

Senate BILL NO. 363

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INTRODUCED BY Grosfield

A BILL FOR AN ACT ENTITLED: "AN ACT ALLOWING EMERGENCY GROUND WATER USE TO BENEFIT THE FISHERY RESOURCE; GRANTING ABANDONMENT PROTECTION FOR VOLUNTARY NONUSE OF WATER; EXEMPTING EMERGENCY GROUND WATER USE FROM THE PROVISIONS OF BASIN CLOSURES; REVISING THE WATER LEASING PROGRAM; AMENDING SECTIONS 85-2-102, 85-2-306, 85-2-311, 85-2-319, 85-2-402, 85-2-404, AND 85-2-437, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND A RETROACTIVE APPLICABILITY DATE."

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

NEW SECTION. Section 1. Emergency ground water use to benefit fishery resource -- limitations -- criteria. In accordance with the provisions of 85-2-311 or 85-2-402, the department shall accept and process an application for a permit to appropriate ground water for emergency instream use to benefit the fishery resource if the ground water to be used is not immediately or directly connected to surface water.

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

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

- (1) "Appropriate" means to:
 - (a) divert, impound, or withdraw (including by stock for stock water) a quantity of water;
 - (b) in the case of a public agency, reserve water in accordance with 85-2-316;
 - (c) in the case of the department of fish, wildlife, and parks, lease water in accordance with 85-2-436; ~~or~~
 - (d) in the Upper Clark Fork River basin, maintain and enhance streamflows to benefit the fishery resource in accordance with 85-2-439; or

(e) use ground water to benefit the fishery resource in accordance with [section 1].

- (2) "Beneficial use", unless otherwise provided, means:
 - (a) a use of water for the benefit of the appropriator, other persons, or the public, including but

1 not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining,
2 municipal, power, and recreational uses;

3 (b) a use of water appropriated by the department for the state water leasing program under
4 85-2-141 and of water leased under a valid lease issued by the department under 85-2-141;

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

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

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

17 (7) "Declaration" means the declaration of an existing right filed with the department under section
18 8, Chapter 452, Laws of 1973.

19 (8) "Department" means the department of natural resources and conservation provided for in Title
20 2, chapter 15, part 33.

21 (9) "Existing right" means a right to the use of water that would be protected under the law as it
22 existed prior to July 1, 1973.

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) "Substantial credible information" means probable, believable facts sufficient to support a
 6 reasonable legal theory upon which the department should proceed with the action requested by the person
 7 providing the information.

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

10 (18) "Water" means all water of the state, surface and subsurface, regardless of its character or
 11 manner of occurrence, including but not limited to geothermal water, diffuse surface water, and sewage
 12 effluent.

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

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

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

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

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

21 **85-2-102. (Effective July 1, 1999) Definitions.** Unless the context requires otherwise, in this
 22 chapter, the following definitions apply:

23 (1) "Appropriate" means:

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

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

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

28 (d) to use ground water to benefit the fishery resource in accordance with [section 1].

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

30 (a) a use of water for the benefit of the appropriator, other persons, or the public, including but

1 not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining,
2 municipal, power, and recreational uses;

3 (b) a use of water appropriated by the department for the state water leasing program under
4 85-2-141 and of water leased under a valid lease issued by the department under 85-2-141; or

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

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

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

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

14 (6) "Declaration" means the declaration of an existing right filed with the department under section
15 8, Chapter 452, Laws of 1973.

16 (7) "Department" means the department of natural resources and conservation provided for in Title
17 2, chapter 15, part 33.

18 (8) "Existing right" means a right to the use of water that would be protected under the law as it
19 existed prior to July 1, 1973.

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

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

23 (11) "Permit" means the permit to appropriate issued by the department under 85-2-301 through
24 85-2-303 and 85-2-306 through 85-2-314.

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

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

30 (14) "Salvage" means to make water available for beneficial use from an existing valid appropriation

1 through application of water-saving methods.

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

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

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

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

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

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

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

15 (22) "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; or

25 (d) use ground water to benefit the fishery resource in accordance with [section 1].

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

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

30 (b) a use of water appropriated by the department for the state water leasing program under

1 85-2-141 and of water leased under a valid lease issued by the department under 85-2-141; and

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

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

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

11 (7) "Declaration" means the declaration of an existing right filed with the department under section
12 8, Chapter 452, Laws of 1973.

13 (8) "Department" means the department of natural resources and conservation provided for in Title
14 2, chapter 15, part 33.

15 (9) "Existing right" means a right to the use of water that would be protected under the law as it
16 existed prior to July 1, 1973.

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) "Substantial credible information" means probable, believable facts sufficient to support a
30 reasonable legal theory upon which the department should proceed with the action requested by the person

1 providing the information.

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

4 (18) "Water" means all water of the state, surface and subsurface, regardless of its character or
5 manner of occurrence, including but not limited to geothermal water, diffuse surface water, and sewage
6 effluent.

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

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

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

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

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

15

16 **Section 3.** Section 85-2-306, MCA, is amended to read:

17 **"85-2-306. Exceptions to permit requirements.** (1) Ground Except for emergency use of ground
18 water to benefit the fishery resource in accordance with [section 1], ground water may be appropriated only
19 by a person who has a possessory interest in the property where the water is to be put to beneficial use
20 and exclusive property rights in the ground water development works or, if another person has rights in the
21 ground water development works, with the written consent of the person with those property rights.
22 Outside the boundaries of a controlled ground water area, a permit is not required before appropriating
23 ground water by means of a well or developed spring with a maximum appropriation of 35 gallons per
24 minute or less, not to exceed 10 acre-feet per year, except that a combined appropriation from the same
25 source from two or more wells or developed springs exceeding this limitation requires a permit. Within 60
26 days of completion of the well or developed spring and appropriation of the ground water for beneficial use,
27 the appropriator shall file a notice of completion with the department on a form provided by the department
28 at its offices and at the offices of the county clerk and recorders. Upon receipt of the notice, the
29 department shall review the notice and may, before issuing a certificate of water right, return a defective
30 notice for correction or completion, together with the reasons for returning it. A notice does not lose priority

1 of filing because of defects if the notice is corrected, completed, and refiled with the department within 30
2 days or within a further time as the department may allow, not to exceed 6 months. If a notice is not
3 corrected and completed within the time allowed, the priority date of appropriation is the date of refiled
4 a correct and complete notice with the department. A certificate of water right may not be issued until a
5 correct and complete notice has been filed with the department. The original of the certificate must be sent
6 to the appropriator. The department shall keep a copy of the certificate in its office in Helena. The date of
7 filing of the notice of completion is the date of priority of the right.

