

# Comprehensive Water Review – Draft Bill Package

## For editing by SWG

**Commented [HD1]:** From Pat Byorth, Trout Unlimited:

Thanks for the opportunity to review the early drafts. First, the “waiver” bill is great. I really like the tie into the burden of proving no adverse effect. Having the waiver language inserted across the permit, change, and mitigation statutes is an improvement over the sunsetted provision. Second, I am also optimistic about the language of the “streamlined change process” draft. First, splitting off the various exceptions into a new section is a solid plan. Second, having clear notice and objections provisions embedded in the new section is clear and helpful. Finally, the biggest worry in expanded service areas is the potential expansions of consumptive use. As you all know, typical domestic use is minimally consumptive, and non-consumptive portions often become reclaimed wastewater return flow. Acknowledging that some cities use their effluent to exhaustion as part of their discharge permit, an expansion in service area is likely to mean increased consumption through lawn and garden and decreased return flow. In sources like the East Gallatin River, this could seriously diminish late season flows. I wish I had a creative magic bullet to avoid expanded consumption with expanded service areas. The only idea I have at this point is adding something like: 4(a) ...“ without the prior approval of the department if: ... (iv) the consumptive portion of the water right can be regulated through existing municipal restrictions for irrigating lawns and gardens.” Certainly needs some thinking over. My thought is that water short cities and towns have lawn and garden restrictions built into their ordinances, which might limit expansions to some extent. Thanks for your hard work on these issues and many more!

Final Decree Transition	Action Items	Page
Bill 1: Role of the Judiciary	<ul style="list-style-type: none"> <li>- Review by DNRC/GO (8/1)</li> <li>- August meeting: discussion and vote (8/19)</li> </ul>	-
Bill 2: Provisional Permits	<ul style="list-style-type: none"> <li>- DNRC take meeting notes and update draft</li> <li>- Review and edits: Abby, Clayton, Julie, Judge Brown, Brian H.</li> <li>- Next sub-working group: 8/14</li> <li>- August meeting: discuss (8/19)</li> </ul>	-
Planning, Growth, and Exempt Wells	Action Items	Page
<b>Storage:</b>		
Funding 1: New storage	<ul style="list-style-type: none"> <li>- SWG comments by 7/19</li> <li>- DNRC/Clayton edit</li> <li>- August meeting: discussion and vote (8/19)</li> </ul>	2
Funding 2: Funding package for existing storage	<ul style="list-style-type: none"> <li>- DNRC working</li> </ul>	TBD
<b>Mitigation &amp; Change Process:</b>		
Bill 3: Waiver of adverse effect	<ul style="list-style-type: none"> <li>- Comments by: Clayton, Julie, Brian H. (7/19)</li> <li>- DNRC edit</li> <li>- August meeting: discussion and vote (8/19)</li> </ul>	3
Bill 4: Streamlined change process	<ul style="list-style-type: none"> <li>- Comments by: Clayton, Julie, Brian, Raylee, Nicole, Mark, Spencer by 7/19</li> <li>- Next sub-working group: 8/1</li> <li>- August meeting: discuss (8/19)</li> <li>- September meeting (TBD)</li> </ul>	14
<b>Public Water and Sewer:</b>		
Funding 3: Funding package for incentivizing PWS	<ul style="list-style-type: none"> <li>- Kelly and Mark in August</li> </ul>	TBD
<b>Exempt Wells:</b>		
Bill 5: Agency coordination & notice of intent for exempt wells	<ul style="list-style-type: none"> <li>- Comments by: Mark, Julie, Clayton, Brian, Spencer by 7/19</li> <li>- DEQ, DNRC, MACO, Kelly incorporates edits</li> <li>- August meeting: discussion and vote (8/19)</li> </ul>	25
Bill 6: Exempt Wells	<ul style="list-style-type: none"> <li>- DNRC first draft (Anna/Nate/Jake)</li> <li>- Spencer, Clayton, Kelly to review</li> <li>- Next sub-working group: 7/31</li> <li>- August meeting: discuss (8/19)</li> <li>- September meeting (TBD)</li> </ul>	TBD
<b>Recommendations 1-4:</b> Storage, Mitigation, Municipalities, Notifications and outreach plan for exempt wells	Comments by SWG by 7/19	43

# Amendments to HB7 (2025) – Water Storage Innovation Grant Fund

*Draft of legislative concept*

## **OPTION A:**

**Section 1. Appropriations for reclamation and development grants.** (X) There is appropriated to the department of natural resources and conservation from the natural resources projects state special revenue account established in 15-38-302 up to \$20,000,000 for grants for the purposes of water storage innovation projects to be awarded by the department over the course of the biennium beginning July 1, 2025.

## **OR OPTION B:**

**New Section 2. Water storage innovation grant and loan account.** (1) There is an account in the state special revenue fund established in 17-2-102 to be known as the water storage innovation grant and loan account.

(2) Interest earned must be retained by the account.

(3) Eligible uses include innovations in water storage projects identified in 85-1-704, and the disbursement of grants and authorization of loans in [section 3]

**New Section 3. Authorization.** (1) The amount transferred in [section 4] shall be held in escrow for loans and grants for the purposes of water storage innovation projects identified in 85-1-704.

(2) The interest rate for any loans made in the water storage innovation program from proceeds from subsection (1) must be negotiated with the department of natural resources and conservation at a rate and term consistent with loan financing available from other federal and state sources.

(3) Loan repayment may be interest only.

(4) The interest repaid must be placed in the state special revenue account established in [section 2] for use by the department for purposes of water storage innovation.

(5) The department shall issue any grants under the water storage innovation program consistent with all conditions provided for in the reclamation and development grant program. The department may establish any guidelines necessary to establish the water storage innovation program within the parameters of the reclamation and development grant program.

## **GOES WITH BOTH OPTION A AND B:**

**New Section 4. Transfer of funds.** By July 1, 2025, the state treasurer shall transfer \$20 million from the general fund to the natural resources state special revenue account established in 15-38-302.

**General Comment:** My question would be if we would want to also amend 85-1-704 to be more inclusive of other types of storage. Or if there is another account/fund we should look at using? That statute talks a lot about “facilities,” which sounds a lot like structures to me, which is fine and good, but I don’t think we want to exclude things like off-stream storage, recharge projects, storage in gravel pits, removing invasive vegetation in riparian areas, conifer encroachment, etc.

**Commented [BH2]:** What is the department’s rationale for utilizing RDG program instead of RRGL? RRGL (85-1-602) seems like a better fit since the program objectives specifically provide for development of natural, offstream, and tributary storage projects. RRGL is also specifically identified as the program being the “key implementation portion of the state water plan” which has many recommendations concerning storage. RDG I thought was purposed with reclamation of extractive resource impacts so I’m not seeing a link to ‘innovative water storage’ under RDGs purpose (90-2-1102)

**Commented [BH3]:** Should be defined. What distinguishes an ‘innovation’ from a ‘renovation’? Is innovation only applicable to ‘new storage’, or does it extend to innovative methods of optimizing existing storage projects such as telemetry and automation?

Consider linking water storage innovation to projects that implement state water plan storage recommendations.

**Commented [BH4]:** Again why RDG and not RRGL?

**Commented [BH5]:** This is pretty open ended. Consider providing some sideboards in statute about what constitutes “storage innovation” by linking to state water plan.

# Waiver of Adverse Effect Bill Draft

Last edited 7/2/2024 (ready to post)

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

(a) (i) there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; and

(ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:

(A) identification of physical water availability;

(B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and

(C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.

(b) (i) the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. In this subsection (1)(b), adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied.

(ii) Written consent to approval of the application in the form of a signed waiver of adverse effect by a prior appropriator proves by a preponderance of evidence that the prior appropriator's water rights identified in the written consent will not be adversely affected by the proposed permit.

(iii) Written consent to the application by a prior appropriator does not constitute an abandonment or serve as evidence that could be used to establish an abandonment of any part of the right.

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

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

(e) 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 use has 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 under the permit;

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

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

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

(2) The applicant is required to prove that the criteria in subsections (1)(f) through (1)(h) have been met only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the

**Commented [BH6]:** For decree enforcement and administration purposes, the waiver form should be attached to the water right record in WRIS, effect the title of the water right to the extent the waiver effectively subordinates to the permit, and the waiver must attach to the water right title and transfer to new owners. These sorts of policy details should be set forth in department rules.

**Commented [JM7]:** How does FWP feel about this language? As I recall the prior version language was worded the way it was to provide more comfort to FWP. That way they didn't have to expressly admit no adverse effect giving them some cover for not abandoning their water rights.

**Commented [AG8]:** This language (or similar) should be added to various subsections or could be added to 85-2-404.

satisfaction of the department that the criteria in subsection (1)(f), (1)(g), or (1)(h), as applicable, may not be met. For the criteria set forth in subsection (1)(g), only the department of environmental quality or a local water quality district established under Title 7, chapter 13, part 45, may file a valid objection.

(3) The department may not issue a permit for 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 applicant proves by clear and convincing evidence that:

- (a) the criteria in subsection (1) are met;
- (b) the proposed appropriation is a reasonable use. A finding must be based on a consideration of the following:
  - (i) the existing demands on the state water supply, as well as projected demands, such as reservations of water 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 beneficial 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.

(4) (a) 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 criteria in this subsection (4) must be met before out-of-state use may occur.

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

- (i) depending on the volume of water diverted or consumed, the applicable criteria and procedures of subsection (1) or (3) 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.

(c) In determining whether the applicant has proved by clear and convincing evidence that the requirements of subsections (4)(b)(ii) and (4)(b)(iii) are met, the department 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 application could 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 demands placed on the applicant's supply in the state where the applicant intends to use the water.

