYSIS MUST BE AS GENERALLY DESCRIBED IN THE PAMPHLET "INFORMATION AND  
 6 INSTRUCTIONS FOR APPLICATION FOR BENEFICIAL WATER USE PERMIT, FORM NO. 600INS, FORM NO.  
 7 600 AND CRITERIA ADDENDUM A", PUBLISHED BY THE MONTANA DEPARTMENT OF NATURAL  
 8 RESOURCES AND CONSERVATION.

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

11  
 12 **Section 1.** Section 85-2-101, MCA, is amended to read:

13 **"85-2-101. Declaration of policy and purpose.** (1) Pursuant to Article IX of the Montana  
 14 constitution, the legislature declares that any use of water is a public use and that the waters within the  
 15 state are the property of the state for the use of its people and are subject to appropriation for beneficial  
 16 uses as provided in this chapter.

17 (2) A purpose of this chapter is to implement Article IX, section 3(4)<sub>1</sub> of the Montana constitution,  
 18 which requires that the legislature provide for the administration, control, and regulation of water rights and  
 19 establish a system of centralized records of all water rights. The legislature declares that this system of  
 20 centralized records recognizing and establishing all water rights is essential for the documentation,  
 21 protection, preservation, and future beneficial use and development of Montana's water for the state and  
 22 its citizens and for the continued development and completion of the comprehensive state water plan.

23 (3) It is the policy of this state and a purpose of this chapter to encourage the wise use of the  
 24 state's water resources by making them available for appropriation consistent with this chapter and to  
 25 provide for the wise utilization, development, and conservation of the waters of the state for the maximum  
 26 benefit of its people with the least possible degradation of the natural aquatic ecosystems. In pursuit of this  
 27 policy, the state encourages the development of facilities ~~which~~ that store and conserve waters for  
 28 beneficial use, for the maximization of the use of those waters in Montana, for the stabilization of ~~stream~~  
 29 ~~flows~~ streamflows, and for ground water recharge.

30 (4) Pursuant to Article IX, section 3(1)<sub>2</sub> of the Montana constitution, it is further the policy of this



1 state and a purpose of this chapter to recognize and confirm all existing rights to the use of any waters for  
2 any useful or beneficial purpose.

3 (5) It is the intent of the legislature that the statutory determinations for issuing new water use  
4 permits and authorizing changes do not require the adjudication of all water rights in the source of supply.  
5 The legislature recognizes the unique character and nature of water resources of the state. Because water  
6 is a resource that is subject to use and reuse, such as through return flows, and because at most times all  
7 water rights on a source will not be exercised to their full extent simultaneously, it is recognized that an  
8 adjudication is not a water availability study. Consequently, the legislature has provided an administrative  
9 forum for the factual investigation into whether water is available for new uses and changes both before  
10 and after the completion of an adjudication in the source of supply. To allow for orderly permitting in the  
11 absence of a complete adjudication in the source of supply, permits issued under this chapter are  
12 provisional. A provisional permit is subject to reduction, modification, or revocation by the department as  
13 provided in 85-2-313 upon completion of the general adjudication.

14 ~~(6) It is the intent of the legislature that the establishment of a moratorium under 85-2-302 does~~  
15 ~~not limit, expand, alter, or waive state jurisdiction to administer water rights within the exterior boundaries~~  
16 ~~of an Indian reservation.~~

17 (6) IT IS THE INTENT OF THE LEGISLATURE THAT THE STATE, TO FULFILL ITS CONSTITUTIONAL  
18 DUTIES AND TO EXERCISE ITS HISTORIC POWERS AND RESPONSIBILITIES TO ITS CITIZENS LIVING ON  
19 AND OFF RESERVATIONS, COMPREHENSIVELY ADJUDICATE EXISTING WATER RIGHTS AND REGULATE  
20 WATER USE WITHIN THE STATE. IT IS FURTHER THE LEGISLATURE'S INTENT THAT THE STATE, TO  
21 THE FULLEST EXTENT POSSIBLE, RETAIN AND EXERCISE ITS AUTHORITY TO REGULATE WATER USE  
22 AND PROVIDE FORUMS FOR THE PROTECTION OF WATER RIGHTS, INCLUDING FEDERAL NON-INDIAN  
23 AND INDIAN WATER RIGHTS, AND RESOLVE ISSUES CONCERNING ITS AUTHORITY OVER WATER  
24 RIGHTS AND PERMITS, BOTH PRIOR TO AND AFTER THE FINAL ADJUDICATION OF WATER RIGHTS.  
25 IN FURTHERANCE OF THIS LEGISLATIVE INTENT:

26 (A) ALL PERMITS ISSUED ARE PROVISIONAL, AND IT IS THE INTENT OF THE LEGISLATURE THAT  
27 THIS STATUS PROVIDE ENFORCEABLE LEGAL PROTECTION FOR EXISTING RIGHTS; AND

28 (B) ANY JUDICIAL DETERMINATION OF THE STATE'S AUTHORITY TO ISSUE PROVISIONAL  
29 PERMITS ON OR OFF RESERVATIONS SHOULD BE DECIDED IN THE APPROPRIATE STATE FORUM."

30

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

2           **"85-2-102. (Temporary) Definitions.** Unless the context requires otherwise, in this chapter, the  
3 following definitions apply:

4           (1) "Appropriate" means to:

5           (a) divert, impound, or withdraw (including by stock for stock water) a quantity of water;

6           (b) in the case of a public agency, reserve water in accordance with 85-2-316;

7           (c) in the case of the department of fish, wildlife, and parks, lease water in accordance with  
8 85-2-436; or

9           (d) in the Upper Clark Fork River basin, maintain and enhance streamflows to benefit the fishery  
10 resource in accordance with 85-2-439.

11          (2) "Beneficial use", unless otherwise provided, means:

12          (a) a use of water for the benefit of the appropriator, other persons, or the public, including but  
13 not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining,  
14 municipal, power, and recreational uses;

15          (b) a use of water appropriated by the department for the state water leasing program under  
16 85-2-141 and of water leased under a valid lease issued by the department under 85-2-141;

17          (c) a use of water by the department of fish, wildlife, and parks pursuant to a lease authorized  
18 under 85-2-436; or

19          (d) a use of water to maintain and enhance streamflows to benefit the fishery resource in the Upper  
20 Clark Fork River basin as part of the Upper Clark Fork River basin instream flow pilot program authorized  
21 under 85-2-439.

22          (3) "Certificate" means a certificate of water right issued by the department.

23          (4) "Change in appropriation right" means a change in the place of diversion, the place of use, the  
24 purpose of use, or the place of storage.

25          (5) "Commission" means the fish, wildlife, and parks commission provided for in 2-15-3402.

26          (6) "Correct and complete" means that the information required to be submitted conforms to the  
27 standard of substantial credible information and that all of the necessary parts of the form requiring the  
28 information have been filled in with the required information.

29          (7) "Declaration" means the declaration of an existing right filed with the department under section  
30 8, Chapter 452, Laws of 1973.

1 (8) "Department" means the department of natural resources and conservation provided for in Title  
2 2, chapter 15, part 33.

3 (9) "Existing right" or "existing water right" means a right to the use of water that would be  
4 protected under the law as it existed prior to July 1, 1973. The term includes federal non-Indian and Indian  
5 reserved water rights created under federal law and water rights created under state law.

6 (10) "Ground water" means any water that is beneath the ground surface.

7 (11) "Late claim" means a claim to an existing right forfeited pursuant to the conclusive  
8 presumption of abandonment under 85-2-226.

9 (12) "Permit" means the permit to appropriate issued by the department under 85-2-301 through  
10 85-2-303 and 85-2-306 through 85-2-314.

11 (13) "Person" means an individual, association, partnership, corporation, state agency, political  
12 subdivision, the United States or any agency of the United States, or any other entity.

13 (14) "Political subdivision" means any county, incorporated city or town, public corporation, or  
14 district created pursuant to state law or other public body of the state empowered to appropriate water.  
15 The term does not mean a private corporation, association, or group.

16 (15) "Salvage" means to make water available for beneficial use from an existing valid appropriation  
17 through application of water-saving methods.

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

21 ~~(16)~~(17) "Substantial credible information" means probable, believable facts sufficient to support  
22 a reasonable legal theory upon which the department should proceed with the action requested by the  
23 person providing the information.

24 ~~(17)~~(18) "Waste" means the unreasonable loss of water through the design or negligent operation  
25 of an appropriation or water distribution facility or the application of water to anything but a beneficial use.

26 ~~(18)~~(19) "Water" means all water of the state, surface and subsurface, regardless of its character  
27 or manner of occurrence, including but not limited to geothermal water, diffuse surface water, and sewage  
28 effluent.

29 ~~(19)~~(20) "Water division" means a drainage basin as defined in 3-7-102.

30 ~~(20)~~(21) "Water judge" means a judge as provided for in Title 3, chapter 7.

1           ~~(21)~~(22) "Water master" means a master as provided for in Title 3, chapter 7.

2           ~~(22)~~(23) "Watercourse" means any naturally occurring stream or river from which water is diverted  
3 for beneficial uses. It does not include ditches, culverts, or other ~~manmade~~ constructed waterways.

4           ~~(23)~~(24) "Well" means any artificial opening or excavation in the ground, however made, by which  
5 ground water is sought or can be obtained or through which it flows under natural pressures or is artificially  
6 withdrawn. (Terminates June 30, 1999--sec. 4, Ch. 740, L. 1991.)

7           **85-2-102. (Effective July 1, 1999) Definitions.** Unless the context requires otherwise, in this  
8 chapter, the following definitions apply:

9           (1) "Appropriate" means:

10           (a) to divert, impound, or withdraw (including by stock for stock water) a quantity of water;

11           (b) in the case of a public agency, to reserve water in accordance with 85-2-316; or

12           (c) in the Upper Clark Fork River basin, to maintain and enhance streamflows to benefit the fishery  
13 resource in accordance with 85-2-439.

14           (2) "Beneficial use", unless otherwise provided, means:

15           (a) a use of water for the benefit of the appropriator, other persons, or the public, including but  
16 not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining,  
17 municipal, power, and recreational uses;

18           (b) a use of water appropriated by the department for the state water leasing program under  
19 85-2-141 and of water leased under a valid lease issued by the department under 85-2-141; or

20           (c) a use of water to maintain and enhance streamflows to benefit the fishery resource in the Upper  
21 Clark Fork River basin as part of the Upper Clark Fork River basin instream flow pilot program authorized  
22 under 85-2-439.

23           (3) "Certificate" means a certificate of water right issued by the department.

24           (4) "Change in appropriation right" means a change in the place of diversion, the place of use, the  
25 purpose of use, or the place of storage.

26           (5) "Correct and complete" means that the information required to be submitted conforms to the  
27 standard of substantial credible information and that all of the necessary parts of the form requiring the  
28 information have been filled in with the required information.

29           (6) "Declaration" means the declaration of an existing right filed with the department under section  
30 8, Chapter 452, Laws of 1973.

1 (7) "Department" means the department of natural resources and conservation provided for in Title  
2 2, chapter 15, part 33.

3 (8) "Existing right" or "existing water right" means a right to the use of water that would be  
4 protected under the law as it existed prior to July 1, 1973. The term includes federal non-Indian and Indian  
5 reserved water rights created under federal law and water rights created under state law.

6 (9) "Ground water" means any water that is beneath the ground surface.

7 (10) "Late claim" means a claim to an existing right forfeited pursuant to the conclusive  
8 presumption of abandonment under 85-2-226.

9 (11) "Permit" means the permit to appropriate issued by the department under 85-2-301 through  
10 85-2-303 and 85-2-306 through 85-2-314.

11 (12) "Person" means an individual, association, partnership, corporation, state agency, political  
12 subdivision, the United States or any agency of the United States, or any other entity.

13 (13) "Political subdivision" means any county, incorporated city or town, public corporation, or  
14 district created pursuant to state law or other public body of the state empowered to appropriate water.  
15 The term does not mean a private corporation, association, or group.

16 (14) "Salvage" means to make water available for beneficial use from an existing valid appropriation  
17 through application of water-saving methods.

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

21 ~~(15)~~(16) "Substantial credible information" means probable, believable facts sufficient to support  
22 a reasonable legal theory upon which the department should proceed with the action requested by the  
23 person providing the information.

24 ~~(16)~~(17) "Waste" means the unreasonable loss of water through the design or negligent operation  
25 of an appropriation or water distribution facility or the application of water to anything but a beneficial use.

26 ~~(17)~~(18) "Water" means all water of the state, surface and subsurface, regardless of its character  
27 or manner of occurrence, including but not limited to geothermal water, diffuse surface water, and sewage  
28 effluent.

29 ~~(18)~~(19) "Water division" means a drainage basin as defined in 3-7-102.

30 ~~(19)~~(20) "Water judge" means a judge as provided for in Title 3, chapter 7.

1           ~~(20)~~(21) "Water master" means a master as provided for in Title 3, chapter 7.

2           ~~(21)~~(22) "Watercourse" means any naturally occurring stream or river from which water is diverted  
3 for beneficial uses. It does not include ditches, culverts, or other ~~manmade~~ constructed waterways.

4           ~~(22)~~(23) "Well" means any artificial opening or excavation in the ground, however made, by which  
5 ground water is sought or can be obtained or through which it flows under natural pressures or is artificially  
6 withdrawn. (Terminates June 30, 2005--sec. 14, Ch. 487, L. 1995.)

7           **85-2-102. (Effective July 1, 2005) Definitions.** Unless the context requires otherwise, in this  
8 chapter, the following definitions apply:

9           (1) "Appropriate" means to:

10           (a) divert, impound, or withdraw (including by stock for stock water) a quantity of water;

11           (b) in the case of a public agency, to reserve water in accordance with 85-2-316; or

12           (c) in the case of the department of fish, wildlife, and parks, to lease water in accordance with  
13 85-2-436.

14           (2) "Beneficial use", unless otherwise provided, means:

15           (a) a use of water for the benefit of the appropriator, other persons, or the public, including but  
16 not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining,  
17 municipal, power, and recreational uses;

18           (b) a use of water appropriated by the department for the state water leasing program under  
19 85-2-141 and of water leased under a valid lease issued by the department under 85-2-141; and

20           (c) a use of water by the department of fish, wildlife, and parks pursuant to a lease authorized  
21 under 85-2-436.

22           (3) "Certificate" means a certificate of water right issued by the department.

23           (4) "Change in appropriation right" means a change in the place of diversion, the place of use, the  
24 purpose of use, or the place of storage.

25           (5) "Commission" means the fish, wildlife, and parks commission provided for in 2-15-3402.

