

BILL NO _____

INTRODUCED BY _____

BY REQUEST OF _____

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING THE MONTANA WATER USE ACT REGARDING APPROPRIATIONS EXEMPT FROM THE PERMITTING PROCESS; PROVIDING FOR THE DESIGNATION OF CONTROLLED GROUND WATER AREAS FOR WATER QUANTITY; PROVIDING FOR THE DESIGNATION OF TEMPORARY GROUND WATER MONITORING AREAS FOR WATER QUANTITY; PROVIDING FOR RULEMAKING; _____; _____; AMENDING SECTIONS; AND PROVIDING FOR AN EFFECTIVE DATE."

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

WHEREAS,

Section 1. Section 85-2-113, MCA, is amended to read;

85-2-113. Department powers and duties. (1) The department may prescribe fees or service charges for any public service rendered by the department under this chapter, including fees for the filing of applications or for the issuance of permits and certificates, for rulemaking hearings under 85-2-319, for administrative hearings conducted under this chapter, for investigations concerning permit revocation, for field verification of issued and completed permits, and for all change approvals. There may not be fees for any action taken by the department at the request of the water judge or for the issuance of certificates of existing rights.

(2) The department may adopt rules necessary to implement and carry out the purposes and provisions of this chapter. These rules may include but are not limited to rules to:

(a) govern the issuance and terms of interim permits authorizing an applicant for a regular permit under this chapter to begin appropriating water immediately, pending final approval or denial by the department of the application for a regular permit;

(b) require the owner or operator of appropriation facilities to install and maintain suitable controlling and measuring devices and report data, ~~except that the department may not require a meter on a water well outside of a controlled ground water area or proposed controlled ground water area unless the maximum appropriation of the well is in excess of the limitation contained in 85-2-306;~~

(c) require the owner or operator of appropriation facilities to report to the department the readings of measuring devices at reasonable intervals and to file reports on appropriations; and

(d) regulate the construction, use, and sealing of wells to prevent the waste, contamination, or pollution of ground water.

Commented [PSA1]: Background: Allows measurement for green subdivisions

(3) The department shall adopt rules providing for and governing temporary emergency appropriations, including for emergency fire training and emergency fire-related operations, without prior application for a permit, necessary to protect lives or property.

(4) (a) The department shall adopt rules to require the owner or operator of an appropriation facility on a watercourse or portions of a watercourse identified as chronically dewatered by the department under 85-2-150 to acquire, install, and maintain a suitable controlling and measuring device no later than 2 years after designation of the watercourse or portions of the watercourse as chronically dewatered, except that when the department specifically finds that the installation of measuring devices along the entire watercourse or portions of the watercourse is not practicable within the 2-year deadline, it may establish a later deadline.

(b) For the purposes of subsection (4), an appropriation facility includes but is not limited to any method used to divert, impound, or withdraw water from a watercourse. Hydroelectric facilities that are using recognized methods of flow measurement, as determined by the department, are in compliance with subsection (4).

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

85-2-306. Exceptions to permit requirements. (1) (a) Except as provided in subsection (1)(b), ground water may be appropriated only by a person who has a possessory interest in the property where the water is to be put to beneficial use and exclusive property rights in the ground water development works.

(b) If another person has rights in the ground water development works, water may be appropriated with the written consent of the person with those property rights or, if the ground water development works are on national forest system lands, with any prior written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the certificate.

(c) If the person does not have a possessory interest in the real property from which the ground water may be appropriated, the person shall provide to the owner of the real property written notification of the works and the person's intent to appropriate ground water from the works. The written notification must be provided to the landowner at least 30 days prior to constructing any associated works or, if no new or expanded works are proposed, 30 days prior to appropriating the water. The written notification under this subsection is a notice requirement only and does not create an easement in or over the real property where the ground water development works are located.

(2) Inside the boundaries of a controlled ground water area, ground water may be appropriated only:

(a) according to a permit received pursuant to 85-2-508; or

(b) according to the requirements of a rule promulgated pursuant to 85-2-506;

(3) When the appropriation is within the Rye Creek Stream Depletion Zone - Ravalli Count is 20 gallons per minute or less, and does not exceed 2 acre-feet a year, except that a combined appropriation from the same source by two or more wells or developed springs exceeding this limitation requires a permit.