(d) When applying for a permit or a lease 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, lease, and use of water.

(5) Subject to [85-2-360](#), to meet the preponderance of evidence standard in this section, the applicant, in addition to other evidence demonstrating that the criteria of subsection (1) have been met, shall submit hydrologic or other evidence, including but not limited to water supply data, field reports, and other information developed by the applicant, the department, the U.S. geological survey, or the U.S. natural resources conservation service and other specific field studies.

(6) An appropriation, diversion, impoundment, use, restraint, or attempted appropriation, diversion, impoundment, use, or restraint 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 appropriation, diversion, impoundment, use, or other restraint. A person or corporation may not, directly or indirectly, personally or through an agent, officer, or employee, attempt to appropriate, divert, impound, use, or otherwise restrain or control waters within the boundaries of this state except in accordance with this section.

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

(8) For an application for ground water in a basin closed pursuant to [85-2-319](#), [85-2-321](#), [85-2-330](#), [85-2-336](#), [85-2-341](#), [85-2-343](#), or [85-2-344](#), the applicant shall comply with the provisions of [85-2-360](#) in addition to the requirements of this section.

**"85-2-320. Change in appropriation right authorization for instream flow -- United States department of agriculture, forest service.** (1) (a) The department shall accept and process an application by the United States department of agriculture, forest service for a change in appropriation right under the provisions of 85-2-402 and this section to protect, maintain, or enhance streamflows to benefit the fishery or other resources on national forest system lands.

(b) To change an appropriation right, the United States department of agriculture, forest service must own the appropriation right that it seeks to change to an instream flow right, the diversion or withdrawal that is to be changed to instream flow must be located within or immediately adjacent to the exterior boundaries of national forest system lands on the date provided in 85-20-1401, Article IV.B.2., and the stream reach in which the streamflow is to be protected, maintained, or enhanced must be located within or immediately adjacent to the exterior boundaries of national forest system lands as of the date provided in 85-20-1401, Article IV.B.2. The application for a change in appropriation right must:

(i) include specific information on the length and location of the stream reach in which the streamflow is to be protected, maintained, or enhanced; and

(ii) provide a detailed streamflow measuring plan that describes the point where and the manner in which the streamflow must be measured.

(2) In addition to the requirements of [85-2-402](#), when applying for a change in appropriation right pursuant to this section, the United States department of agriculture, forest service, shall prove by a preponderance of the evidence that:

(a) the change in appropriation right authorization to protect, maintain, or enhance streamflows to benefit the fishery or other resources, as measured at a specific point, will not adversely affect the water rights of other persons, except for a water right identified in a written consent to approval of the application in the form of a signed waiver of adverse effect filed pursuant to 85-2-402(2)(a)(ii) in connection with the change in appropriation right; and

(b) the amount of water for the proposed instream flow use is needed to protect, maintain, or enhance streamflows to benefit the fishery or other resources.

(3) The proposed method of measurement of the water to protect, maintain, or enhance streamflows to benefit the fishery or other resources must be approved by the department before a change in appropriation right may be approved.

(4) The department is not responsible for costs associated with installing devices or providing personnel to measure streamflows according to the measurement plan submitted under this section.

**Commented [BH9]:** The new language in (2)(a) below is redundant since the general reference to 85-2-402 captures the waiver provision. Probably harmless to keep as is.

(5) If an appropriation right is changed pursuant to this section, the priority of the appropriation right remains the same as the appropriation right that was changed.

(6) A change in appropriation right authorization under this section does not create a right of access across private property or allow any infringement of private property rights.

(7) The maximum quantity of water that may be subject to a change in appropriation right authorization to protect, maintain, or enhance streamflows to benefit the fishery or other resources is the amount historically diverted. However, only the amount historically consumed or a smaller amount if specified by the department in the change in appropriation right authorization may be used to protect, maintain, or enhance streamflows to benefit the fishery or other resources below the existing point of diversion.

(8) The department may modify or revoke the change in appropriation right up to 10 years after it is approved if an appropriator with a priority of appropriation that is earlier than the change in appropriation right that was granted submits new evidence that was not available at the time the change in appropriation right was approved that proves by a preponderance of evidence that the appropriator's water right is adversely affected. A water right for which written consent to approval of the application in the form of a signed waiver of adverse effect was filed pursuant to 85-2-402(2)(a)(ii) may not be the basis for modification or revocation of the change in appropriation.

**Commented [BH10]:** Would it not be better to delete this provision and just use the change reconciliation process to address this issue?

**"85-2-360. Ground water appropriation right in closed basins.** (1) An application for a ground water appropriation right in a basin closed pursuant to 85-2-319, 85-2-321, 85-2-330, 85-2-336, 85-2-341, 85-2-343, or 85-2-344 must be accompanied by a hydrogeologic report conducted pursuant to 85-2-361, an aquifer recharge or mitigation plan if required, and an application for a change in appropriation right or rights if necessary.

(2) The department shall use the hydrogeologic report to determine if the proposed appropriation right could result in a net depletion of surface water.

(3) (a) For the purposes of 85-2-360 through 85-2-362, the prediction of net depletion does not mean that an adverse effect on a prior appropriator will occur or if an adverse effect does occur that the entire amount of net depletion is the cause of the adverse effect. A determination of whether or not there is an adverse effect on a prior appropriator as the result of a new appropriation right is a determination that must be made by the department based on the rate, location, and timing of the net depletion that causes the adverse effect relative to the historic beneficial use of the appropriation right that may be adversely affected.

(b) The department shall not consider whether a net depletion causes adverse effect to a water right for which a written consent to approval of the application in the form of a signed waiver of adverse effect was filed pursuant to 85-2-311(1)(b)(ii).

~~(b)~~(c) The department may grant a permit for a new appropriation only if the applicant proves by a preponderance of the evidence that the adverse effect would be offset through an aquifer recharge or mitigation plan that meets the requirements of 85-2-362."

**"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) Except as provided in subsections (4) through (6), (15), (16), and (18) and, if applicable, subject to ~~subsection (17)~~ subsections (1)(c) and (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) (i) 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.

(ii) Written consent to approval of the application in the form of a signed waiver of adverse effect by an appropriator proves by a preponderance of evidence that the appropriator's water rights identified in the written consent will not be adversely affected by the proposed change in appropriation.

(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 demands on the state water supply, as well as projected demands for water 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;

Commented [BH11]: I don't see subsection 1(c).

Commented [BH12]: See very first comment above for this waiver bill.

- (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 demands 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, except for any right for which a written consent to approval of the application in the form of a signed waiver of adverse effect has been filed pursuant to subsection 85-2-402(2)(a)(ii) in connection with the application.

(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.

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

(2) Except as provided in subsection (9), a temporary change in appropriation right may be approved for a period not to exceed 10 years. A temporary change in appropriation right may be approved for consecutive or intermittent use.

(3) An authorization for a temporary change in appropriation right may be renewed by the department for a period not to exceed 10 years. There is no limitation on the number of renewals the appropriator may seek. Renewal of an authorization for a temporary change in appropriation right requires notice to the department by the appropriator. Upon receipt of the notice, the department shall notify other appropriators potentially affected by the renewal and shall allow 90 days for submission of new evidence of adverse effects to other water rights. A temporary change authorization may not be renewed by the department if it determines that the water right of an appropriator, other than an appropriator described in subsection (7) or 85-2-402(2)(a)(ii), is adversely affected.

(4) (a) During the term of the original temporary change authorization, the department may modify or revoke its authorization for a temporary change if it determines that the water right of an appropriator, other than an appropriator described in subsection (7) or 85-2-402(2)(a)(ii), is adversely affected.

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

(i) during the initial temporary change application process;

(ii) during the temporary change renewal process; and

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

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

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

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

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

(9) If the quantity of water that is subject to a temporary change in appropriation right is made available from the development of a new water conservation or storage project, a temporary change in appropriation right may be approved for a period not to exceed 30 years unless a renewal is obtained pursuant to subsection (3)."

**"85-2-408. Temporary change authorization for instream flow -- additional requirements.** (1) The department shall accept and process an application for a temporary change in appropriation rights to maintain or enhance instream flow to benefit the fishery resource under the provisions of 85-2-402, 85-2-407, and this section. The application must:

(a) include specific information on the length and location of the stream reach in which the streamflow is to be maintained or enhanced; and

(b) provide a detailed streamflow measuring plan that describes the point where and the manner in which the streamflow must be measured.

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

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

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

(b) For the purpose of this subsection (2), "person" means and is limited to an individual, association, partnership, or corporation.

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

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

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

~~(4)~~ Written consent to the application pursuant to 85-2-402(a)(ii) by an appropriator proves by a preponderance of evidence that the appropriator's water rights identified in the written consent will not be adversely affected by the proposed change in appropriation of the application in the form of a signed waiver of adverse effect b

~~(4)(5)~~ The department shall approve the method of measurement of the water to maintain and enhance instream flow to benefit the fishery resource through a temporary change authorization as provided in this section.

~~(5)(6)~~ Only the owner of the water right may seek enforcement of the temporary change authorization or object under 85-2-308.

~~(6)(7)~~ A temporary change authorization under this section does not create a right of access across private property or allow any infringement of private property rights.

~~(7)(8)~~ The maximum quantity of water that may be changed to maintain and enhance streamflows to benefit the fishery resource is the amount historically diverted. However, only the amount historically consumed, or a smaller amount if specified by the department in the lease authorization, may be used to maintain or enhance streamflows to benefit the fishery resource below the existing point of diversion."

This is a revival of the waiver of adverse effect language that used to exist but sunset, correct? It does seem prudent to revive that law, for all types of users. It's important to require review at least every ten years and that all potentially impacted senior users are included in the process.