8 (2) An appropriator of ground water by means of a well or developed spring first put to beneficial
9 use between January 1, 1962, and July 1, 1973, who did not file a notice of completion, as required by
10 laws in force prior to April 14, 1981, with the county clerk and recorder shall file a notice of completion,
11 as provided in subsection (1), with the department to perfect the water right. The filing of a claim pursuant
12 to 85-2-221 is sufficient notice of completion under this subsection. The priority date of the appropriation
13 is the date of the filing of a notice as provided in subsection (1) of this section or the date of the filing of
14 the claim of existing water right. An appropriation under this subsection is an existing right, and a permit
15 is not required; ~~however~~ However, the department shall acknowledge the receipt of a correct and complete
16 filing of a notice of completion, except that for an appropriation of 35 gallons per minute or less, not to
17 exceed 10 acre-feet per year, the department shall issue a certificate of water right. If a certificate is issued
18 under this section, a certificate need not be issued under the adjudication proceedings provided for in
19 85-2-236.

20 (3) A (a) Subject to the provisions of subsection (3)(c), a permit is not required before constructing
21 an impoundment or pit and appropriating water for use by livestock if:

22 (i) the maximum capacity of the impoundment or pit is less than 15 acre-feet; and

23 (ii) the appropriation is less than 30 acre-feet per year and is from a source other than a perennial
24 flowing stream; and

25 (iii) the impoundment or pit is to be constructed on and will be accessible to a parcel of land that
26 is owned or under the control of the applicant and that is 40 acres or larger. As used in this subsection (3),
27 "perennial flowing stream" means a stream that historically has flowed continuously during all seasons of
28 the year, during dry as well as wet years.

29 (b) Subject to the provisions of subsection (3)(c), a permit is not required prior to an emergency
30 ground water use to benefit the fishery resource in accordance with [section 1].

1 ~~(c) However, within~~ Within 60 days after constructing the impoundment or pit under subsection
 2 (3)(a) or using ground water in accordance with [section 1], the appropriator shall apply for a permit as
 3 prescribed by this part. Upon receipt of a correct and complete application for a stockwater provisional
 4 permit or an application for emergency ground water use to benefit the fishery resource in accordance with
 5 [section 1], the department shall ~~then~~ automatically issue a provisional permit. If, based on a valid objection
 6 filed under 85-2-308 pursuant to notice as required under 85-2-307, the department determines after a
 7 hearing that the rights of other appropriators have been or will be adversely affected, it may revoke the
 8 permit or require the permittee to modify the impoundment or pit or emergency ground water use and may
 9 ~~then~~ make the permit subject to terms, conditions, restrictions, or limitations that it considers necessary
 10 to protect the rights of other appropriators.

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

13

14 **Section 4.** Section 85-2-311, MCA, is amended to read:

15 **"85-2-311. Criteria for issuance of permit.** (1) Except as provided in subsections (3) and (4), the
 16 department shall issue a permit if the applicant proves by a preponderance of evidence that the following
 17 criteria are met:

18 (a) there are unappropriated waters in the source of supply at the proposed point of diversion:

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

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

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

23 (b) the water rights of a prior appropriator will not be adversely affected;

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

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

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

29 (f) except for appropriations in accordance with [section 1], the applicant has a possessory interest,
 30 or the written consent of the person with the possessory interest, in the property where the water is to be

1 put to beneficial use;

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

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

5 (i) 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) through (1)(i) have been
8 met only if a valid objection is filed. A valid objection must contain substantial credible information
9 establishing to the satisfaction of the department that the criteria in subsection (1)(g), (1)(h), or (1)(i), as
10 applicable, may not be met. For the criteria set forth in subsection (1)(h), only the department of
11 environmental quality or a local water quality district established under Title 7, chapter 13, part 45, may
12 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 (c) the proposed appropriation is a reasonable use. A finding must be based on a consideration of
19 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 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 criteria in this subsection (4)
7 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 5.** Section 85-2-319, MCA, is amended to read:

13 **"85-2-319. Permit action in highly appropriated basins or subbasins -- exceptions.** (1) With regard
14 to a highly appropriated basin or subbasin, the legislature may by law preclude permit applications or the
15 department may by rule reject permit applications or modify or condition permits already issued.

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

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

22 (b) the rights of prior appropriators will be adversely affected;

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

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

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

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

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

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

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

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

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

6 (4) Title 2, chapter 4, parts 1 through 4, govern rulemaking proceedings conducted under this
7 section, except that in addition to the notice requirements of those parts, the department notice of the
8 rulemaking hearing must be published at least once in each week for 3 successive weeks, not less than 30
9 days before the date of the hearing, in a newspaper of general circulation in the county or counties in which
10 the source is located. The department shall serve by mail a copy of the notice, not less than 30 days before
11 the hearing, upon each person or public agency known from the examination of the records of the
12 department to be a claimant, appropriator, or permit holder of water in the source.

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

14 (6) Permit applications for the emergency use of ground water to benefit the fishery resource under
15 [section 1] are not subject to the provisions of this section unless the law or rule adopted pursuant to
16 subsection (1) specifically provides that a permit may not be issued under [section 1]."

17
18 **Section 6.** Section 85-2-402, MCA, is amended to read:

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

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

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

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

1 operation of the appropriation works are adequate.

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

3 (d) Except for a lease authorization pursuant to 85-2-436, ~~or~~ a temporary change authorization
4 pursuant to 85-2-408 for instream flow to benefit the fishery resource, or an emergency use of ground
5 water to benefit the fishery resource in accordance with [section 1], the applicant has a possessory
6 interest, or the written consent of the person with the possessory interest, in the property where the water
7 is to be put to beneficial use.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

30 (ii) whether the water that is the subject of the proposed change in appropriation might feasibly

1 be transported to alleviate water shortages within the state of Montana;

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

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

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

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

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

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

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

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

30 (12) A person holding an issued permit or change approval that has not been perfected may change

1 the place of diversion, place of use, purpose of use, or place of storage by filing an application for change
2 pursuant to this section.

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

8 (14) The department may adopt rules to implement the provisions of this section. (Terminates June
9 30, 1999--sec. 4, Ch. 740, L. 1991.)

10 **85-2-402. (Effective July 1, 1999) Changes in appropriation rights.** (1) An appropriator may not
11 make a change in an appropriation right except, as permitted under this section, by applying for and
12 receiving the approval of the department or, if applicable, of the legislature. An applicant shall submit a
13 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 will not adversely affect the water rights of other persons or other planned
18 uses or developments for which a permit has been issued or for which water has been reserved.

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

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

23 (d) Except for a temporary change authorization pursuant to 85-2-408 for instream flow to benefit
24 the fishery resource, or an emergency use of ground water to benefit the fishery resource in accordance
25 with [section 1], the applicant has a possessory interest, or the written consent of the person with the
26 possessory interest, in the property where the water is to be put to beneficial use.

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

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

30 (g) The ability of a discharge permit holder to satisfy effluent limitations of a permit issued in

1 accordance with Title 75, chapter 5, part 4, will not be adversely affected.