26           (6) "Correct and complete" means that the information required to be submitted conforms to the  
27 standard of substantial credible information and that all of the necessary parts of the form requiring the  
28 information have been filled in with the required information.

29           (7) "Declaration" means the declaration of an existing right filed with the department under section  
30 8, Chapter 452, Laws of 1973.

1 (8) "Department" means the department of natural resources and conservation provided for in Title  
2 2, chapter 15, part 33.

3 (9) "Existing right" or "existing water right" means a right to the use of water that would be  
4 protected under the law as it existed prior to July 1, 1973. The term includes federal non-Indian and Indian  
5 reserved water rights created under federal law and water rights created under state law.

6 (10) "Ground water" means any water that is beneath the ground surface.

7 (11) "Late claim" means a claim to an existing right forfeited pursuant to the conclusive  
8 presumption of abandonment under 85-2-226.

9 (12) "Permit" means the permit to appropriate issued by the department under 85-2-301 through  
10 85-2-303 and 85-2-306 through 85-2-314.

11 (13) "Person" means an individual, association, partnership, corporation, state agency, political  
12 subdivision, the United States or any agency ~~thereof~~ of the United States, or any other entity.

13 (14) "Political subdivision" means any county, incorporated city or town, public corporation, or  
14 district created pursuant to state law or other public body of the state empowered to appropriate water.  
15 The term does not mean a private corporation, association, or group.

16 (15) "Salvage" means to make water available for beneficial use from an existing valid appropriation  
17 through application of water-saving methods.

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

21 ~~(16)~~(17) "Substantial credible information" means probable, believable facts sufficient to support  
22 a reasonable legal theory upon which the department should proceed with the action requested by the  
23 person providing the information.

24 ~~(17)~~(18) "Waste" means the unreasonable loss of water through the design or negligent operation  
25 of an appropriation or water distribution facility or the application of water to anything but a beneficial use.

26 ~~(18)~~(19) "Water" means all water of the state, surface and subsurface, regardless of its character  
27 or manner of occurrence, including but not limited to geothermal water, diffuse surface water, and sewage  
28 effluent.

29 ~~(19)~~(20) "Water division" means a drainage basin as defined in 3-7-102.

30 ~~(20)~~(21) "Water judge" means a judge as provided for in Title 3, chapter 7.

1           ~~(21)~~(22) "Water master" means a master as provided for in Title 3, chapter 7.

2           ~~(22)~~(23) "Watercourse" means any naturally occurring stream or river from which water is diverted  
3 for beneficial uses. It does not include ditches, culverts, or other ~~manmade~~ constructed waterways.

4           ~~(23)~~(24) "Well" means any artificial opening or excavation in the ground, however made, by which  
5 ground water is sought or can be obtained or through which it flows under natural pressures or is artificially  
6 withdrawn."

7

8           **Section 3.** Section 85-2-217, MCA, is amended to read:

9           "**85-2-217. Suspension of adjudication.** While negotiations for the conclusion of a compact under  
10 part 7 are being pursued, all proceedings to generally adjudicate reserved Indian water rights and federal  
11 reserved water rights of those tribes and federal agencies ~~which~~ that are negotiating are suspended. The  
12 obligation to file water rights claims for those federal non-Indian and Indian reserved rights is also  
13 suspended. This suspension ~~shall be~~ is effective until July 1, 1999, as long as negotiations are continuing  
14 or ratification of a completed compact is being sought. If approval by the state legislature and tribes or  
15 federal agencies has not been accomplished by July 1, 1999, the suspension ~~shall~~ must terminate on that  
16 date. Upon termination of the suspension of this part, the tribes and the federal agencies ~~shall be~~ are  
17 subject to the special filing requirements of 85-2-702(3) and all other requirements of the state water  
18 adjudication system provided for in Title 85, chapter 2. Those tribes and federal agencies that choose not  
19 to negotiate their federal non-Indian and Indian reserved water rights are subject to the full operation of the  
20 state adjudication system and may not benefit from the suspension provisions of this section."

21

22           **Section 4.** Section 85-2-228, MCA, is amended to read:

23           "**85-2-228. Federal reserved water rights with priority date of July 1, 1973, or later -- process and**  
24 **adjudication -- purpose.** (1) The purpose of this section is to ensure that a federal reserved water right with  
25 a priority date of July 1, 1973, or later ~~be~~ is subject to the same process and adjudication as a federal  
26 reserved water right with a priority date before July 1, 1973.

27           (2) Under authority granted to the states by 43 U.S.C. 666, a federal reserved water right that has  
28 a priority date of July 1, 1973, or later and that is asserted by a federal agency is subject to the claim filing  
29 requirements and all other applicable requirements of the state water adjudication system provided for in  
30 Title 85, chapter 2, parts 2 and 7.



1 (3) At the request of a federal agency, the reserved water rights compact commission may  
2 negotiate to conclude a compact under Title 85, chapter 2, part 7, for a federal reserved water right with  
3 a priority date of July 1, 1973, or later.

4 (4) Whenever necessary, a water judge may reopen any decree issued pursuant to Title 85, chapter  
5 2, to process the asserted or negotiated federal reserved water right."

6  
7 **Section 5.** Section 85-2-301, MCA, is amended to read:

8 "**85-2-301. Right to appropriate -- recognition and confirmation of permits issued after July 1,**  
9 **1973.** (1) After July 1, 1973, a person may not appropriate water except as provided in this chapter. A  
10 person may ~~only~~ appropriate water only for a beneficial use.

11 (2) (a) Only the department may appropriate water by permit in either of the following instances:

12 (i) for transport outside the following river basins:

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

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

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

16 (D) the Little Missouri River and its tributaries to its confluence with Lake Sakakawea in North  
17 Dakota;

18 (E) the Missouri River and its tributaries to its confluence with the Yellowstone River in North  
19 Dakota; and

20 (F) the Yellowstone River and its tributaries to its confluence with the Missouri River in North  
21 Dakota; or

22 (ii) whenever water in excess of 4,000 acre-feet a year and 5.5 cubic feet per second, for any use,  
23 is to be consumed.

24 (b) Water for these purposes or in these amounts may be leased from the department by any  
25 person under the provisions of 85-2-141.

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

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

30

1           ~~Section 6. Section 85-2-302, MCA, is amended to read:~~

2           ~~"85-2-302. Application for permit. (1) Except as otherwise provided in (1) through (3) of~~  
 3 ~~85-2-306 (1) through (3), a person may not appropriate water or commence construction of diversion,~~  
 4 ~~impoundment, withdrawal, or distribution works therefor for water except by applying for and receiving a~~  
 5 ~~permit from the department. The application shall must be made on a form prescribed by the department.~~  
 6 ~~The department shall make the forms available through its offices and the offices of the county clerk and~~  
 7 ~~recorders. The applicant shall submit a correct and complete application. The department shall return a~~  
 8 ~~defective application for correction or completion, together with the reasons for returning it. An application~~  
 9 ~~does not lose priority of filing because of defects if the application is corrected, completed, and refiled with~~  
 10 ~~the department within 30 days after its return to the applicant or within a further time as the department~~  
 11 ~~may allow. If an application is not corrected and completed within 30 days or within a further time as the~~  
 12 ~~department allows, up to 3 months, the priority date of the application shall must be the date of refiling the~~  
 13 ~~application with the corrections with the department. An application not corrected within 3 months shall~~  
 14 ~~must be terminated.~~

15           ~~(2) Prior to final adjudication and while negotiations for the conclusion of a compact under part 7~~  
 16 ~~are being pursued or until July 1, 2003, whichever occurs first, there is a moratorium on the processing~~  
 17 ~~of permit applications for surface water on an affected Indian reservation."~~

18  
 19           **SECTION 6. SECTION 85-2-309, MCA, IS AMENDED TO READ:**

20           **"85-2-309. Hearings on objections -- jurisdiction.** (1) If the department determines that an  
 21 objection to an application for a permit or change approval under 85-2-402 states a valid objection, it shall  
 22 hold a public hearing on the objection within 60 days from the date set by the department for the filing of  
 23 objections, after serving notice of the hearing by certified mail upon the applicant and the objector, unless  
 24 the department certifies an issue to the district court for determination by a water judge under subsection  
 25 (2). The department may consolidate hearings if more than one objection is filed to an application. The  
 26 department shall file in its records proof of the service by affidavit of the department.

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

1 given priority by a water judge over all other adjudication matters.

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

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

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

8

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

10 **"85-2-311. Criteria for issuance of permit.** (1) A permit may be issued under this part prior to the  
11 adjudication of existing water rights in a source of supply. In a permit proceeding under this part there is  
12 no presumption that an applicant for a permit cannot meet the statutory criteria of this section prior to the  
13 adjudication of existing water rights pursuant to this chapter. IN MAKING A DETERMINATION UNDER THIS  
14 SECTION, THE DEPARTMENT MAY NOT ALTER THE TERMS AND CONDITIONS OF AN EXISTING WATER  
15 RIGHT OR AN ISSUED CERTIFICATE, PERMIT, OR STATE WATER RESERVATION. Except as provided in  
16 subsections (3) and (4), the department shall issue a permit if the applicant proves by a preponderance of  
17 evidence that the following criteria are met:

18 (a)(I) ~~there are unappropriated waters in the source of supply~~ is water physically available at the  
19 proposed point of diversion:

20 ~~(i) at times when the water can be put to the use proposed by the applicant;~~

21 ~~(ii) in the amount that the applicant seeks to appropriate; and~~

22 ~~(iii) during the period in which the applicant seeks to appropriate, in the amount requested and that~~  
23 ~~is reasonably available;~~

24 (II) WATER CAN REASONABLY BE CONSIDERED LEGALLY AVAILABLE DURING THE PERIOD IN  
25 WHICH THE APPLICANT SEEKS TO APPROPRIATE, IN THE AMOUNT REQUESTED, BASED ON THE  
26 RECORDS OF THE DEPARTMENT AND OTHER EVIDENCE PROVIDED TO THE DEPARTMENT. LEGAL  
27 AVAILABILITY IS DETERMINED USING AN ANALYSIS INVOLVING THE FOLLOWING FACTORS:

28 (A) IDENTIFICATION OF PHYSICAL WATER AVAILABILITY;

29 (B) IDENTIFICATION OF EXISTING LEGAL DEMANDS ON THE SOURCE OF SUPPLY THROUGHOUT  
30 THE AREA OF POTENTIAL IMPACT BY THE PROPOSED USE; AND

1            (C) ANALYSIS OF THE EVIDENCE ON PHYSICAL WATER AVAILABILITY AND THE EXISTING  
 2 LEGAL DEMANDS, INCLUDING BUT NOT LIMITED TO A COMPARISON OF THE PHYSICAL WATER  
 3 SUPPLY AT THE PROPOSED POINT OF DIVERSION WITH THE EXISTING LEGAL DEMANDS ON THE  
 4 SUPPLY OF WATER.

5            (b) the water rights of a prior appropriator UNDER AN EXISTING WATER RIGHT, A CERTIFICATE,  
 6 A PERMIT, OR A STATE WATER RESERVATION will not be adversely affected. In this subsection (1)(b),  
 7 adverse effect must be determined based on a consideration of:

8            ~~(i) whether water can reasonably be considered IS REASONABLY legally available DURING THE~~  
 9 ~~PERIOD IN WHICH THE APPLICANT SEEKS TO APPROPRIATE, IN THE AMOUNT REQUESTED, based on~~  
 10 ~~the records of the department and other evidence provided to the department; and~~

11            ~~(iii) an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of~~  
 12 ~~the water will be controlled so the water right of a prior appropriator will be satisfied;~~

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

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

16            ~~(e) the proposed use will not interfere unreasonably with other planned uses or developments for~~  
 17 ~~which a permit has been issued or for which water has been reserved;~~

18            ~~(f)~~(e) the applicant has a possessory interest, or the written consent of the person with the  
 19 possessory interest, in the property where the water is to be put to beneficial use;

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

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

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

25            (2) The applicant is required to prove that the criteria in subsections ~~(1)(g)~~ (1)(f) through ~~(1)(i)~~ (1)(h)  
 26 have been met only if a valid objection is filed. A valid objection must contain substantial credible  
 27 information establishing to the satisfaction of the department that the criteria in subsection ~~(1)(g)~~ (1)(f),  
 28 ~~(1)(h)~~ (1)(g), or ~~(1)(i)~~ (1)(h), as applicable, may not be met. For the criteria set forth in subsection ~~(1)(h)~~  
 29 (1)(g), only the department of environmental quality or a local water quality district established under Title  
 30 7, chapter 13, part 45, may file a valid objection.

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

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

5 ~~(b) the rights of a prior appropriator will not be adversely affected;~~

6 ~~(c)~~(b) the proposed appropriation is a reasonable use. A finding must be based on a consideration  
 7 of the following:

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

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

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

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

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

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

19 (4) (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 federal non-Indian and Indian reserved water rights held by the United States for federal  
 22 reserved lands and in trust for the various Indian tribes within the state's boundaries. Although the state  
 23 of Montana also recognizes that, under appropriate conditions, the out-of-state transportation and use of  
 24 its public waters are not in conflict with the public welfare of its citizens or the conservation of its waters,  
 25 the criteria in this subsection (4) must be met before out-of-state use may occur.

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

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

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

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

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

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

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

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

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

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

16 (5) To meet the preponderance of evidence standard in this section, the applicant, in addition to  
17 other evidence demonstrating that the criteria of subsection (1) have been met, shall submit hydrologic or  
18 other evidence, including but not limited to water supply data, field reports, and other information  
19 developed by the applicant, the department, the U.S. geological survey, or the U.S. natural resources  
20 conservation service and other specific field studies.

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

28 (7) The department may adopt rules to implement the provisions of this section."  
29

30 **Section 8.** Section 85-2-313, MCA, is amended to read:

1           **"85-2-313. Provisional permit.** A permit issued prior to a final determination of existing water  
 2 rights is provisional and is subject to that final determination. ~~The~~ Upon petition, the amount of the  
 3 appropriation granted in a provisional permit ~~shall~~ must be reduced ~~or,~~ modified, or revoked by the  
 4 department in FOLLOWING a show cause hearing where when IN WHICH IT IS DETERMINED THAT  
 5 REDUCTION, MODIFICATION, OR REVOCATION IS necessary to protect and guarantee existing water  
 6 rights determined in the final decree. Because a provisional permit is issued on a reasonable determination  
 7 of legal availability under 85-2-311(1)(b), in a show cause hearing under this section, legal availability must  
 8 be determined on a consideration of the final decree in the affected basin or subbasin. A person may not  
 9 obtain any vested right to an appropriation obtained under a provisional permit by virtue of construction  
 10 of diversion works, purchase of equipment to apply water, planting of crops, or other action where the  
 11 permit would have been denied or modified if the final decree had been available to the department."  
 12

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

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

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

- 21           (i) the Clark Fork River and its tributaries to its confluence with Lake Pend Oreille in Idaho;
- 22           (ii) the Kootenai River and its tributaries to its confluence with Kootenay Lake in British Columbia;
- 23           (iii) the St. Mary River and its tributaries to its confluence with the Oldman River in Alberta;
- 24           (iv) the Little Missouri River and its tributaries to its confluence with Lake Sakakawea in North  
 25 Dakota;
- 26           (v) the Missouri River and its tributaries to its confluence with the Yellowstone River in North  
 27 Dakota; and
- 28           (vi) the Yellowstone River and its tributaries to its confluence with the Missouri River in North  
 29 Dakota.