**Commented [BH13]:** Waivers for temporary changes under 407 or 408 present a wrinkle to the enforcement/administration and title issue. Would still need the waiver to attach to the water right in WRIS for enforcement and administration purposes. The effect on title is removed if the temporary change lapses.

**Commented [JM14]:** This language is different than the proposed language in (2)(b). I'm curious about why that is?

# Streamlined Change Process (Replacement wells; POU for municipalities, county water & sewer districts, and stock tanks)

*Edited on 7.2.2024*

## Notes:

- There are three modifications to the change process to streamline changes: replacement wells, POU for municipalities, county water and sewer districts, and stock tanks.
- I only underlined things that are new or are proposed to change from existing statute (85-2-402).
- Updated the notice and objection language from existing 85-2-402 and applied it to existing sections where it currently applies as well as the new sections being added. Reasoning is that notice and objection language was outdated because these processes were overhauled by HB 114.
- Tried to keep old processes consistent with how they currently exist in 85-2-402. I also applied this same principal to the new processes. That is why you see that DNRC would approve if correct & complete notice is received and then send to public notice/objections. Open to discussion on if new processes should follow this pathway but the general idea is that there are sideboards and should not be adverse effect to anyone and so to not hold things up, we would approve and then allow for objections.
- For SWG discussion: There have been discussions with stakeholders and internally about allowing water users to have a year on the new sections (4) and (5) to come into compliance (i.e., completed changes more than 60 days prior to filing form) upon the effective date of this bill. After one year has passed, the filing of timelines must be followed or the water user will be required to file a change under 85-2-402.

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

(a) The proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been

issued or for which a state water reservation has been issued under part 3. For purposes of this section, adverse effects analysis is specific to the proposed change in appropriation right and a determination that water is not legally available pursuant to **85-2-311** does not necessarily mean that an adverse effect will occur.

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

- (i) a change in appropriation right for instream flow pursuant to **85-2-320** or **85-2-436**;
  - (ii) a temporary change in appropriation right for instream flow pursuant to **85-2-408**; or
  - (iii) a change in appropriation right pursuant to **85-2-420** for mitigation or marketing for mitigation.
- (c) The proposed use of water is a beneficial use.

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

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

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

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

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

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

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

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

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

(i) the existing legal demands of water rights on the state water supply, as well as projected legal 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)(15) The department shall accept and process an application for a change in appropriation right for instream flow to protect, maintain, or enhance streamflows pursuant to **85-2-320** and this section and to benefit the fishery resource pursuant to **85-2-436** and this section.~~

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

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

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

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

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

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

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

~~(vii) the appropriator can show that the existing point of diversion has been used in the 10 years prior to the notice for change of appropriation right for a replacement point of diversion;~~

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

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

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

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

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

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

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

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

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

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

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

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

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

**[New Section] Exceptions to change requirements.**

(1) (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)(i) 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 shall have 30 days to review the notice of construction and shall either issue a redundant well authorization or return a deficiency letter to the appropriator..

(ii) A redundant water supply well located on national forest system lands shall not be authorized by the department 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.

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

(i) the appropriation right is for:

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

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

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

(iii) the rate and volume of the appropriation from the replacement well are equal to or less than that of the well being replaced;

(iv) ~~do not exceed~~ the distance between the replacement well and the well being replaced is 50 feet or less, except where strict application of the 50 foot limit is impracticable, in which case the replacement well should be located as close as reasonably possible;

;

(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;

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

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

(b) (i) Within 60 days 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.

**Commented [JM15]:** I know this is not new but I would like clarification about what 'completion' means. Does it mean the hole in the ground is finished or does it mean the new well is completely developed, screen installed, power run to it, etc. and hooked up to the existing system? 60 days can easily elapse between the completion of the hole and the time the well is actually ready to be turned on. Maybe mirror the replacement well language if this is what is meant "completion of a" redundant "well and appropriation of groundwater for a beneficial use"

**Commented [JM16]:** Seems like we need a statement about what the Dept will issue once a C&C notice of construction is received. In the replacement well section it says, "(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 (2)(a) have been met and the notice is correct and complete." It has been problematic that redundant well notices do not show up in the WRIS and I wonder if it is related to the ambiguous nature of what action the dept is taking. Is this a change authorization?

**Commented [JM17]:** This is perfect

**Commented [JM18]:** Why 50 feet? There are any number of reasons why a well, especially a large municipal well, cannot be sited within 50 feet of the existing well

**Commented [MT19R18]:** Agree. 50' seems arbitrary and impractical in certain factual scenarios.

(ii) (A) The department shall have 30 days to review the notice of replacement well and shall either issue an authorization of a change in an appropriation right if all of the criteria in subsection (2)(a) have been met and the notice is correct and complete, or return a deficiency letter to the appropriator.

(B) If the replacement well is located on national forest system lands, the notice is not correct and complete under this subsection (2) 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.

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

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

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

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

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

(iv) there are no points of diversion or intervening water rights between the existing point of diversion and the replacement point of diversion or the appropriator obtains written waivers from all intervening 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 (3)(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) Within 30 days after receipt, the department shall review the notice of replacement point of diversion and shall either issue an authorization of a change in an appropriation right if all of the criteria in subsection (3)(a) have been met and the notice is correct and complete or return a deficiency letter to the appropriator. The department may inspect the diversion to confirm that the criteria under subsection (3)(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 public notice of the authorization as identified in subsection (7) and provide an opportunity to object as identified in subsection (8).

(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

**Commented [JM20]:** Refile? Don't we mean correct the defects?

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.

(4) (a) A municipality as defined in 7-1-4121, or a county water and sewer district organized under Title 7, Chapter 13, Part 22, may change an appropriation right to expand the place of use of water provided through their water delivery system without the prior approval of the department if:

(i) the capacity of the diversion(s) will not exceed the flow rate of the appropriation right or rights;:

(ii) the volume appropriated from the diversion(s) is not increased and will not exceed the volume of the appropriation right and or rights;:

(iii) the expanded place of use is within:

(A) the extents of a municipality's land use plan and future land use map boundary duly adopted by a municipality pursuant to Title 76, Chapter 25;

(B) the extents of a municipality's growth policy boundary duly adopted by a municipality pursuant to Title 76, Chapter 1; or

(C) the extents of a county water and sewer district's service area boundary duly adopted by a county pursuant to Title 76, Chapter 1 or Title 76, Chapter 25;

(iv) there are no other changes to the water right, or rights, and

(v) the consumptive portion of the water right can be regulated through existing municipal restrictions for irrigating lawns and gardens.

(b) (i) Within 60 days of annexation by a municipality under Title 7, Chapter 2, Parts 42 through 47, or addition of land to a county water and sewer district under 7-13-2341, the appropriator shall file a notice of expansion of place of use with the department on a form provided by the department.

(ii) Within 30 days of receipt, the department shall review the notice of expansion of place of use and shall issue an authorization of a change in an appropriation right if all the criteria in subsection (4)(a) have been met and the notice is correct and complete. If the department issues an authorization of a change in an appropriation right for an expansion of place of use, the department shall prepare a public notice of the authorization as identified in subsection (7) and provide an opportunity to object as identified in subsection (8).

(iii) The department may not issue an authorization of a change in appropriation right until a correct and complete notice of expansion of place of use 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 expansion of place of use within 30 days of notification of defects or within a further time as the department may allow, not to exceed 6 months.

(c) Need to include language about this statute not giving them the ability to force someone onto the system

(5) (a) An appropriator with an existing water right, permit, or certificate of water right for stock use may add or move stock tanks without the prior approval of the department if:

(i) stock tanks are added to a livestock direct from source right which does not increase the livestock use;

(ii) additional stock tanks are added to an existing stock watering system; or

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

(b) The following requirements must be met for changes filed under this subsection:

(i) The diverted flow rate of the stock watering system may not exceed the historical diverted flow rate of the stock watering system. For situations where stock tanks are being added to a livestock direct from source right, the maximum flow rate for the diversion to the tanks is 35 GPM;

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

**Commented [BH21]:** As drafted, this is only forward looking. Should consider adding a OTO process for municipalities and county WSD to "catch up"

**Commented [MT22]:** What happens factually when a city currently annexes in a parcel of land that has an exempt well on it? Same as applied to a permitted well? I assume they are limited to place of use, purpose of use, and period of use.

**Commented [AG23]:** -Why are county water and sewer districts included in this exception? Some county water & sewer districts essentially operate like irrigation districts? They can now just add land to their POU?

**Commented [AG24]:**  
-How can we mitigate incremental (or drastic) increases in flow rate and volume over time as municipalities expand their places of use? This has the potential to adversely impact other appropriators through increases in pumping, timing of depletions, increases in consumptive use, etc... Is there any limit to expansion beyond the total claimed volume (whether perfected or not)?

**Commented [JM25]:** Missoula has like 50 overlapping water rights. Are you prepared to change them all in one application?

**Commented [MT26]:** Subsection (b) suggests a triggering event while subsection (a) does not.

**Commented [MT27]:** Because I don't fully understand mechanics of public water delivery systems, isn't the overall purpose of the use blended or lost once the water supply is added to the overall system if using the existing diversion mechanism to tie into the system (and ...

**Commented [JM28]:** These 2 things are not necessarily the same. Cities may have pumps in wells that currently allow a flow rate less than the max flow rate on the water ...

**Commented [MT29R28]:** Agree. See suggested edit.

**Commented [JM30]:** This makes less sense than the flow rate not increasing. Most municipalities have room to grow especially when it comes to volume under ...