(3)(4) (a) Outside the boundaries of a controlled ground water area, a permit is not required before appropriating ground water by means of a well or developed spring:

(i) when the appropriation is made by a local governmental fire agency organized under Title 7, chapter 33, and the appropriation is used only for emergency fire protection, emergency fire training, and emergency fire-related operations, which may include enclosed storage;

(ii) when a maximum appropriation of 350 gallons a minute or less is used in nonconsumptive geothermal heating or cooling exchange applications, all of the water extracted is returned without delay to the same source aquifer, and the distance between the extraction well and both the nearest existing well and the hydraulically connected surface waters is more than twice the distance between the extraction well and the injection well;

(iii) when the appropriation is ~~outside a stream depletion zone~~, is 35 gallons a minute or less, and does not exceed 10 acre-feet a year, except that a combined appropriation from the same source by two or more wells or developed springs exceeding 10 acre-feet, regardless of the flow rate, requires a permit. ~~or~~ When evaluating combined appropriations under this subsections (3), the department will consider the following factors:

- (i) physically manifold water system;
- (ii) purpose(s) of use;
- (iii) place of use;
- (iv) tract information;
- (v) ownership;
- (vi) proximity of wells; and
- (vii) topography.

~~(iv) when the appropriation is within a stream depletion zone, is 20 gallons per minute or less, and does not exceed 2 acre feet a year, except that a combined appropriation from the same source by two or more wells or developed springs exceeding this limitation requires a permit.; or~~

(iv) when the appropriation is 35 gallons a minute or less, for a parcel of land proposed to be divided pursuant to Title 76, chapter 3, and chapter 4 as applicable, a combined appropriation exceeding conditions below, requires a permit. All water use under this part must be measured and reported annually to the department. The volume in a predetermination letter under ARM 17.36.103(n) and (o) from the department will be recognized for parcels created after 10/17/2014 that received a certificate of subdivision approval through the department of environmental quality. The lots and volume recognized and allocated in a predetermination letter will carry forward and count against the maximum amongst limitations in (B) and (C).

- (A) The parcel that has been divided or is being divided pursuant to Title 76, chapter 3, and chapter 4 as applicable is a tract of record as defined in 76-3-103(17)(a) in existence on or before October 17, 2014/ February 14, 2024;
- (B) That is divided pursuant to Title 76, chapter 3, and chapter 4 as applicable to cumulatively create range: 12/20/24/30 lots or less from that original tract of record;
- (C) Where each lot is allowed up to 0.5 acre-feet per acre of water use but no more than 1 acre-foot per lot; and

Commented [AP2]: Background: path 1 (not subdividing land)

Commented [AP3]: Background: path 2, subdividing

Commented [NW4]: Background: family transfers, court ordered splits, and other exemptions are counted as division of land; fall under (c)

(b) (i) Within 60 days of completion of the well or developed spring and appropriation of the ground water for beneficial use, the appropriator shall file a notice of completion with the department on a form provided by the department through its offices.

(ii) Upon receipt of the notice, the department shall review the notice and may, before issuing a certificate of water right, return a defective notice for correction or completion, together with the reasons for returning it. A notice does not lose priority of filing because of defects if the notice is corrected, completed, and refiled with the department within 30 days of notification of defects or within a further time as the department may allow, not to exceed 6 months.

(iii) If a notice is not corrected and completed within the time allowed, the priority date of appropriation is the date of refiled a correct and complete notice with the department.

(c) A certificate of water right may not be issued until a correct and complete notice has been filed with the department, including proof of landowner notification or a written federal special use authorization as necessary under subsection (1). The original of the certificate must be sent to the appropriator. The department shall keep a copy of the certificate in its office in Helena. The date of filing of the notice of completion is the date of priority of the right.

(d) (i) Construction of a water supply system subject to Title 75, chapter 6, part 1, and use of a permit exception for the appropriation of water pursuant to this section is proof of beneficial use.

(ii) The department shall allocate a volume of 10 acre-feet a year to the system and issue a certificate of water right after the conditions in subsection (3)(d)(i) are met.

(iii) The department shall consider a water right as perfected after the conditions in subsection (3)(d)(i) are met.