30           (b) A state water reservation may be made for an existing or future beneficial use outside the basin

1 where the diversion occurs only if stored water is not reasonably available for water leasing under 85-2-141  
2 and the proposed use would occur in a basin designated in subsection (2)(a).

3 (3) Upon receiving a correct and complete application, the department shall proceed in accordance  
4 with 85-2-307 through 85-2-309. After the hearing provided for in 85-2-309, the department shall decide  
5 whether to reserve the water for the applicant. The department's costs of giving notice, holding the  
6 hearing, conducting investigations, and making records incurred in acting upon the application to reserve  
7 water, except the cost of salaries of the department's personnel, must be paid by the applicant. In addition,  
8 a reasonable proportion of the department's cost of preparing an environmental impact statement must be  
9 paid by the applicant unless waived by the department upon a showing of good cause by the applicant.

10 (4) (a) The department may not adopt an order reserving water unless the applicant establishes to  
11 the satisfaction of the department by a preponderance of evidence:

- 12 (i) the purpose of the reservation;
- 13 (ii) the need for the reservation;
- 14 (iii) the amount of water necessary for the purpose of the reservation;
- 15 (iv) that the reservation is in the public interest.

16 (b) In determining the public interest under subsection (4)(a)(iv), the department may not adopt an  
17 order reserving water for withdrawal and transport for use outside the state unless the applicant proves by  
18 clear and convincing evidence that:

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

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

- 25 (i) whether there are present or projected water shortages within the state of Montana;
- 26 (ii) whether the water that is the subject of the application could feasibly be transported to alleviate  
27 water shortages within the state of Montana;
- 28 (iii) the supply and sources of water available to the applicant in the state where the applicant  
29 intends to use the water; and
- 30 (iv) the demands placed on the applicant's supply in the state where the applicant intends to use



1 the water.

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

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

9 (6) The department shall limit any state water reservations after May 9, 1979, for maintenance of  
10 minimum flow, level, or quality of water that it awards at any point on a stream or river to a maximum of  
11 50% of the average annual flow of record on gauged streams. Ungauged streams can be allocated at the  
12 discretion of the department.

13 (7) After the adoption of an order reserving waters, the department may reject an application and  
14 refuse a permit for the appropriation of reserved waters or may issue the permit subject to terms and  
15 conditions that it considers necessary for the protection of the objectives of the reservation.

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

27 (b) Upon actual application of water to the proposed beneficial use, the authorized user shall notify  
28 the conservation district. The notification must contain a certified statement by a person with experience  
29 in the design, construction, or operation of project works for agricultural purposes describing how the  
30 reserved water was put to use. The department or the district may then inspect the appropriation to

1 determine if it has been completed in substantial accordance with the authorization.

2 (9) Except as provided in 85-2-331, the priority of appropriation of a state water reservation and  
3 the relative priority of the reservation to permits with a later priority of appropriation must be determined  
4 according to this subsection (9), as follows:

5 (a) A state water reservation under this section has a priority of appropriation dating from the filing  
6 with the department of a notice of intention to apply for a state water reservation in a basin in which no  
7 other notice of intention to apply is currently pending. The notice of intention to apply must specify the  
8 basin in which the applicant is seeking a state water reservation.

9 (b) Upon receiving a notice of intention to apply for a state water reservation, the department shall  
10 identify all potential state water reservation applicants in the basin specified in the notice and notify each  
11 potential applicant of the opportunity to submit an application and to receive a state water reservation with  
12 the priority of appropriation as described in subsection (9)(a).

13 (c) To receive the priority of appropriation described in subsection (9)(a), the applicant shall submit  
14 a correct and complete state water reservation application within 1 year after the filing of the notice of  
15 intention to apply. Upon a showing of good cause, the department may extend the time for preparing the  
16 application.

17 (d) The department may by order subordinate a state water reservation to a permit issued pursuant  
18 to this part if:

19 (i) the permit application was accepted by the department before the date of the order granting the  
20 reservation; and

21 (ii) the effect of subordinating the reservation to one or more permits does not interfere substantially  
22 with the purpose of the reservation.

23 (e) The department shall by order establish the relative priority of state water reservations approved  
24 under this section that have the same day of priority. A state water reservation may not adversely affect  
25 any rights in existence at that time.

26 (10) The department shall, periodically but at least once every 10 years, review existing state water  
27 reservations to ensure that the objectives of the ~~reservation~~ reservations are being met. When the  
28 objectives of ~~the~~ a state water reservation are not being met, the department may extend, revoke, or  
29 modify the reservation. Any undeveloped water made available as a result of a revocation or modification  
30 under this subsection is available for appropriation by others pursuant to this part.

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

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

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

23 (14) Nothing in this section vests the department with the authority to alter a water right that is  
24 not a state water reservation.

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

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

1           **Section 10.** Section 85-2-321, MCA, is amended to read:

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

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

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

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

11           (A) any new appropriation from the source for the class of applications will adversely affect the  
12 rights of a prior appropriation from the source; or

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

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

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

21

22           **Section 11.** Section 85-2-329, MCA, is amended to read:

23           **"85-2-329. Definitions.** Unless the context requires otherwise, in 85-2-330 and this section, the  
24 following definitions apply:

25           (1) "Application" means an application for a beneficial water use permit pursuant to 85-2-302 or  
26 a state water reservation pursuant to 85-2-316.

27           (2) "Ground water" means water that is beneath the land surface or beneath the bed of a stream,  
28 lake, reservoir, or other body of surface water and that is not immediately or directly connected to surface  
29 water.

30           (3) "Nonconsumptive use" means a beneficial use of water that does not cause a reduction in the

1 source of supply and in which substantially all of the water returns without delay to the source of supply,  
2 causing little or no disruption in stream conditions.

3 (4) "Teton River basin" means the drainage area of the Teton River and its tributaries above the  
4 confluence of the Teton and Marias Rivers."

5

6 **Section 12.** Section 85-2-331, MCA, is amended to read:

7 **"85-2-331. Reservations within Missouri River basin and Little Missouri River basin.** (1) The state,  
8 ~~or~~ an agency or political subdivision of the state, or the United States or an agency of the United States  
9 that desires to apply for a state water reservation ~~of water~~ in the Missouri River basin or in the Little  
10 Missouri River basin shall file an application pursuant to 85-2-316 no later than:

11 (a) July 1, 1989, for reservation of water above Fort Peck dam; or

12 (b) July 1, 1991, for reservation of water below Fort Peck dam and in the Little Missouri River  
13 basin.

14 (2) Subject to legislative appropriation, the department shall provide technical and financial  
15 assistance to other state agencies and political subdivisions in applying for state water reservations within  
16 the Missouri River basin and the Little Missouri River basin.

17 (3) (a) The department shall make a final determination in accordance with 85-2-316 on all  
18 applications filed before July 1, 1989, for state water reservations ~~of water~~ in the Missouri River basin  
19 above Fort Peck dam.

20 (b) The department shall make a final determination in accordance with 85-2-316 on all applications  
21 filed before July 1, 1991, for state water reservations ~~of water~~ in the Missouri River basin below Fort Peck  
22 dam and in the Little Missouri River basin.

23 (c) The department shall determine which applications or portions of applications are considered  
24 to be above or below Fort Peck dam.

25 (4) ~~Water~~ State water reservations approved by the department under this section have a priority  
26 date of July 1, 1985, in the Missouri River basin and a priority date of July 1, 1989, in the Little Missouri  
27 River basin. If the department issues a permit under Title 85, chapter 2, part 3, prior to the granting of a  
28 state water reservation under this section, the department may subordinate the state water reservation to  
29 the permit if it finds that the subordination does not interfere substantially with the purpose of any state  
30 water reservation. The department shall by order establish the relative priority of applications approved

1 under this section."

2

3 **Section 13.** Section 85-2-336, MCA, is amended to read:

4 **"85-2-336. Basin closure -- exception.** (1) As provided in 85-2-319 and subject to the provisions  
5 of subsection (2) of this section, the department may not process or grant an application for a permit to  
6 appropriate water within the Upper Clark Fork River basin.

7 (2) The provisions of subsection (1) do not apply to:

8 (a) an application for a permit to appropriate ground water;

9 (b) an application filed prior to January 1, 2000, for a permit to appropriate water to conduct  
10 response actions or remedial actions pursuant to the federal Comprehensive Environmental Response,  
11 Compensation, and Liability Act of 1980, as amended, or Title 75, chapter 10, part 7, at sites designated  
12 as of January 1, 1994. The total flow rates for all permits issued under this subsection (2)(b) may not  
13 exceed 10 cubic feet per second. A permit issued to conduct response actions or remedial actions may not  
14 be used for dilution and must be limited to a term not to exceed the necessary time to complete the  
15 response or remedial action, and the permit may not be transferred to any person for any purpose other  
16 than the designated response or remedial action;

17 (c) an application for a permit to appropriate water for stock use;

18 (d) an application to store water; or

19 (e) an application for power generation at existing hydroelectric dams. The department may not  
20 approve a permit for power generation if approval results in additional consumption of water.

21 (3) Applications for state water reservations in the Upper Clark Fork River basin filed pursuant to  
22 85-2-316 and pending as of May 1, 1991, have a priority date of May 1, 1991. The filing of a state water  
23 reservation application does not provide standing to object under 85-2-402.

24 (4) The department may not process or approve applications for state water reservations ~~of water~~  
25 in the Upper Clark Fork River basin filed pursuant to 85-2-316."

26

27 **Section 14.** Section 85-2-340, MCA, is amended to read:

28 **"85-2-340. Definitions.** Unless the context requires otherwise, in 85-2-341 and this section, the  
29 following definitions apply:

30 (1) "Application" means an application for a beneficial water use permit pursuant to 85-2-302 or

1 a state water reservation pursuant to 85-2-316.

2 (2) "Ground water" means water that is beneath the land surface or beneath the bed of a stream,  
3 lake, reservoir, or other body of surface water and that is not immediately or directly connected to surface  
4 water.

5 (3) "Jefferson River basin" means the drainage area of the Jefferson River and its tributaries above  
6 the confluence of the Jefferson and Missouri Rivers.

7 (4) "Madison River basin" means the drainage area of the Madison River and its tributaries above  
8 the confluence of the Madison and Jefferson Rivers.

9 (5) "Nonconsumptive use" means a beneficial use of water that does not cause a reduction in the  
10 source of supply and in which substantially all of the water returns without delay to the source of supply,  
11 causing little or no disruption in stream conditions."  
12

13 **Section 15.** Section 85-2-341, MCA, is amended to read:

14 **"85-2-341. Basin closure -- exceptions.** (1) As provided in 85-2-319 and subject to the provisions  
15 of subsection (2) of this section, the department may not process or grant an application for a permit to  
16 appropriate water or for a state water reservation to reserve water within the Jefferson River basin or  
17 Madison River basin.

18 (2) The provisions of subsection (1) do not apply to:

- 19 (a) an application for a permit to appropriate ground water;  
20 (b) an application for a permit to appropriate water for a nonconsumptive use;  
21 (c) an application for a permit to appropriate water for domestic, municipal, or stock use;  
22 (d) an application to store water during high spring flows; or  
23 (e) temporary emergency appropriations as provided for in 85-2-113(3)."  
24

25 **Section 16.** Section 85-2-342, MCA, is amended to read:

26 **"85-2-342. Definitions.** Unless the context requires otherwise, in 85-2-343 and this section, the  
27 following definitions apply:

28 (1) "Application" means an application for a beneficial water use permit pursuant to 85-2-302 or  
29 a state water reservation pursuant to 85-2-316.

30 (2) "Ground water" means water that is beneath the land surface or beneath the bed of a stream,

1 lake, reservoir, or other body of surface water and that is not immediately or directly connected to surface  
2 water.

3 (3) "Nonconsumptive use" means a beneficial use of water that does not cause a reduction in the  
4 source of supply and in which substantially all of the water returns without delay to the source of supply,  
5 causing little or no disruption in stream conditions.

6 (4) "Upper Missouri River basin" means the drainage area of the Missouri River and its tributaries  
7 above Morony dam."

8

9 **Section 17.** Section 85-2-401, MCA, is amended to read:

10 **"85-2-401. Priority -- recognition and confirmation of changes in appropriations issued after July**

11 **1, 1973.** (1) As between appropriators, the first in time is the first in right. Priority of appropriation does  
12 not include the right to prevent changes by later appropriators in the condition of water occurrence, such  
13 as the increase or decrease of streamflow or the lowering of a water table, artesian pressure, or water level,  
14 if the prior appropriator can reasonably exercise ~~his~~ the water right under the changed conditions.

15 (2) Priority of appropriation made under this chapter dates from the filing of an application for a  
16 permit with the department, except as otherwise provided in 85-2-301 through 85-2-303, 85-2-306,  
17 85-2-310(3), and 85-2-313.

18 (3) Priority of appropriation perfected before July 1, 1973, ~~shall~~ must be determined as provided  
19 in part 2 of this chapter.

20 (4) All changes in appropriation rights actions of the department after July 1, 1973, are recognized  
21 and confirmed subject to this part and any terms, conditions, and limitations placed on a change in  
22 appropriation authorization by the department."

23

24 **Section 18.** Section 85-2-402, MCA, is amended to read:

25 **"85-2-402. (Temporary) Changes in appropriation rights.** (1) The right to make a change subject  
26 to the provisions of this section in an existing water right, a permit, or a state water reservation is  
27 recognized and confirmed. In a change proceeding under this section, there is no presumption that an  
28 applicant for a change in appropriation right cannot establish lack of adverse effect prior to the adjudication  
29 of other rights in the source of supply pursuant to this chapter. ~~An applicant for a change in appropriation~~  
30 right must be given the opportunity to establish lack of adverse effect as an evidentiary matter by showing



1 ~~by reference to the applicant's own existing water right and historic water use practices that the proposed~~  
2 ~~change in appropriation right will not increase the amount of water consumed or adversely alter the timing~~  
3 ~~or pattern of flow for perfected uses in the source of the supply.~~ An appropriator may not make a change  
4 in an appropriation right except, as permitted under this section, by applying for and receiving the approval  
5 of the department or, if applicable, of the legislature. An applicant shall submit a correct and complete  
6 application.