**Commented [HC31]:** This addition suggested for consideration by Pat Byorth

**Commented [JM32]:** What if the municipality agrees to serve an area but doesn't want to annex it? This happens ...

**Commented [JM33]:** Do we though? I think that is addressed in other parts of statute and within local govt regulations. I don't think this belongs in title 85

**Commented [BH34]:** There may be situations where a municipality uses Part 45 annexation authority (annexation of wholly surrounded property). Or ...

**Commented [MT35R34]:** Assuming true, this language can cross reference here (and vice versa).

**Commented [JM36]:** Do we though? I think that is addressed in other parts of statute and within local govt regulations. I don't think this belongs in title 85

(iii) The stock tank system must have control structures in place to control diversions and prevent waste of water; and

(iv) 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.

(c) (i) Within 60 days of completion of the stock tank system, the appropriator shall file a notice of stock tank change with the department on a form provided by the department.

(ii) Within 30 days of receipt, the department shall review the notice of stock tank change and shall issue an authorization of change in appropriation right if all the criteria in subsection (5)(b) have been met and the notice is correct and complete. If the department issues an authorization of a change in an appropriation right for stock tank change, the department shall prepare a public notice of the authorization as identified in subsection (7) and provide an opportunity to object as identified in subsection (8).

(iii) The department may not issue an authorization of a change in appropriation right until a correct and complete notice of stock tank change 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 stock tank change within 30 days of notification of defects or within a further time as the department may allow, not to exceed 6 months.

(d) temporary changes under this subsection may be authorized in accordance with 85-2-407.

(6) If a notice under subsections (2), (3), (4) or (5) is not filed and completed within the time allowed or if the department determines the criteria under subsections (2), (3), (4) or (5) have not been met, the appropriator shall submit an application for a change in appropriation right to the department pursuant to 85-2-402.

(X) Add irrigation?

(7) (a) The department shall prepare a public notice which includes a summary of the changes being authorized, and must state that not more than 45 days after the date of publication, persons may file with the department written objections to the application. The department shall publish the notice once in a newspaper of general circulation in the area of the source.

(b) the department shall also serve the notice by first-class mail upon:

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

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

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

(c) The department may, in its discretion, also serve notice upon any state agency or other person the department feels may be interested in or affected by the proposed appropriation.

(d) The department shall file in its records proof of service by affidavit of the publisher in the case of notice by publication and by its own affidavit in the case of service by mail.

(8) (a) An appropriator may file a correct and complete objection with the department alleging that the change as authorized 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

**Commented [JM37]:** No language here about returning a defective application

**Commented [JM38]:** This makes it even more important to define what 60 days after completion means

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 water right.

**Commented [AG39]:** Would this include terms/conditions that extend beyond the change requested? For example, if municipality seeks to expand its POU, can DNRC implement restrictions on type of use?

General thoughts: My question would be: should we add a deadline or a sunset? HB 114 put lots of deadlines in place for new permits and changes, so maybe that is implicit in this draft, but my quick reading did not identify that.

I would like to discuss adding irrigation to this law, with them following the same limitations/parameters as cities. Is that something the group is interested in entertaining? As long as their actual usage and source does not change (like cities), does it hurt to allow them to move their place of use, etc.?

DRAFT



# Subdivision Agency Coordination BillBill for Water/Notice of Intent

*Last updated 7.2.2024*

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## 76-3-604. Review of subdivision application

**76-3-604. Review of subdivision application** -- review for required elements and sufficiency of information. (1) (a) A subdivision application is considered to be received on the date of delivery to the reviewing agent or agency and when accompanied by the review fee submitted as provided in [76-3-602](#).

(b) Within 5 working days of receipt of a subdivision application, the reviewing agent or agency shall determine whether the application contains all of the listed materials as required by [76-3-504\(1\)\(a\)](#) and information required by [76-3-622](#) and shall notify the subdivider or, with the subdivider's written permission, the subdivider's agent of the reviewing agent's or agency's determination. If the reviewing agent or agency determines that elements are missing from the application, the reviewing agent or agency shall identify those elements in the notification.

(2) (a) Within 15 working days after the reviewing agent or agency notifies the subdivider or the subdivider's agent that the application contains all of the required elements as provided in subsection (1), the reviewing agent or agency shall determine whether the application and required elements contain detailed, supporting information that is sufficient to allow for the review of the proposed subdivision under the provisions of this chapter and the local regulations adopted pursuant to this chapter and shall notify the subdivider or, with the subdivider's written permission, the subdivider's agent of the reviewing agent's or agency's determination.

(b) If the reviewing agent or agency determines that information in the application is not sufficient to allow for review of the proposed subdivision, the reviewing agent or agency shall identify the insufficient information in its notification.

(c) A determination that an application contains sufficient information for review as provided in this subsection (2) does not ensure that the proposed subdivision will be approved or conditionally approved by the governing body and does not limit the ability of the reviewing agent or agency or the governing body to request additional information during the review process.

(3) The time limits provided in subsections (1) and (2) apply to each submittal of the application until:

- (a) a determination is made that the application contains the required elements and sufficient information; and
- (b) the subdivider or the subdivider's agent is notified.

(4) After the reviewing agent or agency has notified the subdivider or the subdivider's agent that an application contains sufficient information as provided in subsection (2), the governing body shall approve, conditionally approve, or deny the proposed subdivision within 60 working days or 80 working days if the proposed subdivision contains 50 or more lots, based on its determination of whether the application conforms to the provisions of this chapter and to the local regulations adopted pursuant to this chapter, unless:

- (a) the subdivider and the reviewing agent or agency agree to an extension or suspension of the review period, not to exceed 1 year; or
- (b) a subsequent public hearing is scheduled and held as provided in [76-3-615](#).

(5) (a) If the governing body fails to comply with the time limits under subsection (4), the governing body shall pay to the subdivider a financial penalty of \$50 per lot per month or a pro rata portion of a month, not to exceed the total amount of the subdivision review fee collected by the governing body for the subdivision application, until the governing body denies, approves, or conditionally approves the subdivision.

(b) The provisions of subsection (5)(a) do not apply if the review period is extended or suspended pursuant to subsection (4).

(6) If the governing body denies or conditionally approves the proposed subdivision, it shall send the subdivider a letter, with the appropriate signature, that complies with the provisions of [76-3-620](#).

(7) (a) The governing body shall collect public comment submitted at a hearing or hearings regarding the information presented pursuant to [76-3-622](#) and shall make any comments submitted or a summary of the comments submitted available to the subdivider within 30 days after conditional approval or approval of the subdivision application and preliminary plat.

(b) The subdivider shall, as part of the subdivider's application for sanitation approval, forward the comments or the summary provided by the governing body to the:

(i) reviewing authority provided for in Title 76, chapter 4, for subdivisions that will create one or more parcels containing less than 20 acres; and

(ii) local health department or board of health for proposed subdivisions that will create one or more parcels containing 20 acres or more and less than 160 acres.

(8) (a) For a proposed subdivision that will create one or more parcels containing less than 20 acres, the governing body may require approval by the department of environmental quality as a condition of approval of the final plat.

(b) For a proposed subdivision that will create one or more parcels containing 20 acres or more, the governing body may condition approval of the final plat upon the subdivider demonstrating, pursuant to [76-3-622](#), that there is an adequate water source and at least one area for a septic system and a replacement drainfield for each lot.

(9) (a) Review and approval, conditional approval, or denial of a proposed subdivision under this chapter may occur only under those regulations in effect at the time a subdivision application is determined to contain sufficient information for review as provided in subsection (2).

(b) If regulations change during the review periods provided in subsections (1) and (2), the determination of whether the application contains the required elements and sufficient information must be based on the new regulations.

(10) Unless otherwise provided by law, the governing body may review but does not have approval authority of the governing documents of the subdivision or amendments to the governing documents unless the governing documents directly and materially impact a condition of subdivision approval.

**History:** En. Sec. 8, Ch. 500, L. 1973; amd. Sec. 6, Ch. 334, L. 1974; amd. Sec. 3, Ch. 498, L. 1975; amd. Sec. 1, Ch. 555, L. 1977; R.C.M. 1947, 11-3866(part); amd. Sec. 1, Ch. 236, L. 1999; amd. Sec. 24, Ch. 582, L. 1999; amd. Sec. 4, Ch. 527, L. 2001; amd. Sec. 7, Ch. 298, L. 2005; amd. Sec. 5, Ch. 302, L. 2005; amd. Sec. 2, Ch. 405, L. 2009; amd. Sec. 3, Ch. 109, L. 2013; amd. Sec. 3, Ch. 319, L. 2021.

76-3-608. Criteria for local government review.

**76-3-608. Criteria for local government review.** (1) The basis for the governing body's decision to approve, conditionally approve, or deny a proposed subdivision is whether the subdivision application, preliminary plat, applicable environmental assessment, public hearing, planning board recommendations, or additional information demonstrates that development of the proposed subdivision meets the requirements of this chapter. A governing body may not deny approval of a proposed subdivision based solely on the subdivision's impacts on educational services or based solely on parcels within the subdivision having been designated as wildland-urban interface parcels under [76-13-145](#).

(2) The governing body shall issue written findings of fact that weigh the criteria in subsection (3), as applicable.

(3) A subdivision proposal must undergo review for the following primary criteria:

(a) except when the governing body has established an exemption pursuant to subsection (6) or except as provided in [76-3-509](#), [76-3-609\(2\)](#) or (4), or [76-3-616](#), the specific, documentable, and clearly defined impact on agriculture, agricultural water user facilities, local services, the natural environment, wildlife, wildlife habitat, and public health and safety, excluding any consideration of whether the proposed subdivision will result in a loss of agricultural soils;

(b) compliance with:

(i) the survey requirements provided for in part 4 of this chapter;

(ii) the local subdivision regulations provided for in part 5 of this chapter; and

(iii) the local subdivision review procedure provided for in this part;

(c) the provision of easements within and to the proposed subdivision for the location and installation of any planned utilities; and

(d) the provision of legal and physical access to each parcel within the proposed subdivision and the required notation of that access on the applicable plat and any instrument of transfer concerning the parcel.