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

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

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

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

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

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

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

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

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

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

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

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

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

29 (6) The state of Montana has long recognized the importance of conserving its public waters and
30 the necessity to maintain adequate water supplies for the state's water requirements, including

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

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

10 (i) depending on the volume of water diverted or consumed, the applicable criteria and procedures
11 of subsection (2) or (4) 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 (b) In determining whether the appropriator has proved by clear and convincing evidence that the
16 requirements of subsections (6)(a)(ii) and (6)(a)(iii) will be met, the department and, if applicable, the
17 legislature shall consider the following 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 proposed change in appropriation might feasibly
20 be transported to alleviate 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 (c) When applying for a change in appropriation right to withdraw and transport water for use
26 outside the state, the applicant shall submit to and comply with the laws of the state of Montana governing
27 the appropriation and use of water.

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

1 85-2-309 prior to its approval or denial of the proposed change. The department shall provide notice and
2 may hold one or more hearings upon any other proposed change if it determines that ~~such~~ a change might
3 adversely affect the rights of other persons.

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

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

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

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

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

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

27 (14) The department may adopt rules to implement the provisions of this section. (Terminates June
28 30, 2005--sec. 6, Ch. 322, L. 1995.)

29 **85-2-402. (Effective July 1, 2005) Changes in appropriation rights.** (1) An appropriator may not
30 make a change in an appropriation right except, as permitted under this section, by applying for and

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

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

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

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

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

11 (d) ~~The~~ Except for an emergency use of ground water to benefit the fishery resource in accordance
12 with [section 1], the applicant has a possessory interest, or the written consent of the person with the
13 possessory interest, in the property where the water is to be put to beneficial use.

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

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

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

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

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

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

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

29 (i) the existing demands on the state water supply, as well as projected demands for water for
30 future beneficial purposes, including municipal water supplies, irrigation systems, and minimum streamflows

1 for the protection of existing water rights and aquatic life;

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

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

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

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

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

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

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

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

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

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

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

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

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

1 citizens of Montana.

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

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

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

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

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

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

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

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

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

29 (10) If a change is not completed as approved by the department or legislature or if the terms,
30 conditions, restrictions, and limitations of the change approval are not complied with, the department may,

1 after notice and opportunity for hearing, require the appropriator to show cause why the change approval
2 should not be modified or revoked. If the appropriator fails to show sufficient cause, the department may
3 modify or revoke the change approval.

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

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

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

14 (14) The department may adopt rules to implement the provisions of this section."
15

16 **Section 7.** Section 85-2-404, MCA, is amended to read:

17 **"85-2-404. (Temporary) Abandonment of appropriation right.** (1) If an appropriator ceases to use
18 all or a part of an appropriation right with the intention of wholly or partially abandoning the right or if the
19 appropriator ceases using the appropriation right according to its terms and conditions with the intention
20 of not complying with those terms and conditions, the appropriation right is, to that extent, considered
21 abandoned and ~~must~~ immediately ~~expire~~ expires.

22 (2) If an appropriator ceases to use all or part of an appropriation right or ceases using the
23 appropriation right according to its terms and conditions for a period of 10 successive years and there was
24 water available for use, there is a prima facie presumption that the appropriator has abandoned the right
25 in whole or for the part not used.

26 (3) If an appropriator ceases to use all or part of an appropriation right because the land to which
27 the water is applied to a beneficial use is contracted under a state or federal conservation set-aside
28 program:

29 (a) the set-aside and resulting reduction in use of the appropriation right does not represent an
30 intent by the appropriator to wholly or partially abandon the appropriation right or to not comply with the

1 terms and conditions attached to the right; and

2 (b) the period of nonuse that occurs for part or all of the appropriation right as a result of the
3 contract may not create or may not be added to any previous period of nonuse to create a prima facie
4 presumption of abandonment.

5 (4) The lease of an existing right pursuant to 85-2-436, the use of water pursuant to 85-2-439,
6 or a temporary change pursuant to 85-2-407 does not constitute an abandonment or serve as evidence that
7 could be used to establish an abandonment of all or any part of the right.

8 (5) The voluntary limited use or nonuse of an existing right to benefit the fishery resource during
9 periods of low flow does not constitute an abandonment or serve as evidence that could be used to
10 establish an abandonment of all or any part of the right.

11 ~~(5)(6)~~ Subsections (1) and (2) do not apply to existing rights until they have been determined in
12 accordance with part 2 of this chapter. (Terminates June 30, 1999--sec. 4, Ch. 740, L. 1991.)

13 **85-2-404. (Effective July 1, 1999) Abandonment of appropriation right.** (1) If an appropriator
14 ceases to use all or a part of an appropriation right with the intention of wholly or partially abandoning the
15 right or if the appropriator ceases using the appropriation right according to its terms and conditions with
16 the intention of not complying with those terms and conditions, the appropriation right is, to that extent,
17 considered abandoned and ~~must~~ immediately ~~expire~~ expires.

18 (2) If an appropriator ceases to use all or part of an appropriation right or ceases using the
19 appropriation right according to its terms and conditions for a period of 10 successive years and there was
20 water available for use, there is a prima facie presumption that the appropriator has abandoned the right
21 in whole or for the part not used.

22 (3) If an appropriator ceases to use all or part of an appropriation right because the land to which
23 the water is applied to a beneficial use is contracted under a state or federal conservation set-aside
24 program:

25 (a) the set-aside and resulting reduction in use of the appropriation right does not represent an
26 intent by the appropriator to wholly or partially abandon the appropriation right or to not comply with the
27 terms and conditions attached to the right; and

28 (b) the period of nonuse that occurs for part or all of the appropriation right as a result of the
29 contract may not create or may not be added to any previous period of nonuse to create a prima facie
30 presumption of abandonment.

1 (4) The use of water pursuant to 85-2-439 or a temporary change pursuant to 85-2-407 does not
 2 constitute an abandonment or serve as evidence that could be used to establish an abandonment of all or
 3 any part of the right.

4 (5) The voluntary limited use or nonuse of an existing right to benefit the fishery resource during
 5 periods of low flow does not constitute an abandonment or serve as evidence that could be used to
 6 establish an abandonment of all or any part of the right.

7 ~~(5)(6)~~ Subsections (1) and (2) do not apply to existing rights until they have been determined in
 8 accordance with part 2 of this chapter. (Terminates June 30, 2005--sec. 14, Ch. 487, L. 1995.)

9 **85-2-404. (Effective July 1, 2005) Abandonment of appropriation right.** (1) If an appropriator
 10 ceases to use all or a part of ~~his~~ an appropriation right with the intention of wholly or partially abandoning
 11 the right or if ~~he~~ the appropriator ceases using ~~his~~ the appropriation right according to its terms and
 12 conditions with the intention of not complying with those terms and conditions, the appropriation right ~~shall~~
 13 is, to that extent, be deemed considered abandoned and ~~shall~~ immediately ~~expire~~ expires.