(iv) When the appropriation is for a water supply system that is subject to Title 75, chapter 6, part 1, and is located outside of a stream depletion zone and does not exceed 10 acre-feet a year:

(A) For the purposes of subsection (3)(b)(i), the appropriation will be considered perfected upon completion of construction of the water supply system.

(B) A copy of the department of environmental quality approval for the water supply system must be submitted with the notice of completion. This section does not preclude the public water supply developer or any subsequent owners from expanding the water system or from revising the water use restrictions within the subdivision, provided that the total amount does not exceed 10 acre-feet per year.

(C) Water appropriated under this exception must be measured and reported annually to the department.

(4) An appropriator of ground water by means of a well or developed spring first put to beneficial use between January 1, 1962, and July 1, 1973, who did not file a notice of completion, as required by laws in force prior to April 14, 1981, with the county clerk and recorder shall file a notice of completion, as provided in subsection (3), with the department to perfect the water right. The filing of a claim pursuant to 85-2-221 is sufficient notice of completion under this subsection. The priority date of the appropriation is the date of the filing of a notice, as provided in subsection (3), or the date of the filing of the claim of existing water right.

(5) An appropriation under subsection (4) is an existing right, and a permit is not required. However, the department shall acknowledge the receipt of a correct and complete filing of a notice of completion,

except that for an appropriation of 35 gallons a minute or less, not to exceed 10 acre-feet a year, the department shall issue a certificate of water right. If a certificate is issued under this section, a certificate need not be issued under the adjudication proceedings provided for in 85-2-236.

(6) (a) A permit is not required before constructing an impoundment or pit and appropriating water for use by livestock if:

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

(ii) (b) the appropriation is less than 30 acre-feet a year;

(iii) (c) the appropriation is from an ephemeral stream, an intermittent stream, or another source other than a perennial flowing stream; and

(iv) (d) the impoundment or pit is to be constructed on and will be accessible to a parcel of land that is owned or under the control of the applicant and that is 40 acres or larger.

(b) the purpose of use for this exemption may not be subsequently changed after receiving the certificate of water right.

(7) (a) Within 60 days after constructing an impoundment or pit, the appropriator shall apply for a permit as prescribed by this part. Subject to subsection (7)(b), upon receipt of a correct and complete application for a stock water provisional permit, the department shall automatically issue a provisional permit. If the department determines after a hearing that the rights of other appropriators have been or will be adversely affected, it may revoke the permit or require the permittee to modify the impoundment or pit and may then make the permit subject to terms, conditions, restrictions, or limitations that it considers necessary to protect the rights of other appropriators.

(b) If the impoundment or pit is on national forest system lands, an application is not correct and complete under this section until the applicant has submitted proof of any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit.

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

(9) Pursuant to 85-20-1902, the provisions of this section do not apply within the exterior boundaries of the Flathead Indian reservation.

Section 3. Section 85-2-312, MCA, is amended to read:

85-2-312. Terms of permit. (1) (a) The department may issue a permit for less than the amount of water requested, but may not issue a permit for more water than is requested or than can be beneficially used without waste for the purpose stated in the application. The department may require modification of plans and specifications for the appropriation or related diversion or construction. The department may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria listed in 85-2-311 and subject to subsection (1)(b), and it may issue temporary or seasonal permits. A permit must be issued subject to existing rights and any final determination of those rights made under this chapter.

Commented [AP5]: SWG: Needs discussion with SWG. Livestock was a called out exception, people are changing these for other purposes. Loophole

Other discussion: concern that there is nothing preventing someone from filing a change on a 602 to move it to a different property and file a new one for their property. This effectively would allow people to stack 602's as long as they do it one at a time and then file a change to move the water to a different property.

(b) If the permit is for use of water with a point of diversion, conveyance, or place of use on national forest system lands, the permit is subject to any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of the water under the permit and any terms, conditions, and limitations related to the use of water contained in any special use authorization required by federal law.

(2) If the permit is to be relied upon to show a determination of water rights pursuant to Title 76, chapter 3, or chapter 4, water appropriated must be measured and reported annually to the department.