(4) The governing body may require the subdivider to design the proposed subdivision to reasonably minimize potentially significant adverse impacts identified through the review required under subsection (3) but may not require a set-aside of land or monetary contribution for the loss of agricultural soils. Pursuant to [76-3-620](#), the governing body shall issue written findings to justify the reasonable mitigation required under this subsection (4).

(5) (a) In reviewing a proposed subdivision under subsection (3) and when requiring mitigation under subsection (4), a governing body may not unreasonably restrict a landowner's ability to develop land, but it is recognized that in some instances the impacts of a proposed development may be deemed unmitigable and will preclude approval of the subdivision.

(b) When requiring mitigation under subsection (4) and consistent with [76-3-620](#), a governing body shall consult with the subdivider and shall give due weight and consideration to the expressed preference of the subdivider.

(6) (a) A governing body may conditionally approve or deny a proposed subdivision as a result of the water and sanitation information provided pursuant to [76-3-622](#) or public comment received pursuant to [76-3-604](#) on the information provided pursuant to [76-3-622](#) only if the conditional approval or denial is based on existing subdivision, zoning, or other regulations that the governing body has the authority to enforce.

(b) (i) A governing body may approve a proposed subdivision if the applicant submits proof of adequate water rights pursuant to a permit under 85-2-311, a change under 85-2-402, an existing water right under 85-2-221.

or a groundwater certificate or notice of intent to appropriate groundwater under 85-2-306 as determined by the Department of Natural Resources and Conservation.

(ii) The water allocation for each parcel utilizing a groundwater certificate under 85-2-306 must be identified on the final plat provided for 76-3-611 and be recorded with any required certification of subdivision approval provided for 76-4-122.

(7) A governing body may not require as a condition of subdivision approval that a property owner waive a right to protest the creation of a special improvement district or a rural improvement district for capital improvement projects that does not identify the specific capital improvements for which protest is being waived. A waiver of a right to protest may not be valid for a time period longer than 20 years after the date that the final subdivision plat is filed with the county clerk and recorder.

(8) A governing body may not approve a proposed subdivision if any of the features and improvements of the subdivision encroach onto adjoining private property in a manner that is not otherwise provided for under chapter 4 or this chapter or if the well isolation zone of any proposed well to be drilled for the proposed subdivision encroaches onto adjoining private property unless the owner of the private property authorizes the encroachment. For the purposes of this section, "well isolation zone" has the meaning provided in 76-4-102.

(9) If a federal or state governmental entity submits a written or oral comment or an opinion regarding wildlife, wildlife habitat, or the natural environment relating to a subdivision application for the purpose of assisting a governing body's review, the comment or opinion may be included in the governing body's written statement under 76-3-620 only if the comment or opinion provides scientific information or a published study that supports the comment or opinion. A governmental entity that is or has been involved in an effort to acquire or assist others in acquiring an interest in the real property identified in the subdivision application shall disclose that the entity has been involved in that effort prior to submitting a comment, an opinion, or information as provided in this subsection.

(10) Findings of fact by the governing body concerning whether the development of the proposed subdivision meets the requirements of this chapter must be based on the record as a whole. The governing body's findings of fact must be sustained unless they are arbitrary, capricious, or unlawful.

**History:** En. Sec. 8, Ch. 500, L. 1973; amd. Sec. 6, Ch. 334, L. 1974; amd. Sec. 3, Ch. 498, L. 1975; amd. Sec. 1, Ch. 555, L. 1977; R.C.M. 1947, 11-3866(4); amd. Sec. 5, Ch. 272, L. 1993; amd. Sec. 6, Ch. 468, L. 1995; amd. Sec. 26, Ch. 582, L. 1999; amd. Sec. 7, Ch. 348, L. 2001; amd. Sec. 10, Ch. 298, L. 2005; amd. Sec. 6, Ch. 302, L. 2005; amd. Sec. 6, Ch. 455, L. 2007; amd. Sec. 1, Ch. 406, L. 2009; amd. Sec. 17, Ch. 446, L. 2009; amd. Sec. 1, Ch. 409, L. 2011; amd. Sec. 1, Ch. 112, L. 2013; amd. Sec. 2, Ch. 195, L. 2013; amd. Sec. 2, Ch. 362, L. 2017; amd. Sec. 1, Ch. 275, L. 2021; amd. Sec. 4, Ch. 319, L. 2021.

**Commented [BH40]:** Needs clarification as to what DNRC is determining and when

**Commented [JM41]:** This language means that a subdivision that plans to apply for a permit (and, most likely, a mitigation change application) must have this process completely done before they can even start the subdivision process. This is not realistic. If you all want people to do subdivisions on permits instead of exempt wells, you MUST make provisions for the water right permitting (and mitigation) process to move forward in concert with the subdivision process. No one is going to sink \$250K-\$500K and 2+ years into a water right before they can even start the subdivision process.

**Commented [HC42]:** Karen Alley has proposed conflicting changes to this subsection. Her version would read as follows: "(ii) The water allocation for each parcel utilizing a groundwater certificate under 85-2-306 may accompany the final plat provided for 76-3-611 and in accordance with Admin.R.Mont. 24.183.1107(5)(h) or may be recorded with any required certification of subdivision approval provided for 76-4-122."

76-3-622. Water and sanitation information to accompany preliminary plat.

**76-3-622. Water and sanitation information to accompany preliminary plat.** (1) Except as provided in subsection (2), the subdivider shall submit to the governing body or to the agent or agency designated by the governing body the information listed in this section for proposed subdivisions that will include new water supply or wastewater facilities. The information must include:

(a) a vicinity map or plan that shows:

(i) the location, within 100 feet outside of the exterior property line of the subdivision and on the proposed lots, of:

(A) flood plains;

(B) surface water features;

(C) springs;

(D) irrigation ditches;

(E) existing, previously approved, and, for parcels less than 20 acres, proposed water wells and wastewater treatment systems, except that the subdivider may locate a water well anywhere on a lot, parcel, or tract of record if the subdivider maintains the minimum setback distances adopted in rule by the department of environmental quality;

(F) for parcels less than 20 acres, mixing zones identified as provided in subsection (1)(g); and

(G) the representative drainfield site used for the soil profile description as required under subsection (1)(d); and

(ii) the location, within 500 feet outside of the exterior property line of the subdivision, of public water and sewer facilities;

(b) a description of the proposed subdivision's water supply systems, storm water systems, solid waste disposal systems, and wastewater treatment systems, including:

(i) whether the water supply and wastewater treatment systems are individual, shared, multiple user, or public as those systems are defined in rules published by the department of environmental quality; and

(ii) if the water supply and wastewater treatment systems are shared, multiple user, or public, a statement of whether the systems will be public utilities as defined in [69-3-101](#) and subject to the jurisdiction of the public service commission or exempt from public service commission jurisdiction and, if exempt, an explanation for the exemption;

(c) a drawing of the conceptual lot layout at a scale no smaller than 1 inch equal to 200 feet that shows all information required for a lot layout document in rules adopted by the department of environmental quality pursuant to [76-4-104](#);

(d) evidence of suitability for new onsite wastewater treatment systems that, at a minimum, includes:

(i) a soil profile description from a representative drainfield site identified on the vicinity map, as provided in subsection (1)(a)(i)(G), that complies with standards published by the department of environmental quality;

(ii) demonstration that the soil profile contains a minimum of 4 feet of vertical separation distance between the bottom of the permeable surface of the proposed wastewater treatment system and a limiting layer; and

(iii) in cases in which the soil profile or other information indicates that ground water is within 7 feet of the natural ground surface, evidence that the ground water will not exceed the minimum vertical separation distance provided in subsection (1)(d)(ii);

- (e) for new water supply systems, unless cisterns are proposed, evidence of adequate water availability:
- (ii) obtained from well logs or testing of onsite or nearby wells;
- (iii) obtained from information contained in published hydrogeological reports; or
- (iv) as otherwise specified by rules adopted by the department of environmental quality pursuant to [76-4-104](#);

~~(f)~~ for new water supply systems, proof of adequate water rights pursuant to a permit under 85-2-311, a change under 85-2-402, an existing water right under 85-2-221, or a groundwater certificate or notice of intent to appropriate groundwater under 85-2-306 as determined by the Department of Natural Resources and Conservation.

~~(g)~~ evidence of sufficient water quality in accordance with rules adopted by the department of environmental quality pursuant to [76-4-104](#);

~~(h)~~ a preliminary analysis of potential impacts to ground water quality from new wastewater treatment systems, using as guidance rules adopted pursuant to [75-5-301](#) and [75-5-303](#) related to standard mixing zones for ground water, source specific mixing zones, and nonsignificant changes in water quality. The preliminary analysis may be based on currently available information and must consider the effects of overlapping mixing zones from proposed and existing wastewater treatment systems within and directly adjacent to the subdivision. Instead of performing the preliminary analysis required under this subsection (1)(g), the subdivider may perform a complete nondegradation analysis in the same manner as is required for an application that is reviewed under Title 76, chapter 4.

(2) A subdivider whose land division is excluded from review under [76-4-125\(1\)](#) is not required to submit the information required in this section.

(3) A governing body may not, through adoption of regulations, require water and sanitation information in addition to the information required under this section unless the governing body complies with the procedures provided in [76-3-511](#).