14 (2) If an appropriator ceases to use all or part of ~~his~~ an appropriation right or ceases using ~~his~~ the
 15 appropriation right according to its terms and conditions for a period of 10 successive years and there was
 16 water available for his use, there ~~shall be~~ is a prima facie presumption that the appropriator has abandoned
 17 ~~his~~ the right in whole or for the part not used.

18 (3) If an appropriator ceases to use all or part of ~~his~~ an appropriation right because the land to
 19 which the water is applied to a beneficial use is contracted under a state or federal conservation set-aside
 20 program:

21 (a) the set-aside and resulting reduction in use of the appropriation right does not represent an
 22 intent by the appropriator to wholly or partially abandon the appropriation right or to not comply with the
 23 terms and conditions attached to the right; and

24 (b) the period of nonuse that occurs for part or all of the appropriation right as a result of the
 25 contract may not create or may not be added to any previous period of nonuse to create a prima facie
 26 presumption of abandonment.

27 (4) A temporary change pursuant to 85-2-407 does not constitute an abandonment or serve as
 28 evidence that could be used to establish an abandonment of all or any part of the right.

29 (5) The voluntary limited use or nonuse of an existing right to benefit the fishery resource in periods
 30 of low flow does not constitute an abandonment or serve as evidence that could be used to establish an

1 abandonment of all or any part of the right.

2 ~~(5)(6)~~ Subsections (1) and (2) do not apply to existing rights until they have been determined in
3 accordance with part 2 of this chapter."

4

5 **Section 8.** Section 85-2-437, MCA, is amended to read:

6 **"85-2-437. (Temporary) Department designation of eligible stream reaches.** (1) The department
7 of fish, wildlife, and parks, with the consent of the commission, may apply to the department for
8 designation of stream reaches for which water leasing to maintain or enhance streamflows pursuant to
9 85-2-436 may occur.

10 (2) The department may declare a stream reach eligible for leasing pursuant to 85-2-436 only if
11 it finds that water leasing is necessary to maintain or enhance streamflows for fisheries.

12 ~~(3) The department may designate no more than 20 stream reaches in the state where water~~
13 ~~leasing pursuant to 85-2-436 may occur. If the department of fish, wildlife, and parks determines that a~~
14 ~~water lease cannot be reasonably obtained on a designated stream reach, the department may remove the~~
15 ~~designation from that stream reach and designate another stream reach pursuant to this section.~~
16 (Terminates June 30, 1999--sec. 4, Ch. 740, L. 1991.)"

17

18 **NEW SECTION. Section 9. Codification instruction.** [Section 1] is intended to be codified as an
19 integral part of Title 85, chapter 2, part 3, and the provisions of Title 85, chapter 2, part 3, apply to
20 [section 1].

21

22 **NEW SECTION. Section 10. Retroactive applicability.** [This act] applies retroactively, within the
23 meaning of 1-2-109, to all existing legislative and administrative basin closures.

24

25 **NEW SECTION. Section 11. Effective date.** [This act] is effective on passage and approval.

26

-END-

STATE OF MONTANA - FISCAL NOTE

Fiscal Note for SB0363, as introduced

DESCRIPTION OF PROPOSED LEGISLATION:

An act allowing emergency ground water use to benefit the fishery resource; granting abandonment protection for voluntary nonuse of water; exempting emergency ground water use from the provisions of basin closures; revising the water leasing program.

ASSUMPTIONS:

1. The Department of Natural Resources and Conservation (DNRC) would receive 10 or less applications per year for provisional permits for emergency groundwater use for fisheries benefit.
2. Existing well owners may negotiate with fisheries interests for their groundwater right to be used for emergency instream use to benefit fisheries. This will require a change authorization under 85-2-402, MCA. Only a few of these situations would be anticipated with no significant fiscal impact.
3. Proposed amendatory language in 85-2-306, MCA, will require individual and public noticing for all stock permits which is not currently done.
4. Noticing would be required for an estimated 150 stock and fisheries permit applications per year. For each application, individual noticing postage costs are about \$8 and public noticing publication costs are about \$30. Additionally one person can process about 5 public notices per day at a daily cost of about \$100.
5. The current stock permit application fee is \$25 which would be inadequate to cover individual and public noticing costs. The fee would be raised by \$58 to \$83 to cover the increase in noticing costs.
6. Fee increase would be (150 permits x \$58) = \$8,700 per year.

FISCAL IMPACT:

	<u>FY98</u>	<u>FY99</u>
<u>Expenditures:</u>	<u>Difference</u>	<u>Difference</u>
Personal Services (30 person/days @ \$100/day)	\$3,000	\$3,000
Operating Expenses:		
Postage (\$8 x 150)	1,200	1,200
Publishing (\$30 x 150)	<u>4,500</u>	<u>4,500</u>
Total	\$8,700	\$8,700

Funding:

State Special Revenue (02)	\$8,700	\$8,700
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Revenues:

State Special Revenue (02)	\$8,700	\$8,700
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TECHNICAL NOTES:

1. It is not clear at what point an applicant needs to prove that the groundwater is not immediately or directly connected to surface water. If the proof is required up front with the application, developing the proof and preparing the associated report could be time consuming and counter to the emergency situation time frame. If the proof is not required until after the permit is issued, the permit may be for groundwater that is in fact immediately or directly connected to surface water.
2. The department currently issues stock permits under 85-2-306, MCA, without notices. Amendatory language to this section, "If, based on a valid objection filed under 85-2-308, MCA, pursuant to notice as required under 85-2-307, MCA," would require individual and public noticing for all stock-related as well as fisheries-related permits.

Dave Lewis 2-19-97
 DAVE LEWIS, BUDGET DIRECTOR DATE
 Office of Budget and Program Planning

LORENTS GROSFIELD, PRIMARY SPONSOR DATE

Fiscal Note for SB0363, as introduced

SB 363

1 SENATE BILL NO. 363

2 INTRODUCED BY GROSFIELD

3
4 A BILL FOR AN ACT ENTITLED: "AN ACT ALLOWING EMERGENCY GROUND WATER USE TO BENEFIT
5 THE FISHERY RESOURCE; GRANTING ABANDONMENT PROTECTION FOR VOLUNTARY NONUSE OF
6 WATER; EXEMPTING EMERGENCY GROUND WATER USE FROM THE PROVISIONS OF BASIN CLOSURES;
7 REVISING THE WATER LEASING PROGRAM; AMENDING SECTIONS 85-2-102, 85-2-306, 85-2-311,
8 85-2-319, 85-2-402, 85-2-404, AND 85-2-437, MCA, SECTION 11, CHAPTER 658, LAWS OF 1989, AND
9 SECTIONS 4 AND 7, CHAPTER 740, LAWS OF 1991; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE
10 AND A RETROACTIVE APPLICABILITY DATE."
11

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

13
14 NEW SECTION. Section 1. Emergency ground water use to benefit fishery resource -- limitations
15 -- criteria. In accordance with the provisions of 85-2-311 or 85-2-402, the department shall accept and
16 process an application for a permit to appropriate ground water for emergency instream use to benefit the
17 fishery resource if the ground water to be used is not immediately or directly connected to surface water.
18

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

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

22 (1) "Appropriate" means to:

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

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

25 (c) in the case of the department of fish, wildlife, and parks, lease water in accordance with
26 85-2-436; ~~or~~

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

29 (e) use ground water to benefit the fishery resource in accordance with [section 1].