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

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

14 (b) Except for a lease authorization pursuant to 85-2-436, a temporary change authorization for  
15 instream use to benefit the fishery resource pursuant to 85-2-408, or water use pursuant to 85-2-439 when  
16 authorization does not require appropriation works, the proposed means of diversion, construction, and  
17 operation of the appropriation works are adequate.

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

19 (d) Except for a lease authorization pursuant to 85-2-436 or a temporary change authorization  
20 pursuant to 85-2-408 for instream flow to benefit the fishery resource, the applicant has a possessory  
21 interest, or the written consent of the person with the possessory interest, in the property where the water  
22 is to be put to beneficial use.

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

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

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

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

1 be met.

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

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

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

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

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

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

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

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

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

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

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

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

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

1 the following criteria must be met before out-of-state use may occur:

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

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

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

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

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

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

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

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

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

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

24 (7) For any application for a change in appropriation right involving 4,000 or more acre-feet of  
25 water a year and 5.5 or more cubic feet per second of water, the department shall give notice of the  
26 proposed change in accordance with 85-2-307 and shall hold one or more hearings in accordance with  
27 85-2-309 prior to its approval or denial of the proposed change. The department shall provide notice and  
28 may hold one or more hearings upon any other proposed change if it determines that a change might  
29 adversely affect the rights of other persons.

30 (8) The department or the legislature, if applicable, may approve a change subject to terms,

1 conditions, restrictions, and limitations as it considers necessary to satisfy the criteria of this section,  
2 including limitations on the time for completion of the change. The department may extend time limits  
3 specified in the change approval under the applicable criteria and procedures of 85-2-312(3).

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

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

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

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

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

23 (14) The department may adopt rules to implement the provisions of this section. (Terminates June  
24 30, 1999--sec. 4, Ch. 740, L. 1991.)

25 **85-2-402. (Effective July 1, 1999) Changes in appropriation rights.** (1) The right to make a change  
26 subject to the provisions of this section in an existing water right, a permit, or a state water reservation  
27 is recognized and confirmed. In a change proceeding under this section, there is no presumption that an  
28 applicant for a change in appropriation right cannot establish lack of adverse effect prior to the adjudication  
29 of other rights in the source of supply pursuant to this chapter. An applicant for a change in appropriation  
30 right must be given the opportunity to establish lack of adverse effect as an evidentiary matter by showing

1 ~~by reference to the applicant's own existing water right and historic water use practices that the proposed~~  
2 ~~change in appropriation right will not increase the amount of water consumed or adversely alter the timing~~  
3 ~~or pattern of flow for perfected uses in the source of the supply.~~ An appropriator may not make a change  
4 in an appropriation right except, as permitted under this section, by applying for and receiving the approval  
5 of the department or, if applicable, of the legislature. An applicant shall submit a correct and complete  
6 application.

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

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

14 (b) Except for a temporary change authorization pursuant to 85-2-408 or for water use pursuant  
15 to 85-2-439 that does not require appropriation works, the proposed means of diversion, construction, and  
16 operation of the appropriation works are adequate.

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

18 (d) Except for a temporary change authorization pursuant to 85-2-408 for instream flow to benefit  
19 the fishery resource, the applicant has a possessory interest, or the written consent of the person with the  
20 possessory interest, in the property where the water is to be put to beneficial use.

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

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

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

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

30 (4) The department may not approve a change in purpose of use or place of use of an appropriation

1 of 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water unless the  
2 appropriator proves by a preponderance of evidence that:

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

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

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

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

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

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

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

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

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

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

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

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

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

1 right for the withdrawal and transportation of appropriated water for use outside the state unless the  
2 appropriator proves by clear and convincing evidence and, if applicable, the legislature approves after one  
3 or more public hearings that:

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

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

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

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

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

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

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

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

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

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

28 (8) The department or the legislature, if applicable, may approve a change subject to such terms,  
29 conditions, restrictions, and limitations as it considers necessary to satisfy the criteria of this section,  
30 including limitations on the time for completion of the change. The department may extend time limits

1 specified in the change approval under the applicable criteria and procedures of 85-2-312(3).

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

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

13 (12) A person holding an issued permit or change approval that has not been perfected may change  
14 the place of diversion, place of use, purpose of use, or place of storage by filing an application for change  
15 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  
18 unauthorized change in appropriation right. A person or corporation may not, directly or indirectly,  
19 personally or through an agent, officer, or employee, attempt to change an appropriation right except in  
20 accordance with this section.

21 (14) The department may adopt rules to implement the provisions of this section. (Terminates June  
22 30, 2005--sec. 6, Ch. 322, L. 1995.)

23 **85-2-402. (Effective July 1, 2005) Changes in appropriation rights.** (1) The right to make a  
24 change subject to the provisions of this section in an existing water right, a permit, or a state water  
25 reservation is recognized and confirmed. In a change proceeding under this section, there is no  
26 presumption that an applicant for a change in appropriation right cannot establish lack of adverse effect  
27 prior to the adjudication of other rights in the source of supply pursuant to this chapter. An applicant for  
28 a change in appropriation right must be given the opportunity to establish lack of adverse effect as an  
29 evidentiary matter by showing by reference to the applicant's own existing water right and historic water  
30 use practices that the proposed change in appropriation right will not increase the amount of water



1 ~~consumed or adversely alter the timing or pattern of flow for perfected uses in the source of the supply.~~

2 An appropriator may not make a change in an appropriation right except, as permitted under this section,  
3 by applying for and receiving the approval of the department or, if applicable, of the legislature. An  
4 applicant shall submit a correct and 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~~ change in appropriation right will not adversely affect the use of the existing  
9 water rights of other persons or other perfected or planned uses or developments for which a permit or  
10 certificate has been issued or for which ~~water has been reserved~~ a state water reservation has been issued  
11 under part 3.

12 (b) The proposed means of diversion, construction, and operation of the appropriation works are  
13 adequate.

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

15 (d) The applicant has a possessory interest, or the written consent of the person with the  
16 possessory interest, in the property where the water 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) The state of Montana has long recognized the importance of conserving its public waters and  
20 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 (a) 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 (b) In determining whether the appropriator has proved by clear and convincing evidence that the  
6 requirements of subsections (6)(a)(ii) and (6)(a)(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 (c) 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 such 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 such 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."  
18

19 **NEW SECTION. SECTION 19. WATER ADMINISTRATION AGREEMENTS WITHIN INDIAN**  
20 **RESERVATIONS. (1) BECAUSE IT APPEARS TO BE TO THE COMMON ADVANTAGE OF THE STATE AND**  
21 **INDIAN TRIBES TO COOPERATE IN MATTERS INVOLVING THE PERMITTING AND USE OF WATER WITHIN**  
22 **THE EXTERIOR BOUNDARIES OF AN INDIAN RESERVATION PRIOR TO THE FINAL ADJUDICATION OF**  
23 **INDIAN RESERVED WATER RIGHTS AND BECAUSE THE STATE DOES NOT INTEND BY ENACTMENT OF**  
24 **THIS SECTION TO LIMIT, EXPAND, ALTER, OR WAIVE STATE JURISDICTION TO ADMINISTER WATER**  
25 **RIGHTS WITHIN THE EXTERIOR BOUNDARIES OF AN INDIAN RESERVATION, PURSUANT TO THE**  
26 **REQUIREMENTS OF TITLE 18, CHAPTER 11, THE DEPARTMENT MAY NEGOTIATE AND CONCLUDE AN**  
27 **INTERIM AGREEMENT WITH THE TRIBAL GOVERNMENT OF ANY INDIAN TRIBE IN MONTANA PRIOR TO**  
28 **FINAL ADJUDICATION OF INDIAN RESERVED WATER RIGHTS FOR THE PURPOSE OF IMPLEMENTING**  
29 **A WATER ADMINISTRATION PLAN AND A PERMITTING PROCESS FOR THE ISSUANCE OF WATER**  
30 **RIGHTS AND CHANGES IN WATER RIGHT USES WITHIN THE EXTERIOR BOUNDARIES OF AN INDIAN**

1 RESERVATION.

2 (2) AN AGREEMENT ENTERED INTO PURSUANT TO SUBSECTION (1) MUST:

3 (A) PROVIDE FOR THE RETENTION OF EXCLUSIVE AUTHORITY BY THE STATE TO ISSUE  
 4 PERMITS TO APPLICANTS WHO ARE NOT MEMBERS OF THE TRIBE AND TO ISSUE CHANGE OF USE  
 5 AUTHORIZATIONS;

6 (B) PROVIDE THAT ANY PERMITS MUST BE ISSUED IN ACCORDANCE WITH THE CRITERIA  
 7 ESTABLISHED BY STATE LAW; AND

8 (C) PROVIDE THAT PERMITS MAY BE ONLY FOR NEW USES WITH A DATE OF PRIORITY IN  
 9 COMPLIANCE WITH STATE LAW.

10 (3) PRIOR TO CONCLUDING ANY AGREEMENT UNDER THIS SECTION, THE DEPARTMENT SHALL  
 11 HOLD PUBLIC MEETINGS, AFTER PROPER PUBLIC NOTICE OF THE MEETINGS HAS BEEN GIVEN AND THE  
 12 PROPOSED AGREEMENT HAS BEEN MADE AVAILABLE FOR PUBLIC REVIEW, TO AFFORD THE PUBLIC  
 13 AN OPPORTUNITY TO COMMENT ON THE CONTENTS OF THE AGREEMENT.

14

15 NEW SECTION. Section 20. Notification to tribal governments. The secretary of state shall send  
 16 a copy of [this act] to each tribal government located on the seven Montana reservations.

17

18 NEW SECTION. SECTION 21. CODIFICATION INSTRUCTION. [SECTION 19] IS INTENDED TO  
 19 BE CODIFIED AS AN INTEGRAL PART OF TITLE 85, CHAPTER 2, AND THE PROVISIONS OF TITLE 85,  
 20 CHAPTER 2, APPLY TO [SECTION 19].

21

22 ~~NEW SECTION. SECTION 22. IF SENATE BILL NO. 69 IS NOT PASSED AND APPROVED, THEN:~~

23 ~~(1) [SECTION 6 OF THIS ACT], AMENDING 85-2-302, IS VOID; AND~~

24 ~~(2) SUBSECTION (6) OF 85-2-101, INSERTED IN [SECTION 1 OF THIS ACT] IS VOID.~~

25

26 NEW SECTION. Section 22. Saving clause. [This act] does not affect rights and duties that  
 27 matured, penalties that were incurred, or proceedings that were begun before [the effective date of this  
 28 act].

29

30 NEW SECTION. SECTION 23. SEVERABILITY. IF A PART OF [THIS ACT] IS INVALID, ALL VALID

1 PARTS THAT ARE SEVERABLE FROM THE INVALID PART REMAIN IN EFFECT. IF A PART OF [THIS ACT]  
2 IS INVALID IN ONE OR MORE OF ITS APPLICATIONS, THE PART REMAINS IN EFFECT IN ALL VALID  
3 APPLICATIONS THAT ARE SEVERABLE FROM THE INVALID APPLICATIONS.

4  
5 NEW SECTION. Section 24. Retroactive applicability. [Section 1] applies retroactively, within the  
6 meaning of 1-2-109, to all permits and change authorizations issued by the department of natural resources  
7 and conservation after July 1, 1973.

8  
9 NEW SECTION. Section 25. Effective date. [This act] is effective on passage and approval.

10 -END-

## 1 SENATE BILL NO. 97

2 INTRODUCED BY GROSFIELD

3 BY REQUEST OF THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

4

5 A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING THE WATER LAWS TO CLARIFY THAT

6 THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION MAY ISSUE WATER PERMITS AND

7 CHANGE AUTHORIZATIONS PRIOR TO THE COMPLETION OF AN ADJUDICATION IN A SOURCE OF

8 SUPPLY; CLARIFYING THAT WATER RESERVED UNDER STATE LAW IS NOT SYNONYMOUS WITH

9 FEDERAL AND INDIAN RESERVED WATER RIGHTS UNDER FEDERAL LAW; REQUIRING A WATER JUDGE

10 TO GIVE PRIORITY OVER OTHER ADJUDICATION ISSUES TO ISSUES CERTIFIED TO THE DISTRICT

11 COURT BY THE DEPARTMENT; ALLOWING THE DEPARTMENT TO NEGOTIATE INTERIM AGREEMENTS

12 WITH TRIBAL GOVERNMENTS; AMENDING SECTIONS 85-2-101, 85-2-102, 85-2-217, 85-2-228,

13 85-2-301, ~~85-2-302~~, ~~85-2-309~~, 85-2-311, 85-2-313, 85-2-316, 85-2-321, 85-2-329, 85-2-331, 85-2-336,

14 85-2-340, 85-2-341, 85-2-342, 85-2-401, AND 85-2-402, MCA; AND PROVIDING AN IMMEDIATE

15 EFFECTIVE DATE AND A RETROACTIVE APPLICABILITY DATE."

16

17 WHEREAS, the Montana Supreme Court, in In the Matter of the Application for Beneficial Water

18 Use Permit Nos. 66459-76L, Ciotti; 64988-g76L, Starner; and Application for Change of Appropriation

19 Water Right No. G15152-s761, Pope, which was decided August 22, 1996, held that an applicant for a

20 permit or change of use authorization on the Flathead Indian Reservation may not as a matter of law meet

21 the applicant's burden of proof to establish that the proposed use will not interfere unreasonably with

22 planned uses or developments for which water has been reserved until the Confederated Salish and

23 Kootenai Tribes' federal reserved water rights are quantified; and

24 WHEREAS, in 1973, Montana enacted comprehensive legislation referred to as the Montana Water

25 Use Act of 1973, codified in Title 85, chapter 2, to implement Article IX, section 3(4), of the Montana

26 Constitution, which requires that the Legislature provide for the administration, control, and regulation of

27 water rights and establish a system of centralized records of all water rights, and to implement Article IX

28 making the water of the state subject to appropriation for beneficial use by its citizens; and

29 WHEREAS, Title 85, chapter 2, as amended, provides for the comprehensive adjudication of water

30 rights and the continued development of Montana's water resources through a permit and change

1 authorization process; and

2 WHEREAS, historically in Montana, water has been developed, water use rights acquired, and  
3 changes in water use completed in the absence of the adjudication of water rights in a source of supply;  
4 and

5 WHEREAS, since July 1, 1973, it has been the intent of the Legislature that provisional permits and  
6 change authorizations be issued pursuant to statutory standards in the absence of a completed adjudication  
7 in a source of supply; and

8 WHEREAS, the dissent filed with the Montana Supreme Court decision raises a concern that the  
9 majority decision may be interpreted to apply statewide, but that interpretation does not reflect the intent  
10 of the Legislature to allow for the continued wise and efficient use of Montana's water resources and  
11 Montana's growing economy as required under Title 85, chapter 2.