**History:** En. Sec. 4, Ch. 302, L. 2005; amd. Sec. 1, Ch. 165, L. 2013; amd. Sec. 5, Ch. 344, L. 2017; amd. Sec. 2, Ch. 80, L. 2019; amd. Sec. 77, Ch. 324, L. 2021; amd. Sec. 1, Ch. 673, L. 2023.

**Commented [BH43]:** Needs clarification as to what DNRC is determining. Timing is off here since section is for preliminary plats. Adequate water system is developed after prelim plat approval, but prior to final plat.

**Commented [JM44]:** Same comment as 6(b) above

76-4-104. Rules for administration and enforcement.

**76-4-104. Rules for administration and enforcement.** (1) The department shall, subject to the provisions of [76-4-135](#), adopt reasonable rules, including adoption of sanitary standards, necessary for administration and enforcement of this part.

(2) The rules and standards must provide the basis for approving subdivisions for various types of public and private water supplies, sewage disposal facilities, storm water drainage ways, and solid waste disposal. The rules and standards must be related to:

- (a) size of lots;
- (b) contour of land;
- (c) porosity of soil;
- (d) ground water level;
- (e) distance from lakes, streams, and wells;
- (f) type and construction of private water and sewage facilities; and
- (g) other factors affecting public health and the quality of water for uses relating to agriculture, industry, recreation, and wildlife.

(3) The storm drainage review requirements of this chapter do not apply to divisions or parcels of land that are exempt from review under [76-3-207](#)(1)(a), (1)(d), (1)(e), or (1)(f) that:

- (a) are used for a single-family residential purpose; and
- (b) include no more than 25% that is impervious.

(4) (a) Except as provided in subsection (4)(b), the rules must provide for the review of subdivisions consistent with [76-4-114](#) by a local department or board of health, as described in Title 50, chapter 2, part 1, if the local department or board of health employs a registered sanitarian or a registered professional engineer and if the department certifies under subsection (5) that the local department or board is competent to conduct the review.

(b) (i) Except as provided in [75-6-121](#) and subsection (4)(b)(ii) of this section, a local department or board of health may not review public water supply systems, public sewage systems, or extensions of or connections to these systems.

(ii) A local department or board of health may be certified by the department to review subdivisions proposed to connect to existing municipal or county water and/or sewer district water and wastewater systems previously approved by the department if no extension of the systems is required.

(5) (a) The department shall also adopt standards and procedures for certification and maintaining certification to ensure that a local department, local board of health, or independent reviewer is competent to review the subdivisions as described in subsection (4).

(b) On or before December 31, 2023, the department shall develop procedures for certification of prequalified independent reviewers and develop a training curriculum to ensure compliance with this part.

(6) The department shall review those subdivisions described in subsection (4) if:

- (a) a proposed subdivision lies within more than one jurisdictional area and the respective governing bodies are in disagreement concerning approval of or conditions to be imposed on the proposed subdivision; or
- (b) the local department or board of health elects not to be certified.

(7) The rules must further provide for:

(a) providing the reviewing authority with a copy of the plat or certificate of survey subject to review under this part and other documentation showing the layout or plan of development, including:

(i) total development area; and

(ii) total number of proposed units and structures requiring facilities for water supply or sewage disposal;

(b) adequate evidence that a water supply that is sufficient in terms of quality, quantity, and dependability will be available to ensure an adequate supply of water for the type of subdivision proposed;

(c) (i) proof of adequate water rights pursuant to a permit under 85-2-311, a change under 85-2-402, an existing water right under 85-2-221, or a groundwater certificate or notice of intent to appropriate groundwater under 85-2-306 approved by the Department of Natural Resources and Conservation must be submitted prior to final Sanitation Act approval

(ii) The water allocation for each parcel utilizing a groundwater certificate under 85-2-306 must be identified on the final plat provided for 76-3-611 and be recorded with any required certification of subdivision approval provided for 76-4-122.

~~(c)~~(d) evidence concerning the potability of the proposed water supply for the subdivision;

~~(d)~~(e) adequate evidence that a sewage disposal facility is sufficient in terms of capacity and dependability;

~~(e)~~(f) standards and technical procedures applicable to storm drainage plans and related designs, in order to ensure proper drainage ways, except that the rules must provide a basis for not requiring storm water review under this part for parcels 5 acres and larger on which the total impervious area does not and will not exceed 5%. Nothing in this section relieves any person of the duty to comply with the requirements of Title 75, chapter 5, or rules adopted pursuant to Title 75, chapter 5.

~~(f)~~(g) standards and technical procedures applicable to sanitary sewer plans and designs, including soil testing and site design standards for on-lot sewage disposal systems when applicable;

~~(g)~~(h) standards and technical procedures applicable to water systems;

~~(h)~~(i) standards and technical procedures applicable to solid waste disposal;

~~(i)~~(j) adequate evidence that a proposed drainfield mixing zone and a proposed well isolation zone are located wholly within the boundaries of the proposed subdivision where the proposed drainfield or well is located or that an easement or, for public land, other authorization has been obtained from the landowner to place the proposed drainfield mixing zone or proposed well isolation zone outside the boundaries of the proposed subdivision where the proposed drainfield or proposed well is located.

(i) A proposed drainfield mixing zone or a proposed well isolation zone for an individual water system well that is a minimum of 50 feet inside the subdivision boundary may extend outside the boundaries of the subdivision onto adjoining land that is dedicated for use as a right-of-way for roads, railroads, or utilities.

(ii) This subsection (7)(i) does not apply to the divisions provided for in 76-3-207 except those under 76-3-207(1)(b). Nothing in this section is intended to prohibit the extension, construction, or reconstruction of or other improvements to a public sewage system within a well isolation zone that extends onto land that is dedicated for use as a right-of-way for roads, railroads, or utilities.

(j) criteria for granting waivers and deviations from the standards and technical procedures adopted under subsections (7)(e) through (7)(i);

(k) evidence to establish that, if a public water supply system or a public sewage system is proposed, provision has been made for the system and, if other methods of water supply or sewage disposal are proposed, evidence that the systems will comply with state and local laws and regulations that are in effect at the time of submission

**Commented [CH45]:** Additions in this subsection that look like they're by me are from DEQ

**Commented [JM46]:** Ditto previous comments

**Commented [BH47]:** Needs clarity as to what DNRC is to determine



of the subdivision application under this chapter. Evidence that the systems will comply with local laws and regulations must be in the form of a certification from the local health department as provided by department rule.

(l) evidence to demonstrate that appropriate easements, covenants, agreements, and management entities have been established to ensure the protection of human health and state waters and to ensure the long-term operation and maintenance of water supply, storm water drainage, and sewage disposal facilities;

(m) eligibility requirements for municipalities and county water and/or sewer districts to qualify as a certifying authority under the provisions of [76-4-127](#);

(n) construction details for individual and shared onsite wastewater systems to be reviewed by the local board of health at the time of septic permitting, except that the reviewing authority may require additional construction detail if the wastewater is not residential strength;

(o) simplified methods for storm water reviews, including acceptable minimum storm water volumes based solely on impervious area for proposed lots with one or two single-family residences; and

(p) a basis for exempting from review facilities previously approved under this chapter or by a local reviewing authority of the facility is not proposed to be changed, is not affected by a proposed change to another facility, and meets the design conditions of its existing approval under this chapter or by the local authority and is operating properly. Existing systems must meet the current setbacks established in rule and subsection (7)(i), unless the lot was created before the relevant effective dates for mixing zones and isolation zones.

(8) The requirements of subsection (7)(i) regarding proposed drainfield mixing zones and proposed well isolation zones apply to all subdivisions or divisions excluded from review under [76-4-125](#) created after October 1, 2021, except as provided in subsections (7)(i)(i) and (7)(i)(ii).

(9) The department shall:

(a) conduct a biennial review of experimental wastewater system components that have been granted a waiver or deviation as provided in subsection (7)(j);

(b) utilize relevant analysis of wastewater system components approved in other states and data from peer-reviewed third-party studies to conduct the review provided in subsection (9)(a);

(c) propose those experimental wastewater system components that meet the purposes and provisions of this part for adoption into the rules pursuant to this section; and

(d) report to the local government interim committee biennially, in accordance with [5-11-210](#), the number and type of experimental wastewater system components reviewed and the number and type of system components approved and provide written findings to explain why a system component was reviewed but not approved.

(10) Review and certification or denial of certification that a division of land is not subject to sanitary restrictions under this part may occur only under those rules in effect when a complete application is submitted to the reviewing authority, except that in cases in which current rules would preclude the use for which the lot was originally intended, the applicable requirements in effect at the time the lot was recorded must be applied. In the absence of specific requirements, minimum standards necessary to protect public health and water quality apply.

(11) The reviewing authority may not deny or condition a certificate of subdivision approval under this part unless it provides a written statement to the applicant detailing the circumstances of the denial or condition imposition. The statement must include:

(a) the reason for the denial or condition imposition;

(b) the evidence that justifies the denial or condition imposition; and

(c) information regarding the appeal process for the denial or condition imposition.

(12) (a) Subject to subsection (12)(b), the department may adopt rules that provide technical details and clarification regarding the water and sanitation information required to be submitted under [76-3-622](#).

(b) A subdivider may locate a water well anywhere on a lot, parcel, or tract of record if the subdivider maintains the minimum setback distances adopted in rule. The reviewing authority may not limit a subdivider to a single proposed well location.

(13) (a) The rules must provide for the review of subdivisions consistent with [76-4-114](#) by an independent reviewer if the department certifies under subsection (5) of this section that the independent reviewer is competent to conduct the review.

(b) (i) Except as provided in subsection (13)(b)(ii), an independent reviewer may not review public water supply systems, public sewage systems, or extensions of or connections to these systems.