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

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

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

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

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

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

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

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

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

18 (7) "Declaration" means the declaration of an existing right filed with the department under section
19 8, Chapter 452, Laws of 1973.

20 (8) "Department" means the department of natural resources and conservation provided for in Title
21 2, chapter 15, part 33.

22 (9) "Existing right" means a right to the use of water that would be protected under the law as it
23 existed prior to July 1, 1973.

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

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

27 (12) "Permit" means the permit to appropriate issued by the department under 85-2-301 through
28 85-2-303 and 85-2-306 through 85-2-314.

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

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

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

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

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

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

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

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

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

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

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

22 **85-2-102. (Effective July 1, 1999) Definitions.** Unless the context requires otherwise, in this
 23 chapter, the following definitions apply:

24 (1) "Appropriate" means:

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

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

27 (c) in the Upper Clark Fork River basin, to maintain and enhance streamflows to benefit the fishery
 28 resource in accordance with 85-2-439; or

29 (d) to use ground water to benefit the fishery resource in accordance with [section 1].

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

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

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

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

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

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

19 (8) "Existing right" means a right to the use of water that would be protected under the law as it
20 existed prior to July 1, 1973.

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

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

24 (11) "Permit" means the permit to appropriate issued by the department under 85-2-301 through
25 85-2-303 and 85-2-306 through 85-2-314.

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

28 (13) "Political subdivision" means any county, incorporated city or town, public corporation, or
29 district created pursuant to state law or other public body of the state empowered to appropriate water.

30 The term does not mean a private corporation, association, or group.

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

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

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

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

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

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

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

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

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

19 **85-2-102. (Effective July 1, 2005) Definitions.** Unless the context requires otherwise, in this
20 chapter, the 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, ~~to~~ reserve water in accordance with 85-2-316; ~~or~~

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

26 (d) use ground water to benefit the fishery resource in accordance with [section 1].

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

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

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

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

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

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

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

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

12 (7) "Declaration" means the declaration of an existing right filed with the department under section
13 8, Chapter 452, Laws of 1973.

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

16 (9) "Existing right" means a right to the use of water that would be protected under the law as it
17 existed prior to July 1, 1973.

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

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

21 (12) "Permit" means the permit to appropriate issued by the department under 85-2-301 through
22 85-2-303 and 85-2-306 through 85-2-314.

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

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

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

30 (16) "Substantial credible information" means probable, believable facts sufficient to support a

1 reasonable legal theory upon which the department should proceed with the action requested by the person
2 providing the information.

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

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

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

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

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

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

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

16

17 **Section 3.** Section 85-2-306, MCA, is amended to read:

18 **"85-2-306. Exceptions to permit requirements.** (1) ~~Ground~~ Except for emergency use of ground
19 water to benefit the fishery resource in accordance with [section 1], ground water may be appropriated only
20 by a person who has a possessory interest in the property where the water is to be put to beneficial use
21 and exclusive property rights in the ground water development works or, if another person has rights in the
22 ground water development works, with the written consent of the person with those property rights.
23 Outside the boundaries of a controlled ground water area, a permit is not required before appropriating
24 ground water by means of a well or developed spring with a maximum appropriation of 35 gallons per
25 minute or less, not to exceed 10 acre-feet per year, except that a combined appropriation from the same
26 source from two or more wells or developed springs exceeding this limitation requires a permit. Within 60
27 days of completion of the well or developed spring and appropriation of the ground water for beneficial use,
28 the appropriator shall file a notice of completion with the department on a form provided by the department
29 at its offices and at the offices of the county clerk and recorders. Upon receipt of the notice, the
30 department shall review the notice and may, before issuing a certificate of water right, return a defective

1 notice for correction or completion, together with the reasons for returning it. A notice does not lose priority
 2 of filing because of defects if the notice is corrected, completed, and refiled with the department within 30
 3 days or within a further time as the department may allow, not to exceed 6 months. If a notice is not
 4 corrected and completed within the time allowed, the priority date of appropriation is the date of refiled
 5 a correct and complete notice with the department. A certificate of water right may not be issued until a
 6 correct and complete notice has been filed with the department. The original of the certificate must be sent
 7 to the appropriator. The department shall keep a copy of the certificate in its office in Helena. The date of
 8 filing of the notice of completion is the date of priority of the right.

9 (2) An appropriator of ground water by means of a well or developed spring first put to beneficial
 10 use between January 1, 1962, and July 1, 1973, who did not file a notice of completion, as required by
 11 laws in force prior to April 14, 1981, with the county clerk and recorder shall file a notice of completion,
 12 as provided in subsection (1), with the department to perfect the water right. The filing of a claim pursuant
 13 to 85-2-221 is sufficient notice of completion under this subsection. The priority date of the appropriation
 14 is the date of the filing of a notice as provided in subsection (1) of this section or the date of the filing of
 15 the claim of existing water right. An appropriation under this subsection is an existing right, and a permit
 16 is not required; ~~however~~ However, the department shall acknowledge the receipt of a correct and complete
 17 filing of a notice of completion, except that for an appropriation of 35 gallons per minute or less, not to
 18 exceed 10 acre-feet per year, the department shall issue a certificate of water right. If a certificate is issued
 19 under this section, a certificate need not be issued under the adjudication proceedings provided for in
 20 85-2-236.

21 (3) ~~A (a) Subject to the provisions of subsection (3)(c), a~~ A permit is not required before
 22 constructing an impoundment or pit and appropriating water for use by livestock if:

23 (i) the maximum capacity of the impoundment or pit is less than 15 acre-feet; ~~and~~

24 (ii) the appropriation is less than 30 acre-feet per year and is from a source other than a perennial
 25 flowing stream; and

26 (iii) the impoundment or pit is to be constructed on and will be accessible to a parcel of land that
 27 is owned or under the control of the applicant and that is 40 acres or larger. As used in this subsection (3),
 28 "perennial flowing stream" means a stream that historically has flowed continuously during all seasons of
 29 the year, during dry as well as wet years.

30 (b) ~~Subject to the provisions of subsection (3)(c),~~ (3)(D), a permit is not required prior to an

1 emergency ground water use to benefit the fishery resource in accordance with [section 1].