Commented [AP6]: Background: allows measurement and reporting in green and yellow areas when going through Sanitation and/or platting

(2) The department shall specify in the permit or in any authorized extension of time provided in subsection (3), the time limits for commencement of the appropriation works, completion of construction, and actual application of the water to the proposed beneficial use. In fixing those time limits, the department shall consider the cost and magnitude of the project, the engineering and physical features to be encountered, and, on projects designed for gradual development and gradually increased use of water, the time reasonably necessary for that gradual development and increased use. The department shall issue the permit or authorized extension of time subject to the terms, conditions, restrictions, and limitations it considers necessary to ensure that the work on the appropriation is commenced, conducted, and completed and that the water is actually applied in a timely manner to the beneficial use specified in the permit.

(3) The department shall by rule or by condition to a permit establish a process allowing for the extension of the time limits specified in the permit for commencement of the appropriation works, completion of construction, and actual application of water to the proposed beneficial use.

(4) (a) If commencement of the appropriation works, completion of construction, or the actual application of water to the proposed beneficial use is not completed within the time limit specified or within an extension of that time limit, the permit expires.

(b) The department shall reinstate an expired permit if the permittee files a written reinstatement request and a project completion notice on forms provided by the department. The reinstatement request and project completion notice must establish the amount of water actually applied to the proposed beneficial use prior to expiration of the permit. Reinstatement of an expired permit under this subsection (4)(b) may not exceed the amount of water actually applied to the proposed beneficial use under the terms of the permit prior to expiration of the permit.

(c) The department shall reinstate the full amount of water authorized by the expired permit, including any portion that was not actually applied to the proposed beneficial use prior to expiration of the permit, if the permittee:

(i) files a written reinstatement request with the department on a form provided by the department;

(ii) proves by clear and convincing evidence that the failure to comply with the permit time limit was the result of excusable neglect; and

(iii) demonstrates that the requirements for an extension of the time limit as set forth by rule or permit condition are satisfied.

(d) A written reinstatement request for an expired permit must be filed within 2 years of the expiration of the permit time limit.

(e) A permit must be reinstated no more than once pursuant to this subsection (4) if the criteria in this subsection (4) have been met. A reinstated permit under subsection (4)(c) must establish time limits for commencement of the appropriation works, completion of construction, and actual application of the water to the proposed beneficial use.

(5) The original of the permit must be sent to the permittee, and a copy must be kept in the office of the department in Helena. The department shall retain an expired permit in the centralized record system for 2 years.

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

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

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

(2) If the change is to be relied upon to show a determination of water rights pursuant to Title 76, chapter 3, or chapter 4, water appropriated must be measured and reported annually to the department.

Commented [AP7]: Background: allows measurement and reporting in green and yellow areas when going through Sanitation and/or platting

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

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

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

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

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

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

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

(d) The applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use or, if the proposed change involves a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water. This subsection (2)(d) does not apply to:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(i) the appropriation right is for:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- (i) withdraws water from the same ground water source as the original well; and
- (ii) is required by a state or federal agency.

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

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

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

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

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

- (i) the existing point of diversion is inoperable due to natural causes or deteriorated infrastructure;
- (ii) there are no other changes to the water right;
- (iii) the capacity of the diversion is not increased;
- (iv) there are no points of diversion or intervening water rights between the existing point of diversion and the replacement point of diversion or the appropriator obtains written waivers from all intervening water right holders;
- (v) the replacement point of diversion is on the same surface water source and is located as close as reasonably practicable to the existing point of diversion;
- (vi) the replacement point of diversion replaces an existing point of diversion and the existing point of diversion will no longer be used;
- (vii) the appropriator can show that the existing point of diversion has been used in the 10 years prior to the notice for change of appropriation right for a replacement point of diversion;
- (viii) the appropriator can show the change will not increase access to water availability, change the method of irrigation, if applicable, or increase the amount of water diverted, used, or consumed; and

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

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

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

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

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

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

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

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

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

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

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

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

Section 5. Section 85-2-506, MCA, is amended to read:

85-2-506. Controlled ground water areas -- designation or modification. (1) (a) ~~The department may shall by rule designate or modify permanent or temporary controlled ground water areas for water quantity for the following locations, as provided in this part. The rule for each controlled ground water area must designate the boundaries of the controlled ground water area.~~

- (i) TBD

(b) The department shall by rule designate or modify controlled ground water areas for water quantity if the following criteria are met:

- (i) High concentration of ground water consumptive use relative to ground water availability and connected surface water availability; and
- (ii) Ground water level is declining or is projected to decline to an extent that water right holders cannot reasonably exercise their water rights; or
- (iii) Legal demand of ground water exceeds 80% of the physical availability; or
- (iv) Surface water with legal availability limitations where there is hydraulic connection between ground water and surface water and the legal demand on connected surface water exceeds 10% of the appropriation threshold of the stream for any month.