(ii) An independent reviewer may be certified by the department to review subdivisions proposed to connect to existing municipal or county water and/or sewer district water and wastewater systems previously approved by the department if no extension of the system is required.

(c) If 110 or more new files are submitted to the department for review in any 1 month, the department shall assign applications received in that month to independent reviewers unless an independent reviewer is not available.

(d) The department shall reimburse independent reviewers at the same rate the department reimburses local departments or local boards of health certified under subsection (4).

(14) Prior to being assigned an application for review, an independent reviewer shall identify any conflict of interest related to the project under potential review. If the independent reviewer identifies a conflict of interest, the application for review must be assigned to a different independent reviewer.

(15) An independent reviewer acting under the requirements of this chapter shall comply with the provisions of Title 2, chapter 6, for public information requests.

(16) An independent reviewer conducting reviews under this section shall complete documents necessary to complete the review and to comply with:

(a) the Montana Environmental Policy Act provided for in Title 75, chapter 1, parts 1 through 3; and

(b) real property takings requirements in accordance with Title 70.

**History:** En. Sec. 152, Ch. 197, L. 1967; amd. Sec. 3, Ch. 509, L. 1973; amd. Sec. 3, Ch. 529, L. 1975; amd. Sec. 3, Ch. 557, L. 1977; R.C.M. 1947, 69-5005(part); amd. Sec. 2, Ch. 378, L. 1985; amd. Sec. 2, Ch. 490, L. 1985; amd. Sec. 1, Ch. 224, L. 1995; amd. Sec. 19, Ch. 471, L. 1995; amd. Sec. 5, Ch. 280, L. 2001; amd. Sec. 7, Ch. 302, L. 2005; amd. Sec. 1, Ch. 83, L. 2011; amd. Sec. 1, Ch. 217, L. 2011; amd. Sec. 4, Ch. 195, L. 2013; amd. Sec. 2, Ch. 261, L. 2017; amd. Sec. 6, Ch. 344, L. 2017; amd. Sec. 5, Ch. 80, L. 2019; amd. Sec. 1, Ch. 49, L. 2021; amd. Sec. 3, Ch. 419, L. 2021; amd. Sec. 3, Ch. 611, L. 2023; amd. Sec. 3, Ch. 673, L. 2023; amd. Sec. 3, Ch. 752, L. 2023.

76-4-108. Enforcement.

**76-4-108. Enforcement.** (1) If the reviewing authority has reason to believe that a violation of this part or a rule adopted or an order issued under this part has occurred, the reviewing authority may have written notice and an order served personally or by certified mail on the alleged violator or the alleged violator's agent. The notice must state the provision alleged to be violated, the facts alleged to constitute the violation, the corrective action required by the reviewing authority, and the time within which the action is to be taken. A notice and order issued by the department under this section may also assess an administrative penalty as provided in 76-4-109. The alleged violator may, no later than 30 days after service of a notice and order under this section, request a hearing before the local reviewing authority if it issued the notice of violation or the board if the department issued the notice of violation. A request for a hearing must be filed in writing with the appropriate entity and must state the reason for the request. If a request is filed, a hearing must be held within a reasonable time.

(2) In addition to or instead of issuing an order, the reviewing authority may initiate any other appropriate action to compel compliance with this part.

(3) The provisions of this part may be enforced by a reviewing authority other than the department or board only for those divisions described in 76-4-104(4). If a local reviewing authority fails to adequately enforce the provisions of this part, the department or the board may compel compliance with this part under the provisions of this section.

(4) When a local reviewing authority exercises the authority delegated to it by this section, the local reviewing authority is legally responsible for its actions under this part.

(5) If the department or a local reviewing authority determines that a violation of this part, a rule adopted under this part, or an order issued under this part has occurred, the department or the local reviewing authority may revoke its certificate of approval for the subdivision and reimpose sanitary restrictions following written notice to the alleged violator. Upon revocation of a certificate, the person aggrieved by revocation may request a hearing. A hearing request must be filed in writing within 30 days after receipt of the notice of revocation and must state the reason for the request. The hearing is before the board if the department revoked the certificate or before the local reviewing authority if the local reviewing authority revoked the certificate.

(6) The contested case provisions of the Montana Administrative Procedure Act, Title 2, chapter 4, part 6, apply to a hearing held under this section.

(7) Enforcement of water rights under title 85, chapter 2 and the terms, conditions, restrictions, and limits under 76-4-112 (1)(b) will be conducted by the Department of Natural Resources and Conservation.

**Commented [BH48]:** Not a fan of this provision. 76-4-112 allows for easement and covenants running with the land for operation and protection of infrastructure and water supplies. Any benefited owner or entity should be able to enforce those easements/covenants. Regarding water rights, provisions for enforcement by DNRC (or AG/County Attorney) are set forth in 85-1-112. Appropriators also have some enforcement authority for distribution of water under 85-5-301.

76-4-113. Notification to purchasers.

76-4-113. Notification to purchasers. The developer or owner of an approved subdivision shall provide each purchaser of property within the subdivision with a copy of the plat or certificate of survey and the certificate of subdivision approval specifying the approved type and locations of water supply, proof of adequate water rights as required in 76-4-104(7), storm water drainage, and sewage disposal facilities and information regarding connection to municipal, county water and/or sewer district, or regional authority facilities provided for under 76-4-130. Each subsequent seller of property within the subdivision shall include within the instruments of transfer a reference to the conditions of the certificate of subdivision approval. The seller of any lot recorded with the exemption in 76-4-125(1)(c) shall include within the instruments of transfer a reference to that exclusion and a statement that the lot has not been reviewed or approved under this part. A written verification of notice that is signed by both the seller and the purchaser and is recorded with the county clerk and recorder constitutes conclusive evidence of compliance with this section for that transaction.

**Commented [JM49]:** This is the appropriate time to require that the water right process be complete

**Commented [BH50]:** The cited statute does not say water rights, it says "adequate evidence that a water supply that is sufficient . . ."

**Commented [JM51]:** This is the appropriate time to require that the water right process be complete

76-4-114. Review of application.

76-4-114. Review of application. Except as provided in 76-4-125, the applicant shall submit an application for review of a subdivision pursuant to the following procedure:

(1) An applicant may request a preapplication meeting with the reviewing authority prior to submitting an application. The reviewing authority shall schedule the requested meeting between the applicant and the reviewing authority within 30 days of receiving the request from the applicant. The meeting may be conducted in person, via telephone, or via teleconference. For informational purposes only, the reviewing agent shall identify the state laws and rules that may apply to the subdivision review process.

(2) If the proposed development includes onsite sewage disposal facilities, the applicant shall notify the designated agent of the local board of health prior to presenting the subdivision application to the reviewing authority. The agent may conduct a preliminary site assessment to determine whether the site meets applicable state and local requirements.

(3) (a) After submitting an application if required under the Montana Subdivision and Platting Act, the applicant shall submit an application to the reviewing authority. A subdivision application is considered to be received on the date of delivery to the reviewing authority when accompanied by the review fee established pursuant to 76-4-105.

(b) Within 15 days of the receipt of an application, the reviewing authority or independent reviewer shall determine whether the application contains the elements required by 76-4-115(1) to allow for review and shall notify the applicant of the determination. If the reviewing authority or independent reviewer determines that elements are missing from the application, the reviewing agent or agency shall identify those elements in the notification. The applicant shall address the missing elements identified by the reviewing authority or independent reviewer. A determination that an application contains the required elements for review as provided in this subsection (3)(b) does not ensure that the proposed subdivision will be approved and does not limit the ability of the reviewing authority or independent reviewer to request additional information during the review process.

(c) (i) After the reviewing authority or independent reviewer notifies the applicant that the application contains all of the required elements as provided by subsection (3)(b), the reviewing authority or independent reviewer shall make a final decision or a recommendation on the application. Except as provided by subsection (4), the reviewing authority or independent reviewer shall:

(A) make a final decision within 40 days of finding that the application contains all of the required elements if the reviewing authority is the department; or

(B) make a recommendation for approval to the department or deny the application within 30 days of finding that the application contains all of the required elements if the reviewing authority is a local department, local board of health, or independent reviewer. If the department receives a recommendation for approval of

the subdivision from a local department, local board of health, or independent reviewer, the department shall make a final decision on the application within 10 days of receiving the recommendation.

(ii) If the department approves the application, the department shall issue a certificate of subdivision approval indicating that it has approved the plans and specifications, proof of adequate water rights as required in 76-4-104(7), and that the subdivision is not subject to a sanitary restriction.

(iii) If the reviewing authority or independent reviewer denies the application, the reviewing authority or independent reviewer shall identify the deficiencies that result in the denial in a notification to the applicant. The reviewing authority may identify other apparent deficiencies in additional information submitted after the initial application.

(d) (i) If the reviewing authority or independent reviewer denies an application and the applicant resubmits a corrected application within 30 days after the date of the denial letter, the reviewing authority or independent reviewer shall complete review of the resubmitted application within 30 days after receipt of the resubmitted application.

(ii) If the reviewing authority or independent reviewer denies an application and the applicant resubmits a corrected application after 30 days after the date of the denial letter, the reviewing authority or independent reviewer shall complete review of the resubmitted application within:

(A) 55 days after receipt of the resubmitted application if the reviewing authority is the department; or

(B) 45 days after receipt of the resubmitted application if the reviewing authority is a local department, local board of health, or independent reviewer.

(iii) If the review of the resubmitted application is conducted by a local department, local board of health, or independent reviewer and the reviewing authority or independent reviewer makes a recommendation to the department for approval of the application, the department shall make a final decision on the application within 10 days after the local reviewing authority or independent reviewer completes its review under subsection (3)(d)(i) or (3)(d)(ii).