2 ~~(c) However, within~~ Within 60 days after constructing the impoundment or pit under subsection
 3 ~~(3)(a) or using ground water in accordance with [section 1],~~ the appropriator shall apply for a permit as
 4 prescribed by this part. Upon receipt of a correct and complete application for a stockwater provisional
 5 permit ~~or an application for emergency ground water use to benefit the fishery resource in accordance with~~
 6 ~~[section 1],~~ the department shall ~~then~~ automatically issue a provisional permit. ~~If, based on a valid objection~~
 7 ~~filed under 85-2-308 pursuant to notice as required under 85-2-307,~~ the department determines after a
 8 hearing that the rights of other appropriators have been or will be adversely affected, it may revoke the
 9 permit or require the permittee to modify the impoundment or pit ~~or emergency ground water use~~ and may
 10 ~~then~~ make the permit subject to terms, conditions, restrictions, or limitations that it considers necessary
 11 to protect the rights of other appropriators.

12 (D) WITHIN 60 DAYS AFTER APPROPRIATING GROUND WATER IN ACCORDANCE WITH
 13 [SECTION 1], THE APPROPRIATOR SHALL APPLY FOR A PERMIT AS PRESCRIBED BY THIS PART. UPON
 14 RECEIPT OF A CORRECT AND COMPLETE APPLICATION FOR EMERGENCY GROUND WATER USE TO
 15 BENEFIT THE FISHERY RESOURCE, THE DEPARTMENT SHALL AUTOMATICALLY ISSUE A PROVISIONAL
 16 PERMIT. IF, BASED UPON A VALID OBJECTION FILED UNDER 85-2-308 PURSUANT TO THE NOTICE
 17 REQUIRED UNDER 85-2-307, THE DEPARTMENT DETERMINES THAT THE RIGHTS OF OTHER
 18 APPROPRIATORS HAVE BEEN OR WILL BE ADVERSELY AFFECTED, THE DEPARTMENT MAY REVOKE THE
 19 PERMIT OR REQUIRE THE PERMITTEE TO MODIFY THE EMERGENCY GROUND WATER USE AND MAY
 20 MAKE THE PERMIT SUBJECT TO TERMS, CONDITIONS, RESTRICTIONS, OR LIMITATIONS THAT THE
 21 DEPARTMENT CONSIDERS NECESSARY TO PROTECT THE RIGHTS OF OTHER APPROPRIATORS.

22 (4) A person may also appropriate water without applying for or prior to receiving a permit under
 23 rules adopted by the department under 85-2-113."
 24

25 **Section 4.** Section 85-2-311, MCA, is amended to read:

26 **"85-2-311. Criteria for issuance of permit.** (1) Except as provided in subsections (3) and (4), the
 27 department shall issue a permit if the applicant proves by a preponderance of evidence that the following
 28 criteria are met:

29 (a) there are unappropriated waters in the source of supply at the proposed point of diversion:

30 (i) at times when the water can be put to the use proposed by the applicant:

- 1 (ii) in the amount that the applicant seeks to appropriate; and
- 2 (iii) during the period in which the applicant seeks to appropriate, in the amount requested and that
- 3 is reasonably available;
- 4 (b) the water rights of a prior appropriator will not be adversely affected;
- 5 (c) the proposed means of diversion, construction, and operation of the appropriation works are
- 6 adequate;
- 7 (d) the proposed use of water is a beneficial use;
- 8 (e) the proposed use will not interfere unreasonably with other planned uses or developments for
- 9 which a permit has been issued or for which water has been reserved;
- 10 (f) ~~except for appropriations in accordance with [section 1],~~ the applicant has a possessory interest,
- 11 or the written consent of the person with the possessory interest, in the property where the water is to be
- 12 put to beneficial use, OR FOR APPROPRIATIONS IN ACCORDANCE WITH [SECTION 1], THE APPLICANT
- 13 HAS A POSSESSORY INTEREST OR WRITTEN CONSENT OF THE PERSON WITH A POSSESSORY
- 14 INTEREST IN THE PROPERTY WHERE THE GROUND WATER IS TO BE DEVELOPED;
- 15 (g) the water quality of a prior appropriator will not be adversely affected;
- 16 (h) the proposed use will be substantially in accordance with the classification of water set for the
- 17 source of supply pursuant to 75-5-301(1); and
- 18 (i) the ability of a discharge permitholder to satisfy effluent limitations of a permit issued in
- 19 accordance with Title 75, chapter 5, part 4, will not be adversely affected.
- 20 (2) The applicant is required to prove that the criteria in subsections (1)(g) through (1)(i) have been
- 21 met only if a valid objection is filed. A valid objection must contain substantial credible information
- 22 establishing to the satisfaction of the department that the criteria in subsection (1)(g), (1)(h), or (1)(i), as
- 23 applicable, may not be met. For the criteria set forth in subsection (1)(h), only the department of
- 24 environmental quality or a local water quality district established under Title 7, chapter 13, part 45, may
- 25 file a valid objection.
- 26 (3) The department may not issue a permit for an appropriation of 4,000 or more acre-feet of water
- 27 a year and 5.5 or more cubic feet per second of water unless the applicant proves by clear and convincing
- 28 evidence that:
- 29 (a) the criteria in subsection (1) are met;
- 30 (b) the rights of a prior appropriator will not be adversely affected;

1 (c) the proposed appropriation is a reasonable use. A finding must be based on a consideration of
2 the following:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

23 (7) The department may adopt rules to implement the provisions of this section."
24

25 **Section 5.** Section 85-2-319, MCA, is amended to read:

26 **"85-2-319. Permit action in highly appropriated basins or subbasins -- exceptions.** (1) With regard
27 to a highly appropriated basin or subbasin, the legislature may by law preclude permit applications or the
28 department may by rule reject permit applications or modify or condition permits already issued.

29 (2) A rule may be adopted under this section only upon a petition that is signed by at least 25%
30 or 10, whichever is less, of the users of water in the source of supply within a basin or subbasin or upon

1 petition of the department of environmental quality that alleges facts under subsection (2)(d). The petition
2 must be in a form prescribed by the department and must allege facts showing that throughout or at certain
3 times of the year or for certain beneficial uses:

4 (a) there are no unappropriated waters in the source of supply;
5 (b) the rights of prior appropriators will be adversely affected;
6 (c) further uses will interfere unreasonably with other planned uses or developments for which a
7 permit has been issued or for which water has been reserved; or

8 (d) in the case of a petition filed by the department of environmental quality:
9 (i) the water quality of an appropriator will be adversely affected by the issuance of permits;
10 (ii) further use will not be substantially in accordance with the classification of water set for the
11 source of supply pursuant to 75-5-301(1); or

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

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

15 (a) deny the petition in writing, stating its reasons for denial;
16 (b) inform the petitioners that the department shall study the allegations further before denying or
17 proceeding further with the petition; or
18 (c) initiate rulemaking proceedings in accordance with 2-4-302 through 2-4-305.