12 STATEMENT OF INTENT

13 THE LEGISLATURE INTENDS THAT THE MONTANA SUPREME COURT'S DECISION IN IN THE  
14 MATTER OF THE APPLICATION FOR BENEFICIAL WATER USE PERMIT NOS. 66459-76L, CIOTTI,  
15 64988-G76L, STARNER; AND APPLICATION FOR CHANGE OF APPROPRIATION WATER RIGHT NO.  
16 G15152-S761, POPE, 53 ST. REP. 777 AT 784, 923 P.2D 1073, BE NEGATED BY THE PASSAGE AND  
17 APPROVAL OF THIS BILL. THE LEGISLATURE FURTHER INTENDS THAT THE PORTION OF THE DISTRICT  
18 COURT DECISION IN UNITED STATES V. DNRC (1ST JUDICIAL DISTRICT, MONTANA, JUNE 15, 1987),  
19 NO. 50612, (SEE ALSO THE CONCURRING OPINION IN THE MONTANA SUPREME COURT'S DECISION  
20 IN IN THE MATTER OF THE APPLICATION FOR BENEFICIAL WATER USE PERMIT NOS. 66459-76L CIOTTI,  
21 64988-G76L, STARNER; AND APPLICATION FOR CHANGE OF APPROPRIATION WATER RIGHT NO.  
22 G15152-S761, POPE, 53 ST. REP. 777 AT 784, 923 P.2D 1073), DETERMINING THAT IN THE ABSENCE  
23 OF A QUANTIFICATION OF EXISTING WATER RIGHTS, THE DEPARTMENT OF NATURAL RESOURCES  
24 AND CONSERVATION DOES NOT HAVE THE AUTHORITY TO ISSUE A PERMIT FOR A NEW WATER  
25 APPLICATION WHEN QUESTIONS OF SENIOR CONFLICTING CLAIMS ARE RAISED, BE NEGATED BY THE  
26 PASSAGE AND APPROVAL OF THIS BILL, SPECIFICALLY BY THE PASSAGE AND APPROVAL OF THE  
27 AMENDMENTS TO 85-2-311. A STATEMENT OF INTENT IS DESIRED FOR THIS BILL IN ORDER TO  
28 PROVIDE GUIDANCE TO THE DEPARTMENT UNDER 85-2-311 CONCERNING IMPLEMENTATION AND  
29 INTERPRETATION OF THE PHYSICAL AVAILABILITY OF WATER AND REASONABLE LEGAL AVAILABILITY  
30 OF WATER CRITERIA. TO FIND THAT WATER IS AVAILABLE FOR THE ISSUANCE OF A PERMIT, THE



1 DEPARTMENT SHALL REQUIRE A THREE-STEP ANALYSIS INVOLVING THE FOLLOWING FACTORS:  
 2 IDENTIFY PHYSICAL WATER AVAILABILITY, IDENTIFY EXISTING LEGAL DEMANDS ON THE SOURCE OF  
 3 SUPPLY, AND COMPARE AND ANALYZE THE PHYSICAL WATER SUPPLY AT THE PROPOSED POINT OF  
 4 DIVERSION WITH THE EXISTING LEGAL DEMANDS ON THE SOURCE OF SUPPLY. THE THREE STEP  
 5 ANALYSIS MUST BE AS GENERALLY DESCRIBED IN THE PAMPHLET "INFORMATION AND  
 6 INSTRUCTIONS FOR APPLICATION FOR BENEFICIAL WATER USE PERMIT, FORM NO. 600INS, FORM NO.  
 7 600 AND CRITERIA ADDENDUM A", PUBLISHED BY THE MONTANA DEPARTMENT OF NATURAL  
 8 RESOURCES AND CONSERVATION.

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

11  
 12 **Section 1.** Section 85-2-101, MCA, is amended to read:

13 **"85-2-101. Declaration of policy and purpose.** (1) Pursuant to Article IX of the Montana  
 14 constitution, the legislature declares that any use of water is a public use and that the waters within the  
 15 state are the property of the state for the use of its people and are subject to appropriation for beneficial  
 16 uses as provided in this chapter.

17 (2) A purpose of this chapter is to implement Article IX, section 3(4), of the Montana constitution,  
 18 which requires that the legislature provide for the administration, control, and regulation of water rights and  
 19 establish a system of centralized records of all water rights. The legislature declares that this system of  
 20 centralized records recognizing and establishing all water rights is essential for the documentation,  
 21 protection, preservation, and future beneficial use and development of Montana's water for the state and  
 22 its citizens and for the continued development and completion of the comprehensive state water plan.

23 (3) It is the policy of this state and a purpose of this chapter to encourage the wise use of the  
 24 state's water resources by making them available for appropriation consistent with this chapter and to  
 25 provide for the wise utilization, development, and conservation of the waters of the state for the maximum  
 26 benefit of its people with the least possible degradation of the natural aquatic ecosystems. In pursuit of this  
 27 policy, the state encourages the development of facilities ~~which~~ that store and conserve waters for  
 28 beneficial use, for the maximization of the use of those waters in Montana, for the stabilization of ~~stream~~  
 29 ~~flows~~ streamflows, and for ground water recharge.

30 (4) Pursuant to Article IX, section 3(1), of the Montana constitution, it is further the policy of this

1 state and a purpose of this chapter to recognize and confirm all existing rights to the use of any waters for  
2 any useful or beneficial purpose.

3 (5) It is the intent of the legislature that the statutory determinations for issuing new water use  
4 permits and authorizing changes do not require the adjudication of all water rights in the source of supply.  
5 The legislature recognizes the unique character and nature of water resources of the state. Because water  
6 is a resource that is subject to use and reuse, such as through return flows, and because at most times all  
7 water rights on a source will not be exercised to their full extent simultaneously, it is recognized that an  
8 adjudication is not a water availability study. Consequently, the legislature has provided an administrative  
9 forum for the factual investigation into whether water is available for new uses and changes both before  
10 and after the completion of an adjudication in the source of supply. To allow for orderly permitting in the  
11 absence of a complete adjudication in the source of supply, permits issued under this chapter are  
12 provisional. A provisional permit is subject to reduction, modification, or revocation by the department as  
13 provided in 85-2-313 upon completion of the general adjudication.

14 ~~(6) It is the intent of the legislature that the establishment of a moratorium under 85-2-302 does~~  
15 ~~not limit, expand, alter, or waive state jurisdiction to administer water rights within the exterior boundaries~~  
16 ~~of an Indian reservation.~~

17 (6) IT IS THE INTENT OF THE LEGISLATURE THAT THE STATE, TO FULFILL ITS CONSTITUTIONAL  
18 DUTIES AND TO EXERCISE ITS HISTORIC POWERS AND RESPONSIBILITIES TO ITS CITIZENS LIVING ON  
19 AND OFF RESERVATIONS, COMPREHENSIVELY ADJUDICATE EXISTING WATER RIGHTS AND REGULATE  
20 WATER USE WITHIN THE STATE. IT IS FURTHER THE LEGISLATURE'S INTENT THAT THE STATE, TO  
21 THE FULLEST EXTENT POSSIBLE, RETAIN AND EXERCISE ITS AUTHORITY TO REGULATE WATER USE  
22 AND PROVIDE FORUMS FOR THE PROTECTION OF WATER RIGHTS, INCLUDING FEDERAL NON-INDIAN  
23 AND INDIAN WATER RIGHTS, AND RESOLVE ISSUES CONCERNING ITS AUTHORITY OVER WATER  
24 RIGHTS AND PERMITS, BOTH PRIOR TO AND AFTER THE FINAL ADJUDICATION OF WATER RIGHTS.  
25 IN FURTHERANCE OF THIS LEGISLATIVE INTENT:

26 (A) ALL PERMITS ISSUED ARE PROVISIONAL, AND IT IS THE INTENT OF THE LEGISLATURE THAT  
27 THIS STATUS PROVIDE ENFORCEABLE LEGAL PROTECTION FOR EXISTING RIGHTS; AND

28 (B) ANY JUDICIAL DETERMINATION OF THE STATE'S AUTHORITY TO ISSUE PROVISIONAL  
29 PERMITS ON OR OFF RESERVATIONS SHOULD BE DECIDED IN THE APPROPRIATE STATE FORUM."

30

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

2           **"85-2-102. (Temporary) Definitions.** Unless the context requires otherwise, in this chapter, the  
3 following definitions apply:

4           (1) "Appropriate" means to:

5           (a) divert, impound, or withdraw (including by stock for stock water) a quantity of water;

6           (b) in the case of a public agency, reserve water in accordance with 85-2-316;

7           (c) in the case of the department of fish, wildlife, and parks, lease water in accordance with  
8 85-2-436; or

9           (d) in the Upper Clark Fork River basin, maintain and enhance streamflows to benefit the fishery  
10 resource in accordance with 85-2-439.

11          (2) "Beneficial use", unless otherwise provided, means:

12          (a) a use of water for the benefit of the appropriator, other persons, or the public, including but  
13 not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining,  
14 municipal, power, and recreational uses;

15          (b) a use of water appropriated by the department for the state water leasing program under  
16 85-2-141 and of water leased under a valid lease issued by the department under 85-2-141;

17          (c) a use of water by the department of fish, wildlife, and parks pursuant to a lease authorized  
18 under 85-2-436; or

19          (d) a use of water to maintain and enhance streamflows to benefit the fishery resource in the Upper  
20 Clark Fork River basin as part of the Upper Clark Fork River basin instream flow pilot program authorized  
21 under 85-2-439.

22          (3) "Certificate" means a certificate of water right issued by the department.

23          (4) "Change in appropriation right" means a change in the place of diversion, the place of use, the  
24 purpose of use, or the place of storage.

25          (5) "Commission" means the fish, wildlife, and parks commission provided for in 2-15-3402.

26          (6) "Correct and complete" means that the information required to be submitted conforms to the  
27 standard of substantial credible information and that all of the necessary parts of the form requiring the  
28 information have been filled in with the required information.

29          (7) "Declaration" means the declaration of an existing right filed with the department under section  
30 8, Chapter 452, Laws of 1973.

1 (8) "Department" means the department of natural resources and conservation provided for in Title  
2 2, chapter 15, part 33.

3 (9) "Existing right" or "existing water right" means a right to the use of water that would be  
4 protected under the law as it existed prior to July 1, 1973. The term includes federal non-Indian and Indian  
5 reserved water rights created under federal law and water rights created under state law.

6 (10) "Ground water" means any water that is beneath the ground surface.

7 (11) "Late claim" means a claim to an existing right forfeited pursuant to the conclusive  
8 presumption of abandonment under 85-2-226.

9 (12) "Permit" means the permit to appropriate issued by the department under 85-2-301 through  
10 85-2-303 and 85-2-306 through 85-2-314.

11 (13) "Person" means an individual, association, partnership, corporation, state agency, political  
12 subdivision, the United States or any agency of the United States, or any other entity.

13 (14) "Political subdivision" means any county, incorporated city or town, public corporation, or  
14 district created pursuant to state law or other public body of the state empowered to appropriate water.  
15 The term does not mean a private corporation, association, or group.

16 (15) "Salvage" means to make water available for beneficial use from an existing valid appropriation  
17 through application of water-saving methods.

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

21 ~~(16)~~(17) "Substantial credible information" means probable, believable facts sufficient to support  
22 a reasonable legal theory upon which the department should proceed with the action requested by the  
23 person providing the information.

24 ~~(17)~~(18) "Waste" means the unreasonable loss of water through the design or negligent operation  
25 of an appropriation or water distribution facility or the application of water to anything but a beneficial use.

26 ~~(18)~~(19) "Water" means all water of the state, surface and subsurface, regardless of its character  
27 or manner of occurrence, including but not limited to geothermal water, diffuse surface water, and sewage  
28 effluent.

29 ~~(19)~~(20) "Water division" means a drainage basin as defined in 3-7-102.

30 ~~(20)~~(21) "Water judge" means a judge as provided for in Title 3, chapter 7.

1           ~~(21)~~(22) "Water master" means a master as provided for in Title 3, chapter 7.

2           ~~(22)~~(23) "Watercourse" means any naturally occurring stream or river from which water is diverted  
3 for beneficial uses. It does not include ditches, culverts, or other ~~man-made~~ constructed waterways.

4           ~~(23)~~(24) "Well" means any artificial opening or excavation in the ground, however made, by which  
5 'ground water is sought or can be obtained or through which it flows under natural pressures or is artificially  
6 withdrawn. (Terminates June 30, 1999--sec. 4, Ch. 740, L. 1991.)

7           **85-2-102. (Effective July 1, 1999) Definitions.** Unless the context requires otherwise, in this  
8 chapter, the following definitions apply:

9           (1) "Appropriate" means:

10           (a) to divert, impound, or withdraw (including by stock for stock water) a quantity of water;

11           (b) in the case of a public agency, to reserve water in accordance with 85-2-316; or

12           (c) in the Upper Clark Fork River basin, to maintain and enhance streamflows to benefit the fishery  
13 resource in accordance with 85-2-439.

14           (2) "Beneficial use", unless otherwise provided, means:

15           (a) a use of water for the benefit of the appropriator, other persons, or the public, including but  
16 not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining,  
17 municipal, power, and recreational uses;

18           (b) a use of water appropriated by the department for the state water leasing program under  
19 85-2-141 and of water leased under a valid lease issued by the department under 85-2-141; or

20           (c) a use of water to maintain and enhance streamflows to benefit the fishery resource in the Upper  
21 Clark Fork River basin as part of the Upper Clark Fork River basin instream flow pilot program authorized  
22 under 85-2-439.

23           (3) "Certificate" means a certificate of water right issued by the department.

24           (4) "Change in appropriation right" means a change in the place of diversion, the place of use, the  
25 purpose of use, or the place of storage.

26           (5) "Correct and complete" means that the information required to be submitted conforms to the  
27 standard of substantial credible information and that all of the necessary parts of the form requiring the  
28 information have been filled in with the required information.

29           (6) "Declaration" means the declaration of an existing right filed with the department under section  
30 8, Chapter 452, Laws of 1973.

1           (7) "Department" means the department of natural resources and conservation provided for in Title  
2 2, chapter 15, part 33.