(c) Control provisions for controlled ground water areas for water quantity shall include but is not limited to the following provisions:

- (i) A provision closing the controlled ground water area for water quantity to all exceptions from the permitting process under 85-2-306, except for specific appropriations under 85-2-306 authorized by the rule pursuant to this section;
- (ii) A provision requiring metering and reporting for all new water rights and authorizations pursuant to 85-2-306, 85-2-311, and 85-2-402 in controlled ground areas for water quantity pursuant to 85-2-113. The type of metering device, and form and frequency of reporting will be determined by the department. Noncompliance with metering and reporting requirements may result in a fine designated by the department;
- (iii) A provision requiring the filing of notice on land records within the boundary of the controlled ground water area for water quantity to inform prospective holders of an interest in the property of the existence of a controlled ground water area for water quantity; and
- (iv) A provision allowing for use under 85-2-306(3) for parcels created after 10/17/2014 that received a certificate of subdivision approval through the department of environmental quality and a predetermination letter under ARM 17.36.103(n) and (o) from the department of natural resources and conservation.
- (v) Other control provisions that the department determines are appropriate and adopts through the rulemaking.

Commented [AP8]: i)The Gallatin Valley Aquifer; and
ii)The Helena Valley Aquifer;
iii)Flathead Valley Aquifer as defined by the department;
iv)Billings Terrace Aquifer as defined by the department;
v)Bitterroot Valley Aquifer as defined by the department; and
vi)Missoula Valley –Aquifer as defined by the department.

Commented [AP9]: Background: allowance for Deminimus uses or when unable to get a water right

Commented [AP10]: Background: metering and reporting required

Commented [AP11]: Background: Notice (currently in statute)

Commented [AP12]: Background and discussion: grandfathering

(d) The department shall by rule designate ground water monitoring areas for water quantity for the following locations. The rule for each controlled ground water area must designate the boundaries of the controlled ground water area.

(i) TBD

(e) The department shall designate by rule ground water monitoring areas for water quantity if any of the following criteria are met:

- (i) High concentration of ground water consumptive use relative to ground water availability and connected surface water availability; and
- (ii) A decreasing ground water level trend is observed, and long-term cause/effect and projected trend should be analyzed; or
- (iii) The legal demand of ground water is approaching 70% of the physical availability; or
- (iv) Where aquifer recharge is reliant on irrigation losses or where the formation has limited storage or potential for storage; or
- (v) Ground water connected to surface water with legal availability limitations where the legal demand on connected surface water is within 10% above or below the appropriation threshold of the stream (physical availability) for any months.

(f) Control provisions for ground water monitoring areas for water quantity shall include but is not limited to the following provisions:

- (i) A provision requiring metering and reporting for all new water rights and authorizations pursuant to 85-2-311, 85-2-306, and 85-2-402 in controlled ground areas for water quantity pursuant to 85-2-113. The type of metering device, and form and frequency of reporting will be determined by the department. Noncompliance with metering and reporting requirements may result in a fine designated by the department;
- (ii) The department shall review the monitoring data on a biennial basis, to determine if change in status is needed.

(2)(a) The rulemaking process for designation or modification of a controlled ground water area for public health, safety, or water quality may be initiated by when the following criteria are met:

- (i) Water Quality in Source Aquifer: High septic system density (>300 per square mile) or nitrate concentration >5mg/L in more than 25% of ≥ 30 wells
- (ii) Water Quality in Connected Surface Water: Surface water impairment with a TMDL that requires reductions of development-related nonpoint sources.
- (iii) identified public health risks

(b) The rulemaking process for designation or modification of a ground water monitoring area for public health, safety, or water quality (or (5) or (6) may be initiated when the following criteria are met:

- (i) Water Quality in Source Aquifer: Moderate septic system density (150-299 per sq. mi);

Commented [AP13]: i)The Gallatin Valley Aquifer; and
ii)The Helena Valley Aquifer;
iii)Flathead Valley Aquifer as defined by the department;
iv)Billings Terrace Aquifer as defined by the department;
v)Bitterroot Valley Aquifer as defined by the department; and
vi)Missoula Valley–Aquifer as defined by the department.