19 (4) Title 2, chapter 4, parts 1 through 4, govern rulemaking proceedings conducted under this
20 section, except that in addition to the notice requirements of those parts, the department notice of the
21 rulemaking hearing must be published at least once in each week for 3 successive weeks, not less than 30
22 days before the date of the hearing, in a newspaper of general circulation in the county or counties in which
23 the source is located. The department shall serve by mail a copy of the notice, not less than 30 days before
24 the hearing, upon each person or public agency known from the examination of the records of the
25 department to be a claimant, appropriator, or permit holder of water in the source.

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

27 (6) Permit applications for the emergency use of ground water to benefit the fishery resource under
28 [section 1] are not subject to the provisions of this section unless the law or rule adopted pursuant to
29 subsection (1) specifically provides that a permit may not be issued under [section 1]."

30

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

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

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

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

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

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

16 (d) Except for a lease authorization pursuant to 85-2-436, ~~or~~ a temporary change authorization
17 pursuant to 85-2-408 for instream flow to benefit the fishery resource, or an emergency use of ground
18 water to benefit the fishery resource in accordance with [section 1], the applicant has a possessory
19 interest, or the written consent of the person with the possessory interest, in the property where the water
20 is to be put to beneficial use. FOR CHANGE AUTHORIZATIONS INVOLVING APPROPRIATIONS UNDER
21 [SECTION 1], THE APPLICANT MUST HAVE A POSSESSORY INTEREST, OR THE WRITTEN CONSENT OF
22 THE PERSON WITH POSSESSORY INTEREST, IN THE PROPERTY WHERE THE GROUND WATER
23 DEVELOPMENT IS LOCATED.

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

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

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

29 (3) The applicant is required to prove that the criteria in subsections (2)(f) and (2)(g) have been met
30 only if a valid objection is filed. A valid objection must contain substantial credible information establishing

1 to the satisfaction of the department that the criteria in subsection (2)(f) or (2)(g), as applicable, may not
2 be met.

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

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

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

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

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

13 (iii) the effects on the quantity and quality of water for existing uses in the source of 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 (5) The department may not approve a change in purpose of use or place of use for a diversion that
20 results in 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water being
21 consumed unless:

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

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

26 (6) The state of Montana has long recognized the importance of conserving its public waters and
27 the necessity to maintain adequate water supplies for the state's water requirements, including
28 requirements for reserved water rights held by the United States for federal reserved lands and in trust for
29 the various Indian tribes within the state's boundaries. Although the state of Montana also recognizes that,
30 under appropriate conditions, the out-of-state transportation and use of its public waters are not in conflict

1 with the public welfare of its citizens or the conservation of its waters, the following criteria must be met
2 before out-of-state use may occur:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

24 (14) The department may adopt rules to implement the provisions of this section. (Terminates June
25 30, 1999--sec. 4, Ch. 740, L. 1991.)

26 **85-2-402. (Effective July 1, 1999) Changes in appropriation rights.** (1) An appropriator may not
27 make a change in an appropriation right except, as permitted under this section, by applying for and
28 receiving the approval of the department or, if applicable, of the legislature. An applicant shall submit a
29 correct and complete application.

30 (2) Except as provided in subsections (4) through (6), the department shall approve a change in

1 appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are
2 met:

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

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

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

9 (d) Except for a temporary change authorization pursuant to 85-2-408 for instream flow to benefit
10 the fishery resource, or an emergency use of ground water to benefit the fishery resource in accordance
11 with [section 1], the applicant has a possessory interest, or the written consent of the person with the
12 possessory interest, in the property where the water is to be put to beneficial use. FOR CHANGE
13 AUTHORIZATIONS INVOLVING APPROPRIATIONS UNDER [SECTION 1], THE APPLICANT MUST HAVE
14 A POSSESSORY INTEREST, OR THE WRITTEN CONSENT OF THE PERSON WITH POSSESSORY INTEREST,
15 IN THE PROPERTY WHERE THE GROUND WATER DEVELOPMENT IS LOCATED.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

16 (14) The department may adopt rules to implement the provisions of this section. (Terminates June
17 30, 2005--sec. 6, Ch. 322, L. 1995.)

18 **85-2-402. (Effective July 1, 2005) Changes in appropriation rights.** (1) An appropriator may not
19 make a change in an appropriation right except, as permitted under this section, by applying for and
20 receiving the approval of the department or, if applicable, of the legislature. An applicant shall submit a
21 correct and complete application.

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

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

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

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

30 (d) ~~The~~ Except for an emergency use of ground water to benefit the fishery resource in accordance

1 with [section 1], 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. FOR CHANGE
3 AUTHORIZATIONS INVOLVING APPROPRIATIONS UNDER [SECTION 1], THE APPLICANT MUST HAVE
4 A POSSESSORY INTEREST, OR THE WRITTEN CONSENT OF THE PERSON WITH POSSESSORY INTEREST,
5 IN THE PROPERTY WHERE THE GROUND WATER DEVELOPMENT IS LOCATED.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 intends to use the water; and

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

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

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

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

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

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

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

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

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

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

8 **Section 7.** Section 85-2-404, MCA, is amended to read:

9 **"85-2-404. (Temporary) Abandonment of appropriation right.** (1) If an appropriator ceases to use
10 all or a part of an appropriation right with the intention of wholly or partially abandoning the right or if the
11 appropriator ceases using the appropriation right according to its terms and conditions with the intention
12 of not complying with those terms and conditions, the appropriation right is, to that extent, considered
13 abandoned and ~~must~~ immediately ~~expire~~ expires.

14 (2) If an appropriator ceases to use all or part of an appropriation right or ceases using the
15 appropriation right according to its terms and conditions for a period of 10 successive years and there was
16 water available for use, there is a prima facie presumption that the appropriator has abandoned the right
17 in whole or for the part not used.

18 (3) If an appropriator ceases to use all or part of an appropriation right because the land to which
19 the water is applied to a beneficial use is contracted under a state or federal conservation set-aside
20 program:

21 (a) the set-aside and resulting reduction in use of the appropriation right does not represent an
22 intent by the appropriator to wholly or partially abandon the appropriation right or to not comply with the
23 terms and conditions attached to the right; and

24 (b) the period of nonuse that occurs for part or all of the appropriation right as a result of the
25 contract may not create or may not be added to any previous period of nonuse to create a prima facie
26 presumption of abandonment.

27 (4) The lease of an existing right pursuant to 85-2-436, the use of water pursuant to 85-2-439,
28 or a temporary change pursuant to 85-2-407 does not constitute an abandonment or serve as evidence that
29 could be used to establish an abandonment of all or any part of the right.

30 (5) The voluntary limited use or nonuse of an existing right to benefit the fishery resource during

1 periods of low flow LOW-FLOW EMERGENCY CONDITIONS FOR THE FISHERY RESOURCE does not
 2 constitute an abandonment or serve as evidence that could be used to establish an abandonment of all or
 3 any part of the right.