3           (8) "Existing right" or "existing water right" means a right to the use of water that would be  
4 protected under the law as it existed prior to July 1, 1973. The term includes federal non-Indian and Indian  
5 reserved water rights created under federal law and water rights created under state law.

6           (9) "Ground water" means any water that is beneath the ground surface.

7           (10) "Late claim" means a claim to an existing right forfeited pursuant to the conclusive  
8 presumption of abandonment under 85-2-226.

9           (11) "Permit" means the permit to appropriate issued by the department under 85-2-301 through  
10 85-2-303 and 85-2-306 through 85-2-314.

11           (12) "Person" means an individual, association, partnership, corporation, state agency, political  
12 subdivision, the United States or any agency of the United States, or any other entity.

13           (13) "Political subdivision" means any county, incorporated city or town, public corporation, or  
14 district created pursuant to state law or other public body of the state empowered to appropriate water.  
15 The term does not mean a private corporation, association, or group.

16           (14) "Salvage" means to make water available for beneficial use from an existing valid appropriation  
17 through application of water-saving methods.

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

21           ~~(15)~~(16) "Substantial credible information" means probable, believable facts sufficient to support  
22 a reasonable legal theory upon which the department should proceed with the action requested by the  
23 person providing the information.

24           ~~(16)~~(17) "Waste" means the unreasonable loss of water through the design or negligent operation  
25 of an appropriation or water distribution facility or the application of water to anything but a beneficial use.

26           ~~(17)~~(18) "Water" means all water of the state, surface and subsurface, regardless of its character  
27 or manner of occurrence, including but not limited to geothermal water, diffuse surface water, and sewage  
28 effluent.

29           ~~(18)~~(19) "Water division" means a drainage basin as defined in 3-7-102.

30           ~~(19)~~(20) "Water judge" means a judge as provided for in Title 3, chapter 7.

1           ~~(20)~~(21) "Water master" means a master as provided for in Title 3, chapter 7.

2           ~~(21)~~(22) "Watercourse" means any naturally occurring stream or river from which water is diverted  
3 for beneficial uses. It does not include ditches, culverts, or other ~~manmade~~ constructed waterways.

4           ~~(22)~~(23) "Well" means any artificial opening or excavation in the ground, however made, by which  
5 ground water is sought or can be obtained or through which it flows under natural pressures or is artificially  
6 withdrawn. (Terminates June 30, 2005--sec. 14, Ch. 487, L. 1995.)

7           **85-2-102. (Effective July 1, 2005) Definitions.** Unless the context requires otherwise, in this  
8 chapter, the following definitions apply:

9           (1) "Appropriate" means to:

10           (a) divert, impound, or withdraw (including by stock for stock water) a quantity of water;

11           (b) in the case of a public agency, to reserve water in accordance with 85-2-316; or

12           (c) in the case of the department of fish, wildlife, and parks, to lease water in accordance with  
13 85-2-436.

14           (2) "Beneficial use", unless otherwise provided, means:

15           (a) a use of water for the benefit of the appropriator, other persons, or the public, including but  
16 not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining,  
17 municipal, power, and recreational uses;

18           (b) a use of water appropriated by the department for the state water leasing program under  
19 85-2-141 and of water leased under a valid lease issued by the department under 85-2-141; and

20           (c) a use of water by the department of fish, wildlife, and parks pursuant to a lease authorized  
21 under 85-2-436.

22           (3) "Certificate" means a certificate of water right issued by the department.

23           (4) "Change in appropriation right" means a change in the place of diversion, the place of use, the  
24 purpose of use, or the place of storage.

25           (5) "Commission" means the fish, wildlife, and parks commission provided for in 2-15-3402.

26           (6) "Correct and complete" means that the information required to be submitted conforms to the  
27 standard of substantial credible information and that all of the necessary parts of the form requiring the  
28 information have been filled in with the required information.

29           (7) "Declaration" means the declaration of an existing right filed with the department under section  
30 8, Chapter 452, Laws of 1973.

1 (8) "Department" means the department of natural resources and conservation provided for in Title  
2 2, chapter 15, part 33.

3 (9) "Existing right" or "existing water right" means a right to the use of water that would be  
4 protected under the law as it existed prior to July 1, 1973. The term includes federal non-Indian and Indian  
5 reserved water rights created under federal law and water rights created under state law.

6 (10) "Ground water" means any water that is beneath the ground surface.

7 (11) "Late claim" means a claim to an existing right forfeited pursuant to the conclusive  
8 presumption of abandonment under 85-2-226.

9 (12) "Permit" means the permit to appropriate issued by the department under 85-2-301 through  
10 85-2-303 and 85-2-306 through 85-2-314.

11 (13) "Person" means an individual, association, partnership, corporation, state agency, political  
12 subdivision, the United States or any agency ~~thereof~~ of the United States, or any other entity.

13 (14) "Political subdivision" means any county, incorporated city or town, public corporation, or  
14 district created pursuant to state law or other public body of the state empowered to appropriate water.  
15 The term does not mean a private corporation, association, or group.

16 (15) "Salvage" means to make water available for beneficial use from an existing valid appropriation  
17 through application of water-saving methods.

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

21 ~~(16)~~(17) "Substantial credible information" means probable, believable facts sufficient to support  
22 a reasonable legal theory upon which the department should proceed with the action requested by the  
23 person providing the information.

24 ~~(17)~~(18) "Waste" means the unreasonable loss of water through the design or negligent operation  
25 of an appropriation or water distribution facility or the application of water to anything but a beneficial use.

26 ~~(18)~~(19) "Water" means all water of the state, surface and subsurface, regardless of its character  
27 or manner of occurrence, including but not limited to geothermal water, diffuse surface water, and sewage  
28 effluent.

29 ~~(19)~~(20) "Water division" means a drainage basin as defined in 3-7-102.

30 ~~(20)~~(21) "Water judge" means a judge as provided for in Title 3, chapter 7.



1           ~~(21)~~(22) "Water master" means a master as provided for in Title 3, chapter 7.

2           ~~(22)~~(23) "Watercourse" means any naturally occurring stream or river from which water is diverted  
3 for beneficial uses. It does not include ditches, culverts, or other ~~manmade~~ constructed waterways.

4           ~~(23)~~(24) "Well" means any artificial opening or excavation in the ground, however made, by which  
5 ground water is sought or can be obtained or through which it flows under natural pressures or is artificially  
6 withdrawn."

7

8           **Section 3.** Section 85-2-217, MCA, is amended to read:

9           **"85-2-217. Suspension of adjudication.** While negotiations for the conclusion of a compact under  
10 part 7 are being pursued, all proceedings to generally adjudicate reserved Indian water rights and federal  
11 reserved water rights of those tribes and federal agencies ~~which~~ that are negotiating are suspended. The  
12 obligation to file water rights claims for those federal non-Indian and Indian reserved rights is also  
13 suspended. This suspension ~~shall be~~ is effective until July 1, 1999, as long as negotiations are continuing  
14 or ratification of a completed compact is being sought. If approval by the state legislature and tribes or  
15 federal agencies has not been accomplished by July 1, 1999, the suspension ~~shall~~ must terminate on that  
16 date. Upon termination of the suspension of this part, the tribes and the federal agencies ~~shall be~~ are  
17 subject to the special filing requirements of 85-2-702(3) and all other requirements of the state water  
18 adjudication system provided for in Title 85, chapter 2. Those tribes and federal agencies that choose not  
19 to negotiate their federal non-Indian and Indian reserved water rights are subject to the full operation of the  
20 state adjudication system and may not benefit from the suspension provisions of this section."

21

22           **Section 4.** Section 85-2-228, MCA, is amended to read:

23           **"85-2-228. Federal reserved water rights with priority date of July 1, 1973, or later -- process and**  
24 **adjudication -- purpose.** (1) The purpose of this section is to ensure that a federal reserved water right with  
25 a priority date of July 1, 1973, or later ~~be~~ is subject to the same process and adjudication as a federal  
26 reserved water right with a priority date before July 1, 1973.

27           (2) Under authority granted to the states by 43 U.S.C. 666, a federal reserved water right that has  
28 a priority date of July 1, 1973, or later and that is asserted by a federal agency is subject to the claim filing  
29 requirements and all other applicable requirements of the state water adjudication system provided for in  
30 Title 85, chapter 2, parts 2 and 7.

1 (3) At the request of a federal agency, the reserved water rights compact commission may  
2 negotiate to conclude a compact under Title 85, chapter 2, part 7, for a federal reserved water right with  
3 a priority date of July 1, 1973, or later.

4 (4) Whenever necessary, a water judge may reopen any decree issued pursuant to Title 85, chapter  
5 2, to process the asserted or negotiated federal reserved water right."

6  
7 **Section 5.** Section 85-2-301, MCA, is amended to read:

8 **"85-2-301. Right to appropriate -- recognition and confirmation of permits issued after July 1,**  
9 **1973.** (1) After July 1, 1973, a person may not appropriate water except as provided in this chapter. A  
10 person may ~~only~~ appropriate water only for a beneficial use.

11 (2) (a) Only the department may appropriate water by permit in either of the following instances:

12 (i) for transport outside the following river basins:

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

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

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

16 (D) the Little Missouri River and its tributaries to its confluence with Lake Sakakawea in North  
17 Dakota;

18 (E) the Missouri River and its tributaries to its confluence with the Yellowstone River in North  
19 Dakota; and

20 (F) the Yellowstone River and its tributaries to its confluence with the Missouri River in North  
21 Dakota; or

22 (ii) whenever water in excess of 4,000 acre-feet a year and 5.5 cubic feet per second, for any use,  
23 is to be consumed.

24 (b) Water for these purposes or in these amounts may be leased from the department by any  
25 person under the provisions of 85-2-141.

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

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

30

1           ~~Section 6. Section 85-2-302, MCA, is amended to read:~~

2           ~~"85-2-302. Application for permit. (1) Except as otherwise provided in (1) through (3) of~~  
 3 ~~85-2-306 (1) through (3), a person may not appropriate water or commence construction of diversion,~~  
 4 ~~impoundment, withdrawal, or distribution works therefor for water except by applying for and receiving a~~  
 5 ~~permit from the department. The application shall must be made on a form prescribed by the department.~~  
 6 ~~The department shall make the forms available through its offices and the offices of the county clerk and~~  
 7 ~~recorders. The applicant shall submit a correct and complete application. The department shall return a~~  
 8 ~~defective application for correction or completion, together with the reasons for returning it. An application~~  
 9 ~~does not lose priority of filing because of defects if the application is corrected, completed, and refiled with~~  
 10 ~~the department within 30 days after its return to the applicant or within a further time as the department~~  
 11 ~~may allow. If an application is not corrected and completed within 30 days or within a further time as the~~  
 12 ~~department allows, up to 3 months, the priority date of the application shall must be the date of refiling the~~  
 13 ~~application with the corrections with the department. An application not corrected within 3 months shall~~  
 14 ~~must be terminated.~~

15           ~~(2) Prior to final adjudication and while negotiations for the conclusion of a compact under part 7~~  
 16 ~~are being pursued or until July 1, 2003, whichever occurs first, there is a moratorium on the processing~~  
 17 ~~of permit applications for surface water on an affected Indian reservation."~~

18  
 19           SECTION 6. SECTION 85-2-309, MCA, IS AMENDED TO READ:

20           "85-2-309. Hearings on objections -- jurisdiction. (1) If the department determines that an  
 21 objection to an application for a permit or change approval under 85-2-402 states a valid objection, it shall  
 22 hold a public hearing on the objection within 60 days from the date set by the department for the filing of  
 23 objections, after serving notice of the hearing by certified mail upon the applicant and the objector, unless  
 24 the department certifies an issue to the district court for determination by a water judge under subsection  
 25 (2). The department may consolidate hearings if more than one objection is filed to an application. The  
 26 department shall file in its records proof of the service by affidavit of the department.

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

1 given priority by a water judge over all other adjudication matters.

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

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

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

8

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

10 **"85-2-311. Criteria for issuance of permit. (1) A permit may be issued under this part prior to the**  
11 **adjudication of existing water rights in a source of supply. In a permit proceeding under this part there is**  
12 **no presumption that an applicant for a permit cannot meet the statutory criteria of this section prior to the**  
13 **adjudication of existing water rights pursuant to this chapter. IN MAKING A DETERMINATION UNDER THIS**  
14 **SECTION, THE DEPARTMENT MAY NOT ALTER THE TERMS AND CONDITIONS OF AN EXISTING WATER**  
15 **RIGHT OR AN ISSUED CERTIFICATE, PERMIT, OR STATE WATER RESERVATION.** Except as provided in  
16 subsections (3) and (4), the department shall issue a permit if the applicant proves by a preponderance of  
17 evidence that the following criteria are met:

18 ~~(a)(i) there are unappropriated waters in the source of supply is water physically available~~ at the  
19 proposed point of diversion:

20 ~~(i) at times when the water can be put to the use proposed by the applicant;~~

21 ~~(iii) in the amount that the applicant seeks to appropriate; and~~

22 ~~(iiii) during the period in which the applicant seeks to appropriate, in the amount requested and that~~  
23 ~~is reasonably available;~~

24 **(II) WATER CAN REASONABLY BE CONSIDERED LEGALLY AVAILABLE DURING THE PERIOD IN**  
25 **WHICH THE APPLICANT SEEKS TO APPROPRIATE, IN THE AMOUNT REQUESTED, BASED ON THE**  
26 **RECORDS OF THE DEPARTMENT AND OTHER EVIDENCE PROVIDED TO THE DEPARTMENT. LEGAL**  
27 **AVAILABILITY IS DETERMINED USING AN ANALYSIS INVOLVING THE FOLLOWING FACTORS:**

28 **(A) IDENTIFICATION OF PHYSICAL WATER AVAILABILITY;**

29 **(B) IDENTIFICATION OF EXISTING LEGAL DEMANDS ON THE SOURCE OF SUPPLY THROUGHOUT**  
30 **THE AREA OF POTENTIAL IMPACT BY THE PROPOSED USE; AND**

1            (C) ANALYSIS OF THE EVIDENCE ON PHYSICAL WATER AVAILABILITY AND THE EXISTING  
 2 LEGAL DEMANDS, INCLUDING BUT NOT LIMITED TO A COMPARISON OF THE PHYSICAL WATER  
 3 SUPPLY AT THE PROPOSED POINT OF DIVERSION WITH THE EXISTING LEGAL DEMANDS ON THE  
 4 SUPPLY OF WATER.