Commented [AP14]: Background: Water quality

Commented [AP15]: Background: DEQ identified

Commented [AP16]: Background: already in statute

(ii) Water Quality in Connected Surface Water: Surface water impairment

(3) (a) The petition process to initiate rulemaking process for designation of controlled ground water areas for water quantity, ground water monitoring areas for water quantity, controlled ground water area for public health, safety, or water quality, or ground water monitoring area for public health, safety, or water quality may be initiated by submission of a correct and complete petition by:

- ~~(a)~~ (i) the department;
- ~~(b)~~ (ii) ~~submission of a correct and complete petition from~~ a state or local public health agency for identified public health risks; or
- ~~(c)~~ (iii) ~~submission of a correct and complete petition;~~ (i) by a municipality, county, conservation district, or local water quality district formed under Title 7, chapter 13, part 45; or
- ~~(d)~~ (iv) signed by at least one-third of the water right holders in a proposed ~~controlled ground water~~ area.

~~(b)~~ (b) A correct and complete petition must:

- (i) be in a form prescribed by the department and must contain analysis prepared by a hydrogeologist, a qualified scientist, or a qualified licensed professional engineer concluding that one or more of the criteria provided in subsection (5) are met; and
- (ii) describe proposed measures, if any, to mitigate effects of the criteria identified in subsection (5) that are alleged in the petition.

(c) The information collected for the analysis of the criteria for designation of controlled ground water areas for water quantity, ground water monitoring areas for water quantity, shall be conducted by the department if petitioned in accordance with (3)(a) if greater than 50% of the water right holders based on the point of diversion in a proposed controlled ground water area for water quantity or ground water monitoring area for water quantity petition the department. The department may not conduct more than two analyses for petitions annually.

~~(b)~~ (c) When the department proposes a rule pursuant to this section, the place for the hearing must be within or as close as practical to the proposed or existing controlled ground water area.

~~(c)~~ (d)(i) The department shall notify the petitioner of any defects in a petition within 180 days. If the department does not notify the petitioner of any defects within 180 days, the petition must be treated as correct and complete.

(ii) A petition that is not made correct and complete within 90 days from the date of notification by the department of any defect is terminated.

(4) (a) Within 60 days after a petition is determined to be correct and complete, the department shall:

- (i) deny in writing the petition in whole or in part, stating the reasons for denial;
- (ii) inform the petitioner that the department will study the information presented in the petition for a period not to exceed 90 days before denying or proceeding with the petition; or
- (iii) initiate rulemaking proceedings in accordance with Title 2, chapter 4, part 3

Commented [AP17]: Background: DNRC does the analysis if >50% of water right holders petition

(b) Failure of the department to act under subsection (4)(a) does not mandate that the department grant the petition for rulemaking.

(c) In addition to the notice requirements of Title 2, chapter 4, parts 1 through 4, the department shall provide public notice of the rulemaking hearing by:

(i) publishing a notice at least once each week for 3 successive weeks, with the first notice not less than 30 days before the date of the hearing in a newspaper of general circulation in the county or counties in which the proposed controlled ground water area is located;

(ii) serving by mail a copy of the notice, not less than 30 days before the hearing, upon each person or public agency known from an examination of the records of the department to be a water right holder with a diversion within the proposed controlled ground water area, all landowners of record within the proposed controlled ground water area, and each well driller licensed in Montana whose address is within any county in which any part of the proposed controlled ground water area is located; and

(iii) serving by mail a copy of the notice upon any other person or state or federal agency that the department feels may be interested in or affected by the proposed designation or modification of a controlled ground water area.

(d) The notice under subsection (4)(c) must include a summary of the basis for the proposed rule. Publication and mailing of the notice as prescribed in this section, when completed, is considered to be sufficient notice of the hearing to all interested persons.