4 ~~(5)~~(6) Subsections (1) and (2) do not apply to existing rights until they have been determined in
 5 accordance with part 2 of this chapter. (Terminates June 30, 1999--sec. 4, Ch. 740, L. 1991.)

6 **85-2-404. (Effective July 1, 1999) Abandonment of appropriation right.** (1) If an appropriator
 7 ceases to use all or a part of an appropriation right with the intention of wholly or partially abandoning the
 8 right or if the appropriator ceases using the appropriation right according to its terms and conditions with
 9 the intention of not complying with those terms and conditions, the appropriation right is, to that extent,
 10 considered abandoned and ~~must~~ immediately ~~expire~~ expires.

11 (2) If an appropriator ceases to use all or part of an appropriation right or ceases using the
 12 appropriation right according to its terms and conditions for a period of 10 successive years and there was
 13 water available for use, there is a prima facie presumption that the appropriator has abandoned the right
 14 in whole or for the part not used.

15 (3) If an appropriator ceases to use all or part of an appropriation right because the land to which
 16 the water is applied to a beneficial use is contracted under a state or federal conservation set-aside
 17 program:

18 (a) the set-aside and resulting reduction in use of the appropriation right does not represent an
 19 intent by the appropriator to wholly or partially abandon the appropriation right or to not comply with the
 20 terms and conditions attached to the right; and

21 (b) the period of nonuse that occurs for part or all of the appropriation right as a result of the
 22 contract may not create or may not be added to any previous period of nonuse to create a prima facie
 23 presumption of abandonment.

24 (4) The use of water pursuant to 85-2-439 or a temporary change pursuant to 85-2-407 does not
 25 constitute an abandonment or serve as evidence that could be used to establish an abandonment of all or
 26 any part of the right.

27 (5) The voluntary limited use or nonuse of an existing right to benefit the fishery resource during
 28 periods of low flow LOW-FLOW EMERGENCY CONDITIONS FOR THE FISHERY RESOURCE does not
 29 constitute an abandonment or serve as evidence that could be used to establish an abandonment of all or
 30 any part of the right.

1 ~~(5)(6)~~ Subsections (1) and (2) do not apply to existing rights until they have been determined in
 2 accordance with part 2 of this chapter. (Terminates June 30, 2005--sec. 14, Ch. 487, L. 1995.)

3 **85-2-404. (Effective July 1, 2005) Abandonment of appropriation right.** (1) If an appropriator
 4 ceases to use all or a part of ~~his~~ an appropriation right with the intention of wholly or partially abandoning
 5 the right or if ~~he~~ the appropriator ceases using ~~his~~ the appropriation right according to its terms and
 6 conditions with the intention of not complying with those terms and conditions, the appropriation right ~~shall~~
 7 is, to that extent, ~~be deemed~~ considered abandoned and ~~shall~~ immediately ~~expire~~ expires.

8 (2) If an appropriator ceases to use all or part of ~~his~~ an appropriation right or ceases using ~~his~~ the
 9 appropriation right according to its terms and conditions for a period of 10 successive years and there was
 10 water available for his use, there ~~shall be~~ is a prima facie presumption that the appropriator has abandoned
 11 ~~his~~ the right in whole or for the part not used.

12 (3) If an appropriator ceases to use all or part of ~~his~~ an appropriation right because the land to
 13 which the water is applied to a beneficial use is contracted under a state or federal conservation set-aside
 14 program:

15 (a) the set-aside and resulting reduction in use of the appropriation right does not represent an
 16 intent by the appropriator to wholly or partially abandon the appropriation right or to not comply with the
 17 terms and conditions attached to the right; and

18 (b) the period of nonuse that occurs for part or all of the appropriation right as a result of the
 19 contract may not create or may not be added to any previous period of nonuse to create a prima facie
 20 presumption of abandonment.

21 (4) A temporary change pursuant to 85-2-407 does not constitute an abandonment or serve as
 22 evidence that could be used to establish an abandonment of all or any part of the right.

23 (5) The voluntary limited use or nonuse of an existing right to benefit the fishery resource in periods
 24 of low flow does not constitute an abandonment or serve as evidence that could be used to establish an
 25 abandonment of all or any part of the right.

26 ~~(5)(6)~~ Subsections (1) and (2) do not apply to existing rights until they have been determined in
 27 accordance with part 2 of this chapter."

28
 29 **Section 8.** Section 85-2-437, MCA, is amended to read:

30 **"85-2-437. (Temporary) Department designation DECLARATION of eligible stream reaches. (4)**

1 ~~The department of fish, wildlife, and parks, with the consent of the commission, may apply to the~~
 2 ~~department for designation of stream reaches for which water leasing to maintain or enhance streamflows~~
 3 ~~pursuant to 85-2-436 may occur.~~

4 ~~(2)~~ The department OF FISH, WILDLIFE, AND PARKS may declare a stream reach eligible for
 5 leasing pursuant to 85-2-436 only if it finds that water leasing is necessary to maintain or enhance
 6 streamflows for fisheries.

7 ~~(3)~~ ~~The department may designate no more than 20 stream reaches in the state where water~~
 8 ~~leasing pursuant to 85-2-436 may occur. If the department of fish, wildlife, and parks determines that a~~
 9 ~~water lease cannot be reasonably obtained on a designated stream reach, the department may remove the~~
 10 ~~designation from that stream reach and designate another stream reach pursuant to this section.~~
 11 ~~(Terminates June 30, 1999 sec. 4, Ch. 740, L. 1991.)"~~

12

13 **SECTION 9. SECTION 11, CHAPTER 658, LAWS OF 1989, IS AMENDED TO READ:**

14 "Section 11. **Termination.** ~~[This act] terminates~~ [Sections 1 through 3 and 5 through 11] terminate
 15 June 30, ~~1993~~ 1999."

16

17 **SECTION 10. SECTION 4, CHAPTER 740, LAWS OF 1991, IS AMENDED TO READ:**

18 "Section 4. Section 11, Chapter 658, Laws of 1989, is amended to read:

19 "Section 11. **Termination.** ~~[This act] terminates~~ [Sections 1 through 3 and 5 through 11] terminate
 20 June 30, ~~1993~~ 1999."

21

22 **SECTION 11. SECTION 7, CHAPTER 740, LAWS OF 1991, IS AMENDED TO READ:**

23 "Section 7. **Termination.** ~~[This act] terminates~~ [Sections 1 and 3 through 8] terminate June 30,
 24 1999."

25

26 **NEW SECTION. Section 12. Codification instruction.** [Section 1] is intended to be codified as an
 27 integral part of Title 85, chapter 2, part 3, and the provisions of Title 85, chapter 2, part 3, apply to
 28 [section 1].

29

30 **NEW SECTION. Section 13. Retroactive applicability.** [This act] applies retroactively, within the

1 meaning of 1-2-109, to all existing legislative and administrative basin closures.

2

3 NEW SECTION. **Section 14. Effective date.** [This act] is effective on passage and approval.

4

-END-