5            (b) the water rights of a prior appropriator UNDER AN EXISTING WATER RIGHT, A CERTIFICATE,  
 6 A PERMIT, OR A STATE WATER RESERVATION will not be adversely affected. In this subsection (1)(b),  
 7 adverse effect must be determined based on a consideration of:

8            ~~(i) whether water can reasonably be considered IS REASONABLY~~ legally available ~~DURING THE~~  
 9 ~~PERIOD IN WHICH THE APPLICANT SEEKS TO APPROPRIATE, IN THE AMOUNT REQUESTED, based on~~  
 10 ~~the records of the department and other evidence provided to the department; and~~

11            ~~(ii) an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of~~  
 12 ~~the water will be controlled so the water right of a prior appropriator will be satisfied;~~

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

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

16            ~~(e) the proposed use will not interfere unreasonably with other planned uses or developments for~~  
 17 ~~which a permit has been issued or for which water has been reserved;~~

18            ~~(f)(e)~~ the applicant has a possessory interest, or the written consent of the person with the  
 19 possessory interest, in the property where the water is to be put to beneficial use;

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

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

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

25            (2) The applicant is required to prove that the criteria in subsections ~~(1)(g)~~ (1)(f) through ~~(1)(i)~~ (1)(h)  
 26 have been met only if a valid objection is filed. A valid objection must contain substantial credible  
 27 information establishing to the satisfaction of the department that the criteria in subsection ~~(1)(g)~~ (1)(f),  
 28 ~~(1)(h)~~ (1)(g), or ~~(1)(i)~~ (1)(h), as applicable, may not be met. For the criteria set forth in subsection ~~(1)(h)~~  
 29 (1)(g), only the department of environmental quality or a local water quality district established under Title  
 30 7, chapter 13, part 45, may file a valid objection.

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

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

5           ~~(b) the rights of a prior appropriator will not be adversely affected;~~

6           ~~(e)(b)~~ the proposed appropriation is a reasonable use. A finding must be based on a consideration  
7 of the following:

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

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

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

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

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

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

19           (4) (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 federal non-Indian and Indian reserved water rights held by the United States for federal  
22 reserved lands and in trust for the various Indian tribes within the state's boundaries. Although the state  
23 of Montana also recognizes that, under appropriate conditions, the out-of-state transportation and use of  
24 its public waters are not in conflict with the public welfare of its citizens or the conservation of its waters,  
25 the criteria in this subsection (4) must be met before out-of-state use may occur.

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

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

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

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

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

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

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

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

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

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

16 (5) To meet the preponderance of evidence standard in this section, the applicant, in addition to  
17 other evidence demonstrating that the criteria of subsection (1) have been met, shall submit hydrologic or  
18 other evidence, including but not limited to water supply data, field reports, and other information  
19 developed by the applicant, the department, the U.S. geological survey, or the U.S. natural resources  
20 conservation service and other specific field studies.

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

28 (7) The department may adopt rules to implement the provisions of this section."  
29

30 **Section 8.** Section 85-2-313, MCA, is amended to read:

1           **"85-2-313. Provisional permit.** A permit issued prior to a final determination of existing water  
 2 rights is provisional and is subject to that final determination. ~~The~~ Upon petition, the amount of the  
 3 appropriation granted in a provisional permit ~~shall~~ must be reduced ~~or,~~ modified, or revoked by the  
 4 department in FOLLOWING a show cause hearing where when IN WHICH IT IS DETERMINED THAT  
 5 REDUCTION, MODIFICATION, OR REVOCATION IS necessary to protect and guarantee existing water  
 6 rights determined in the final decree. Because a provisional permit is issued on a reasonable determination  
 7 of legal availability under 85-2-311(1)(b), in a show cause hearing under this section, legal availability must  
 8 be determined on a consideration of the final decree in the affected basin or subbasin. A person may not  
 9 obtain any vested right to an appropriation obtained under a provisional permit by virtue of construction  
 10 of diversion works, purchase of equipment to apply water, planting of crops, or other action where the  
 11 permit would have been denied or modified if the final decree had been available to the department."  
 12

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

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

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

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

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

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

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

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

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

30           (b) A state water reservation may be made for an existing or future beneficial use outside the basin



1 where the diversion occurs only if stored water is not reasonably available for water leasing under 85-2-141  
2 and the proposed use would occur in a basin designated in subsection (2)(a).

3 (3) Upon receiving a correct and complete application, the department shall proceed in accordance  
4 with 85-2-307 through 85-2-309. After the hearing provided for in 85-2-309, the department shall decide  
5 whether to reserve the water for the applicant. The department's costs of giving notice, holding the  
6 hearing, conducting investigations, and making records incurred in acting upon the application to reserve  
7 water, except the cost of salaries of the department's personnel, must be paid by the applicant. In addition,  
8 a reasonable proportion of the department's cost of preparing an environmental impact statement must be  
9 paid by the applicant unless waived by the department upon a showing of good cause by the applicant.

10 (4) (a) The department may not adopt an order reserving water unless the applicant establishes to  
11 the satisfaction of the department by a preponderance of evidence:

- 12 (i) the purpose of the reservation;
- 13 (ii) the need for the reservation;
- 14 (iii) the amount of water necessary for the purpose of the reservation;
- 15 (iv) that the reservation is in the public interest.

16 (b) In determining the public interest under subsection (4)(a)(iv), the department may not adopt an  
17 order reserving water for withdrawal and transport for use outside the state unless the applicant proves by  
18 clear and convincing evidence that:

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

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

- 25 (i) whether there are present or projected water shortages within the state of Montana;
- 26 (ii) whether the water that is the subject of the application could feasibly be transported to alleviate  
27 water shortages within the state of Montana;
- 28 (iii) the supply and sources of water available to the applicant in the state where the applicant  
29 intends to use the water; and
- 30 (iv) the demands placed on the applicant's supply in the state where the applicant intends to use

1 the water.

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

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

9 (6) The department shall limit any state water reservations after May 9, 1979, for maintenance of  
10 minimum flow, level, or quality of water that it awards at any point on a stream or river to a maximum of  
11 50% of the average annual flow of record on gauged streams. Ungauged streams can be allocated at the  
12 discretion of the department.

13 (7) After the adoption of an order reserving waters, the department may reject an application and  
14 refuse a permit for the appropriation of reserved waters or may issue the permit subject to terms and  
15 conditions that it considers necessary for the protection of the objectives of the reservation.

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

27 (b) Upon actual application of water to the proposed beneficial use, the authorized user shall notify  
28 the conservation district. The notification must contain a certified statement by a person with experience  
29 in the design, construction, or operation of project works for agricultural purposes describing how the  
30 reserved water was put to use. The department or the district may then inspect the appropriation to

1 determine if it has been completed in substantial accordance with the authorization.

2 (9) Except as provided in 85-2-331, the priority of appropriation of a state water reservation and  
3 the relative priority of the reservation to permits with a later priority of appropriation must be determined  
4 according to this subsection (9), as follows:

5 (a) A state water reservation under this section has a priority of appropriation dating from the filing  
6 with the department of a notice of intention to apply for a state water reservation in a basin in which no  
7 other notice of intention to apply is currently pending. The notice of intention to apply must specify the  
8 basin in which the applicant is seeking a state water reservation.

9 (b) Upon receiving a notice of intention to apply for a state water reservation, the department shall  
10 identify all potential state water reservation applicants in the basin specified in the notice and notify each  
11 potential applicant of the opportunity to submit an application and to receive a state water reservation with  
12 the priority of appropriation as described in subsection (9)(a).

13 (c) To receive the priority of appropriation described in subsection (9)(a), the applicant shall submit  
14 a correct and complete state water reservation application within 1 year after the filing of the notice of  
15 intention to apply. Upon a showing of good cause, the department may extend the time for preparing the  
16 application.

17 (d) The department may by order subordinate a state water reservation to a permit issued pursuant  
18 to this part if:

19 (i) the permit application was accepted by the department before the date of the order granting the  
20 reservation; and

21 (ii) the effect of subordinating the reservation to one or more permits does not interfere substantially  
22 with the purpose of the reservation.

23 (e) The department shall by order establish the relative priority of state water reservations approved  
24 under this section that have the same day of priority. A state water reservation may not adversely affect  
25 any rights in existence at that time.

26 (10) The department shall, periodically but at least once every 10 years, review existing state water  
27 reservations to ensure that the objectives of the ~~reservation~~ reservations are being met. When the  
28 objectives of ~~the~~ a state water reservation are not being met, the department may extend, revoke, or  
29 modify the reservation. Any undeveloped water made available as a result of a revocation or modification  
30 under this subsection is available for appropriation by others pursuant to this part.

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

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

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

23 (14) Nothing in this section vests the department with the authority to alter a water right that is  
24 not a state water reservation.

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

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

1           **Section 10.** Section 85-2-321, MCA, is amended to read:

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

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

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

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

11           (A) any new appropriation from the source for the class of applications will adversely affect the  
12 rights of a prior appropriation from the source; or

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

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

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

21

22           **Section 11.** Section 85-2-329, MCA, is amended to read:

23           **"85-2-329. Definitions.** Unless the context requires otherwise, in 85-2-330 and this section, the  
24 following definitions apply:

25           (1) "Application" means an application for a beneficial water use permit pursuant to 85-2-302 or  
26 a state water reservation pursuant to 85-2-316.

27           (2) "Ground water" means water that is beneath the land surface or beneath the bed of a stream,  
28 lake, reservoir, or other body of surface water and that is not immediately or directly connected to surface  
29 water.

30           (3) "Nonconsumptive use" means a beneficial use of water that does not cause a reduction in the

1 source of supply and in which substantially all of the water returns without delay to the source of supply,  
2 causing little or no disruption in stream conditions.

3 (4) "Teton River basin" means the drainage area of the Teton River and its tributaries above the  
4 confluence of the Teton and Marias Rivers."

5

6 **Section 12.** Section 85-2-331, MCA, is amended to read:

7 **"85-2-331. Reservations within Missouri River basin and Little Missouri River basin.** (1) The state,  
8 ~~or~~ an agency or political subdivision of the state, or the United States or an agency of the United States  
9 that desires to apply for a state water reservation ~~of water~~ in the Missouri River basin or in the Little  
10 Missouri River basin shall file an application pursuant to 85-2-316 no later than:

11 (a) July 1, 1989, for reservation of water above Fort Peck dam; or

12 (b) July 1, 1991, for reservation of water below Fort Peck dam and in the Little Missouri River  
13 basin.

14 (2) Subject to legislative appropriation, the department shall provide technical and financial  
15 assistance to other state agencies and political subdivisions in applying for state water reservations within  
16 the Missouri River basin and the Little Missouri River basin.

17 (3) (a) The department shall make a final determination in accordance with 85-2-316 on all  
18 applications filed before July 1, 1989, for state water reservations ~~of water~~ in the Missouri River basin  
19 above Fort Peck dam.

20 (b) The department shall make a final determination in accordance with 85-2-316 on all applications  
21 filed before July 1, 1991, for state water reservations ~~of water~~ in the Missouri River basin below Fort Peck  
22 dam and in the Little Missouri River basin.

23 (c) The department shall determine which applications or portions of applications are considered  
24 to be above or below Fort Peck dam.

25 (4) ~~Water~~ State water reservations approved by the department under this section have a priority  
26 date of July 1, 1985, in the Missouri River basin and a priority date of July 1, 1989, in the Little Missouri  
27 River basin. If the department issues a permit under Title 85, chapter 2, part 3, prior to the granting of a  
28 state water reservation under this section, the department may subordinate the state water reservation to  
29 the permit if it finds that the subordination does not interfere substantially with the purpose of any state  
30 water reservation. The department shall by order establish the relative priority of applications approved

1 under this section."  
2

3 **Section 13.** Section 85-2-336, MCA, is amended to read:

4 **"85-2-336. Basin closure -- exception.** (1) As provided in 85-2-319 and subject to the provisions  
5 of subsection (2) of this section, the department may not process or grant an application for a permit to  
6 appropriate water within the Upper Clark Fork River basin.

7 (2) The provisions of subsection (1) do not apply to:

8 (a) an application for a permit to appropriate ground water;

9 (b) an application filed prior to January 1, 2000, for a permit to appropriate water to conduct  
10 response actions or remedial actions pursuant to the federal Comprehensive Environmental Response,  
11 Compensation, and Liability Act of 1980, as amended, or Title 75, chapter 10, part 7, at sites designated  
12 as of January 1, 1994. The total flow rates for all permits issued under this subsection (2)(b) may not  
13 exceed 10 cubic feet per second. A permit issued to conduct response actions or remedial actions may not  
14 be used for dilution and must be limited to a term not to exceed the necessary time to complete the  
15 response or remedial action, and the permit may not be transferred to any person for any purpose other  
16 than the designated response or remedial action;

17 (c) an application for a permit to appropriate water for stock use;

18 (d) an application to store water; or

19 (e) an application for power generation at existing hydroelectric dams. The department may not  
20 approve a permit for power generation if approval results in additional consumption of water.

21 (3) Applications for state water reservations in the Upper Clark Fork River basin filed pursuant to  
22 85-2-316 and pending as of May 1, 1991, have a priority date of May 1, 1991. The filing of a state water  
23 reservation application does not provide standing to object under 85-2-402.

24 (4) The department may not process or approve applications for state water reservations ~~of water~~  
25 in the Upper Clark Fork River basin filed pursuant to 85-2-316."  
26

27 **Section 14.** Section 85-2-340, MCA, is amended to read:

28 **"85-2-340. Definitions.** Unless the context requires otherwise, in 85-2-341 and this section, the  
29 following definitions apply:

30 (1) "Application" means an application for a beneficial water use permit pursuant to 85-2-302 or

1 a state water reservation pursuant to 85-2-316.

2 (2) "Ground water" means water that is beneath the land surface or beneath the bed of a stream,  
3 lake, reservoir, or other body of surface water and that is not immediately or directly connected to surface  
4 water.

5 (3) "Jefferson River basin" means the drainage area of the Jefferson River and its tributaries above  
6 the confluence of the Jefferson and Missouri Rivers.

7 (4) "Madison River basin" means the drainage area of the Madison River and its tributaries above  
8 the confluence of the Madison and Jefferson Rivers.

9 (5) "Nonconsumptive use" means a beneficial use of water that does not cause a reduction in the  
10 source of supply and in which substantially all of the water returns without delay to the source of supply,  
11 causing little or no disruption in stream conditions."  
12

13 **Section 15.** Section 85-2-341, MCA, is amended to read:

14 **"85-2-341. Basin closure -- exceptions.** (1) As provided in 85-2-319 and subject to the provisions  
15 of subsection (2) of this section, the department may not process or grant an application for a permit to  
16 appropriate water or for a state water reservation to reserve water within the Jefferson River basin or  
17 Madison River basin.