(5) The department may designate a permanent controlled ground water area by rule if it finds by a preponderance of the evidence that any of the following criteria have been met and cannot be appropriately mitigated:

(a) current or projected reductions of recharge to the aquifer or aquifers in the proposed controlled ground water area will cause ground water levels to decline to the extent that water right holders cannot reasonably exercise their water rights;

(b) current or projected ground water withdrawals from the aquifer or aquifers in the proposed controlled ground water area have reduced or will reduce ground water levels or surface water availability necessary for water right holders to reasonably exercise their water rights;

(c) current or projected ground water withdrawals from the aquifer or aquifers in the proposed controlled ground water area have induced or altered or will induce or alter contaminant migration exceeding relevant water quality standards;

(d) current or projected ground water withdrawals from the aquifer or aquifers in the proposed controlled ground water area have impaired or will impair ground water quality necessary for water right holders to reasonably exercise their water rights based on relevant water quality standards;

(e) ground water within the proposed controlled ground water area is not suited for beneficial use; or

(f) public health, safety, or welfare is or will become at risk.

(6) (a) If the department finds that sufficient facts are not available to designate a permanent controlled ground water area, it may designate by rule a temporary controlled ground water area to allow studies to obtain the facts needed to determine whether or not it is appropriate to designate a permanent controlled

ground water area. The department shall set the length of time that the temporary controlled ground water area will be in effect. Subject to subsection (6)(c), the term of a temporary controlled ground water area may be extended by rule.

(b) A temporary controlled ground water area designation is for the purpose of study and cannot include the control provisions provided in subsection (7), other than measurement, water quality testing, and reporting requirements.

(c) A temporary controlled ground water area designation may not exceed a total of 6 years, including any extensions.

(d) Prior to expiration of a temporary controlled ground water area, the department may amend or repeal the rule establishing the temporary controlled ground water area or may designate a permanent controlled ground water area through the rulemaking process under this section.

(e) Studies for temporary controlled ground water areas may be considered for funding under the renewable resource grant and loan program in Title 85, chapter 1, part 6.

(f) If there is a ground water investigation program within the bureau, the ground water assessment steering committee established by 2-15-1523 shall consider temporary controlled ground water areas for study.

Commented [AP18]: Question: Need this given we have more detail above?

(7) A controlled ground water area may include but is not limited to the following control provisions:

(a) a provision closing the controlled ground water area to further appropriation of ground water;

(b) a provision restricting the development of future ground water appropriations in the controlled ground water area by flow, volume, purpose, aquifer, depth, water temperature, water quality, density, or other criteria that the department determines necessary;

(c) a provision requiring measurement of future ground water or surface water appropriations;

(d) a provision requiring the filing of notice on land records within the boundary of a permanent controlled ground water area to inform prospective holders of an interest in the property of the existence of a permanent controlled ground water area. Notice of the designation must be removed or modified as necessary to accurately reflect modification or repeal of a permanent designation within 60 days.

(e) a provision for well spacing requirements, well construction constraints, and prior department approval before well drilling, unless the well is regulated pursuant to Title 82, chapter 11;

(f) a provision for mitigation of ground water withdrawals;

(g) a provision for water quality testing;

(h) a provision for data reporting to the department; and

(i) other control provisions that the department determines are appropriate and adopts through rulemaking.

(8) Pursuant to 85-20-1902, the provisions of this section do not apply within the exterior boundaries of the Flathead Indian reservation.

Section 7. Section 85-2-508, MCA, is amended to read:

85-2-508. Controlled ground water areas -- permits to appropriate. (1) A person may appropriate ground water in a controlled ground water area by:

(a) applying for and receiving a permit from the department in accordance with part 3 of this chapter; or

~~(b) applying for and receiving a change from the department in accordance with part 4 of this chapter; or~~

~~(b)~~ (c) following the requirements of a rule promulgated pursuant to 85-2-506.

(2) The department may not grant a permit if the withdrawal would be beyond the capacity of the aquifer or aquifers in the controlled ground water area to yield ground water within a reasonable or feasible pumping lift, in the case of pumping developments, or within a reasonable or feasible reduction of pressure, in the case of artesian developments.

Section 8. Codification instruction. (1) [Section 5] is intended to be codified as an integral component of Title 85, chapter 2, part 3, and the provisions of Title 85, chapter 2, part 3 apply to [section 5].

Section 9. Effective date. [This act] is effective on **XXXX**.