18 (2) The provisions of subsection (1) do not apply to:

19 (a) an application for a permit to appropriate ground water;

20 (b) an application for a permit to appropriate water for a nonconsumptive use;

21 (c) an application for a permit to appropriate water for domestic, municipal, or stock use;

22 (d) an application to store water during high spring flows; or

23 (e) temporary emergency appropriations as provided for in 85-2-113(3)."  
24

25 **Section 16.** Section 85-2-342, MCA, is amended to read:

26 **"85-2-342. Definitions.** Unless the context requires otherwise, in 85-2-343 and this section, the  
27 following definitions apply:

28 (1) "Application" means an application for a beneficial water use permit pursuant to 85-2-302 or  
29 a state water reservation pursuant to 85-2-316.

30 (2) "Ground water" means water that is beneath the land surface or beneath the bed of a stream,



1 lake, reservoir, or other body of surface water and that is not immediately or directly connected to surface  
2 water.

3 (3) "Nonconsumptive use" means a beneficial use of water that does not cause a reduction in the  
4 source of supply and in which substantially all of the water returns without delay to the source of supply,  
5 causing little or no disruption in stream conditions.

6 (4) "Upper Missouri River basin" means the drainage area of the Missouri River and its tributaries  
7 above Morony dam."  
8

9 **Section 17.** Section 85-2-401, MCA, is amended to read:

10 **"85-2-401. Priority -- recognition and confirmation of changes in appropriations issued after July**  
11 **1, 1973.** (1) As between appropriators, the first in time is the first in right. Priority of appropriation does  
12 not include the right to prevent changes by later appropriators in the condition of water occurrence, such  
13 as the increase or decrease of streamflow or the lowering of a water table, artesian pressure, or water level,  
14 if the prior appropriator can reasonably exercise ~~his~~ the water right under the changed conditions.

15 (2) Priority of appropriation made under this chapter dates from the filing of an application for a  
16 permit with the department, except as otherwise provided in 85-2-301 through 85-2-303, 85-2-306,  
17 85-2-310(3), and 85-2-313.

18 (3) Priority of appropriation perfected before July 1, 1973, ~~shall~~ must be determined as provided  
19 in part 2 of this chapter.

20 (4) All changes in appropriation rights actions of the department after July 1, 1973, are recognized  
21 and confirmed subject to this part and any terms, conditions, and limitations placed on a change in  
22 appropriation authorization by the department."  
23

24 **Section 18.** Section 85-2-402, MCA, is amended to read:

25 **"85-2-402. (Temporary) Changes in appropriation rights.** (1) The right to make a change subject  
26 to the provisions of this section in an existing water right, a permit, or a state water reservation is  
27 recognized and confirmed. In a change proceeding under this section, there is no presumption that an  
28 applicant for a change in appropriation right cannot establish lack of adverse effect prior to the adjudication  
29 of other rights in the source of supply pursuant to this chapter. ~~An applicant for a change in appropriation~~  
30 right must be given the opportunity to establish lack of adverse effect as an evidentiary matter by showing

1 ~~by reference to the applicant's own existing water right and historic water use practices that the proposed~~  
2 ~~change in appropriation right will not increase the amount of water consumed or adversely alter the timing~~  
3 ~~or pattern of flow for perfected uses in the source of the supply.~~ An appropriator may not make a change  
4 in an appropriation right except, as permitted under this section, by applying for and receiving the approval  
5 of the department or, if applicable, of the legislature. An applicant shall submit a correct and complete  
6 application.

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

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

14 (b) Except for a lease authorization pursuant to 85-2-436, a temporary change authorization for  
15 instream use to benefit the fishery resource pursuant to 85-2-408, or water use pursuant to 85-2-439 when  
16 authorization does not require appropriation works, the proposed means of diversion, construction, and  
17 operation of the appropriation works are adequate.

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

19 (d) Except for a lease authorization pursuant to 85-2-436 or a temporary change authorization  
20 pursuant to 85-2-408 for instream flow to benefit the fishery resource, the applicant has a possessory  
21 interest, or the written consent of the person with the possessory interest, in the property where the water  
22 is to be put to beneficial use.

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

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

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

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

1 be met.

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

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

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

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

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

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

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

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

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

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

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

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

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

1 the following criteria must be met before out-of-state use may occur:

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

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

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

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

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

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

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

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

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

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

24 (7) For any application for a change in appropriation right involving 4,000 or more acre-feet of  
25 water a year and 5.5 or more cubic feet per second of water, the department shall give notice of the  
26 proposed change in accordance with 85-2-307 and shall hold one or more hearings in accordance with  
27 85-2-309 prior to its approval or denial of the proposed change. The department shall provide notice and  
28 may hold one or more hearings upon any other proposed change if it determines that a change might  
29 adversely affect the rights of other persons.

30 (8) The department or the legislature, if applicable, may approve a change subject to terms,

1 conditions, restrictions, and limitations as it considers necessary to satisfy the criteria of this section,  
2 including limitations on the time for completion of the change. The department may extend time limits  
3 specified in the change approval under the applicable criteria and procedures of 85-2-312(3).

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

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

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

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

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

23 (14) The department may adopt rules to implement the provisions of this section. (Terminates June  
24 30, 1999--sec. 4, Ch. 740, L. 1991.)

25 **85-2-402. (Effective July 1, 1999) Changes in appropriation rights.** (1) The right to make a change  
26 subject to the provisions of this section in an existing water right, a permit, or a state water reservation  
27 is recognized and confirmed. In a change proceeding under this section, there is no presumption that an  
28 applicant for a change in appropriation right cannot establish lack of adverse effect prior to the adjudication  
29 of other rights in the source of supply pursuant to this chapter. An applicant for a change in appropriation  
30 right must be given the opportunity to establish lack of adverse effect as an evidentiary matter by showing

1 ~~by reference to the applicant's own existing water right and historic water use practices that the proposed~~  
2 ~~change in appropriation right will not increase the amount of water consumed or adversely alter the timing~~  
3 ~~or pattern of flow for perfected uses in the source of the supply.~~ An appropriator may not make a change  
4 in an appropriation right except, as permitted under this section, by applying for and receiving the approval  
5 of the department or, if applicable, of the legislature. An applicant shall submit a correct and complete  
6 application.

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

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

14 (b) Except for a temporary change authorization pursuant to 85-2-408 or for water use pursuant  
15 to 85-2-439 that does not require appropriation works, the proposed means of diversion, construction, and  
16 operation of the appropriation works are adequate.

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

18 (d) Except for a temporary change authorization pursuant to 85-2-408 for instream flow to benefit  
19 the fishery resource, the applicant has a possessory interest, or the written consent of the person with the  
20 possessory interest, in the property where the water is to be put to beneficial use.

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

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

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

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

30 (4) The department may not approve a change in purpose of use or place of use of an appropriation

1 of 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water unless the  
2 appropriator proves by a preponderance of evidence that:

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

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

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

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

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

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

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

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

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

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

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

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

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

1 right for the withdrawal and transportation of appropriated water for use outside the state unless the  
2 appropriator proves by clear and convincing evidence and, if applicable, the legislature approves after one  
3 or more public hearings that:

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

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

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

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

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

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

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

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

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

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

28 (8) The department or the legislature, if applicable, may approve a change subject to such terms,  
29 conditions, restrictions, and limitations as it considers necessary to satisfy the criteria of this section,  
30 including limitations on the time for completion of the change. The department may extend time limits



1 specified in the change approval under the applicable criteria and procedures of 85-2-312(3).

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

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

13 (12) A person holding an issued permit or change approval that has not been perfected may change  
14 the place of diversion, place of use, purpose of use, or place of storage by filing an application for change  
15 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  
18 unauthorized change in appropriation right. A person or corporation may not, directly or indirectly,  
19 personally or through an agent, officer, or employee, attempt to change an appropriation right except in  
20 accordance with this section.

21 (14) The department may adopt rules to implement the provisions of this section. (Terminates June  
22 30, 2005--sec. 6, Ch. 322, L. 1995.)

23 **85-2-402. (Effective July 1, 2005) Changes in appropriation rights.** (1) The right to make a  
24 change subject to the provisions of this section in an existing water right, a permit, or a state water  
25 reservation is recognized and confirmed. In a change proceeding under this section, there is no  
26 presumption that an applicant for a change in appropriation right cannot establish lack of adverse effect  
27 prior to the adjudication of other rights in the source of supply pursuant to this chapter. An applicant for  
28 a change in appropriation right must be given the opportunity to establish lack of adverse effect as an  
29 evidentiary matter by showing by reference to the applicant's own existing water right and historic water  
30 use practices that the proposed change in appropriation right will not increase the amount of water

1 ~~consumed or adversely alter the timing or pattern of flow for perfected uses in the source of the supply.~~

2 An appropriator may not make a change in an appropriation right except, as permitted under this section,  
3 by applying for and receiving the approval of the department or, if applicable, of the legislature. An  
4 applicant shall submit a correct and 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~~ change in appropriation right will not adversely affect the use of the existing  
9 water rights of other persons or other perfected or planned uses or developments for which a permit or  
10 certificate has been issued or for which ~~water has been reserved~~ a state water reservation has been issued  
11 under part 3.

12 (b) The proposed means of diversion, construction, and operation of the appropriation works are  
13 adequate.

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

15 (d) The applicant has a possessory interest, or the written consent of the person with the  
16 possessory interest, in the property where the water 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) The state of Montana has long recognized the importance of conserving its public waters and  
20 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 (a) 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 (b) In determining whether the appropriator has proved by clear and convincing evidence that the  
6 requirements of subsections (6)(a)(ii) and (6)(a)(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 (c) 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 such 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 such 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."  
18

19 **NEW SECTION. SECTION 19. WATER ADMINISTRATION AGREEMENTS WITHIN INDIAN**  
20 **RESERVATIONS. (1) BECAUSE IT APPEARS TO BE TO THE COMMON ADVANTAGE OF THE STATE AND**  
21 **INDIAN TRIBES TO COOPERATE IN MATTERS INVOLVING THE PERMITTING AND USE OF WATER WITHIN**  
22 **THE EXTERIOR BOUNDARIES OF AN INDIAN RESERVATION PRIOR TO THE FINAL ADJUDICATION OF**  
23 **INDIAN RESERVED WATER RIGHTS AND BECAUSE THE STATE DOES NOT INTEND BY ENACTMENT OF**  
24 **THIS SECTION TO LIMIT, EXPAND, ALTER, OR WAIVE STATE JURISDICTION TO ADMINISTER WATER**  
25 **RIGHTS WITHIN THE EXTERIOR BOUNDARIES OF AN INDIAN RESERVATION, PURSUANT TO THE**  
26 **REQUIREMENTS OF TITLE 18, CHAPTER 11, THE DEPARTMENT MAY NEGOTIATE AND CONCLUDE AN**  
27 **INTERIM AGREEMENT WITH THE TRIBAL GOVERNMENT OF ANY INDIAN TRIBE IN MONTANA PRIOR TO**  
28 **FINAL ADJUDICATION OF INDIAN RESERVED WATER RIGHTS FOR THE PURPOSE OF IMPLEMENTING**  
29 **A WATER ADMINISTRATION PLAN AND A PERMITTING PROCESS FOR THE ISSUANCE OF WATER**  
30 **RIGHTS AND CHANGES IN WATER RIGHT USES WITHIN THE EXTERIOR BOUNDARIES OF AN INDIAN**

1 RESERVATION.2 (2) AN AGREEMENT ENTERED INTO PURSUANT TO SUBSECTION (1) MUST:3 (A) PROVIDE FOR THE RETENTION OF EXCLUSIVE AUTHORITY BY THE STATE TO ISSUE  
4 PERMITS TO APPLICANTS WHO ARE NOT MEMBERS OF THE TRIBE AND TO ISSUE CHANGE OF USE  
5 AUTHORIZATIONS;6 (B) PROVIDE THAT ANY PERMITS MUST BE ISSUED IN ACCORDANCE WITH THE CRITERIA  
7 ESTABLISHED BY STATE LAW; AND8 (C) PROVIDE THAT PERMITS MAY BE ONLY FOR NEW USES WITH A DATE OF PRIORITY IN  
9 COMPLIANCE WITH STATE LAW.10 (3) PRIOR TO CONCLUDING ANY AGREEMENT UNDER THIS SECTION, THE DEPARTMENT SHALL  
11 HOLD PUBLIC MEETINGS, AFTER PROPER PUBLIC NOTICE OF THE MEETINGS HAS BEEN GIVEN AND THE  
12 PROPOSED AGREEMENT HAS BEEN MADE AVAILABLE FOR PUBLIC REVIEW, TO AFFORD THE PUBLIC  
13 AN OPPORTUNITY TO COMMENT ON THE CONTENTS OF THE AGREEMENT.

14

15 NEW SECTION. Section 20. Notification to tribal governments. The secretary of state shall send  
16 a copy of [this act] to each tribal government located on the seven Montana reservations.

17

18 NEW SECTION. SECTION 21. CODIFICATION INSTRUCTION. [SECTION 19] IS INTENDED TO  
19 BE CODIFIED AS AN INTEGRAL PART OF TITLE 85, CHAPTER 2, AND THE PROVISIONS OF TITLE 85,  
20 CHAPTER 2, APPLY TO [SECTION 19].

21

22 ~~NEW SECTION. SECTION 22. IF SENATE BILL NO. 59 IS NOT PASSED AND APPROVED, THEN:~~23 ~~(1) [SECTION 6 OF THIS ACT], AMENDING 85-2-302, IS VOID; AND~~24 ~~(2) SUBSECTION (6) OF 85-2-101, INSERTED IN [SECTION 1 OF THIS ACT] IS VOID.~~

25

26 NEW SECTION. Section 22. Saving clause. [This act] does not affect rights and duties that  
27 matured, penalties that were incurred, or proceedings that were begun before [the effective date of this  
28 act].

29

30 NEW SECTION. SECTION 23. SEVERABILITY. IF A PART OF [THIS ACT] IS INVALID, ALL VALID

1 PARTS THAT ARE SEVERABLE FROM THE INVALID PART REMAIN IN EFFECT. IF A PART OF [THIS ACT]  
2 IS INVALID IN ONE OR MORE OF ITS APPLICATIONS, THE PART REMAINS IN EFFECT IN ALL VALID  
3 APPLICATIONS THAT ARE SEVERABLE FROM THE INVALID APPLICATIONS.

4

5 NEW SECTION. Section 24. Retroactive applicability. [Section 1] applies retroactively, within the  
6 meaning of 1-2-109, to all permits and change authorizations issued by the department of natural resources  
7 and conservation after July 1, 1973.

8

9 NEW SECTION. Section 25. Effective date. [This act] is effective on passage and approval.

10

-END-