(4) Except as provided in subsections (6) and (7), if the reviewing authority or independent reviewer needs an extension of a deadline in this section to complete its review or if an applicant requests an extension of a deadline, then the reviewing authority or independent reviewer shall notify the applicant of the extension prior to the end of the review deadline. An extension under this subsection may not exceed 30 days.

(5) The reviewing authority or independent reviewer may extend a deadline in this section until the items required in 76-4-115(2) and 76-4-104 (7)(c) are submitted. The reviewing authority or independent reviewer shall notify the applicant of the extension before the end of the review deadline. The reviewing authority or independent reviewer shall make a final decision within 30 days of receipt of the items required in 76-4-115(2).

(6) The department may extend a deadline under subsections (3)(c) and (3)(d) by 90 days if an environmental assessment is required.

(7) The department may extend a deadline under subsections (3)(c) and (3)(d) by 120 days if an environmental impact statement is required.

(8) An application is considered an overdue application if the department has not provided a response or met the statutory timelines provided in this section.

(9) If a municipal system has been delegated review authority under 75-6-112, the department is not required to review water or sewer facilities that have already been approved by the municipality.

History: En. Sec. 1, Ch. 344, L. 2017; amd. Sec. 10, Ch. 80, L. 2019; amd. Sec. 5, Ch. 611, L. 2023.

**Commented [BH52]:** The cited statute does not say water rights, it says "adequate evidence that a water supply that is sufficient . . ."

76-4-122. Certain filings prohibited.

**76-4-122. Certain filings prohibited.** (1) The county clerk and recorder may not file or record any plat, certificate of survey, or townhome, townhouse, or condominium declaration subject to review under this part showing a subdivision unless it complies with the provisions of this part.

(2) A county clerk and recorder may not accept a subdivision plat, certificate of survey, or townhome, townhouse, or condominium declaration subject to review under this part for filing until one of the following conditions has been met:

(a) the person wishing to file the plat, certificate of survey, or townhome, townhouse, or condominium declaration has obtained approval of the local health officer having jurisdiction and has filed the approval with the reviewing authority and a certificate of subdivision approval has been issued pursuant to 76-4-114 indicating that the reviewing authority has approved the subdivision application and that the subdivision is not subject to a sanitary restriction;

(b) the person wishing to file the plat, certificate of survey, or townhome, townhouse, or condominium declaration has obtained a certificate from the certifying authority pursuant to 76-4-127 that the subdivision will be provided with adequate municipal or county water and/or sewer district facilities and adequate storm water drainage; or

(c) the person wishing to file the plat, certificate of survey, or townhome, townhouse, or condominium declaration has placed on the plat, certificate of survey, or townhome, townhouse, or condominium declaration an acknowledged certification that the subdivision is exempt from review under this part. The certification must quote in its entirety the wording of the applicable exemption.

(3) proof of adequate water rights as required in 76-4-104(7).

**Commented [BH53]:** The cited statute does not say water rights, it says "adequate evidence that a water supply that is sufficient . . ."

**Commented [JM54]:** What is this trying to say?

[New Section] **Proof of adequate water rights pursuant to Sanitation and Platting Act**

**(1) On a form provided by the department, an applicant shall request from the Department proof of adequate water rights pursuant to a permit under 85-2-311, a change under 85-2-402, an existing water right under 85-2-221, or a groundwater certificate or notice of intent to appropriate groundwater under 85-2-306 for the purposes of Sanitation and Platting Act approval.**

**Commented [HC55]:** Comment from Karen Alley: "I just want to make sure we're clear that this section will refer to both 76-4 (Sanitation in Subdivisions) as well as 76-3 (Subdivision and Platting Act)"

**Commented [JM56]:** Where is this new section proposed to be added?

85-2-306. Exceptions to permit requirements.

**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) (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

(iv) when the appropriation is within a stream depletion zone, is 20 gallons a 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.

**Commented [AG57]:** As I recall, we discussed having a statutory directive for DNRC to designate CGAs in the "red areas." I have concerns about leaving all implementation to rulemaking.

**Commented [AG58]:** I think it's time we strike the exemption within stream depletion zones. This is a tool that should be available for landowners within "green areas" who are concerned about surface depletions, but the current reduction in flow/rate (20 GPM) and volume (2 AF) is totally arbitrary and doesn't give existing users any real protections.

(b) (i) An appropriator may not appropriate groundwater without a permit pursuant to subsection 3 (a)(ii) or 3(a)(iii) unless a notice of intent to appropriate groundwater is approved by the department. An appropriator must file a correct and complete notice of intent to appropriate on a form provided by the department.

(ii) A notice of intent to appropriate groundwater for a water supply system subject to Title 75, chapter 6, part 1, may be submitted pursuant to this subsection. Water appropriated under this exception must be measured and reported annually to the department.

(iii) Upon receipt of notice of intent to appropriate, the department shall review the notice and may, before issuing an approval, return a defective notice of intent to appropriate for correction or completion, together with the reasons for returning it. A notice of intent to appropriate not corrected and completed within 30 days of a notice of defects is terminated.

(iv) Unless extended by the department, an appropriation under this subpart must be completed within five years from the date the notice of intent to appropriate is accepted by the department.

(v) Upon completion of construction of the diversion works and beneficial use of the water, the appropriator shall file a notice of completion pursuant to subsection 3(c).

(b)(c)(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.

(iii) 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 correct and complete notice of completion for an appropriation under 3(a)(iii) or 3(a)(iv) must establish the appropriation was completed in substantial accordance with the notice of proposal of appropriation approved by the department under subsection 3(b). 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. 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, 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.

Commented [BH59]: Added provision for extension

Commented [JM60]: Intent to appropriate?



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

- (a) the maximum capacity of the impoundment or pit is less than 15 acre-feet;
- (b) the appropriation is less than 30 acre-feet a year;
- (c) the appropriation is from an ephemeral stream, an intermittent stream, or another source other than a perennial flowing stream; and
- (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

(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.

**History:** En. Sec. 16, Ch. 452, L. 1973; amd. Sec. 2, Ch. 238, L. 1974; amd. Sec. 8, Ch. 485, L. 1975; amd. Sec. 4, Ch. 416, L. 1977; amd. Sec. 1, Ch. 470, L. 1977; R.C.M. 1947, 89-880(5), (7); amd. Sec. 1, Ch. 30, L. 1981; amd. Sec. 1, Ch. 160, L. 1981; amd. Sec. 1, Ch. 357, L. 1981; amd. Sec. 8, Ch. 448, L. 1983; amd. Sec. 1, Ch. 499, L. 1985; amd. Sec. 2, Ch. 535, L. 1987; amd. Sec. 1, Ch. 432, L. 1989; amd.

Sec. 13, Ch. 769, L. 1991; amd. Sec. 4, Ch. 805, L. 1991; amd. Sec. 9, Ch. 629, L. 1993; amd. Sec. 447, Ch. 418, L. 1995; amd. Sec. 1, Ch. 250, L. 1999; amd. Sec. 3, Ch. 78, L. 2001; amd. Sec. 3, Ch. 161, L. 2005; amd. Sec. 5, Ch. 213, L. 2007; amd. Sec. 1, Ch. 86, L. 2009; amd. Sec. 1, Ch. 96, L. 2011; amd. Sec. 1, Ch. 97, L. 2011; amd. Sec. 2, Ch. 421, L. 2013; amd. Sec. 8, Ch. 294, L. 2015; amd. Sec. 1, Ch. 455, L. 2015; amd. Sec. 1, Ch. 243, L. 2017; amd. Sec. 2, Ch. 264, L. 2017; amd. Sec. 1, Ch. 561, L. 2023.

I still don't have a full grasp of all the subdivision law encompassed in this bill draft and have not had enough time to fully delve into the statutes and do my research so I cannot yet make a fully educated comment.

DRAFT

**2023-2024 DNRC Comprehensive Water Review Stakeholder  
Policy Questions, Concerns, Recommendations**

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**1. Water Storage**

A holistic solution that addresses public and institutional concerns related to water planning, growth, and permit-exempt uses of groundwater in Montana must explore the optimization of both natural and built water storage to expand access to water and mitigate the impacts of drought. Enhancing water storability and exploring more innovative storage solutions are central topics that have long influenced the development of drought, flood, and other statewide planning strategies. The 2015 Montana State Water Plan recognized that large, traditional (built) water storage projects are "expensive to plan, construct, operate, and maintain" that are "limited by the availability of suitable locations, cost, public support, the need to mitigate environmental impacts, and the limited legal and physical availability of water." This plan endorsed ways to maximize built storage capacity through rehabilitation and modifying reservoir operation policies, as well as integrating natural storage to benefit water supplies and ecosystems. As described in the 2023 Montana Drought Management Plan (Drought Plan), building drought resilience in Montana will require the implementation of a broad range of proactive adaptive strategies to help water users prepare for future drought, and state agencies can play an essential role in providing tools and resources for planning, outreach, and project implementation. The Water Supply, Storage, and Delivery stakeholder-derived recommendations described in the Drought Plan received broad and enthusiastic support at every level, and while full implementation of the recommendations in this category will require long-term investment, moving forward with the initial steps is a clear near-term priority. Montana is a diverse state demographically, geographically, and ecologically, and a one-size-fits-all storage approach does not exist. Effective storage solutions will need to consider all beneficial uses of water equally while recognizing that prevention of adverse effect may require greater regulation of some solutions and less oversight for others. The water storage recommendations described below reflect the ideas generated by the DNRC Comprehensive Water Review Stakeholder Working Group over the course of nearly a year's worth of monthly all-day meetings and monthly interim sub-working group meetings. Each recommendation action item is intended to respond to the water storage-specific challenges illuminated by stakeholders.

**Water Storage Recommendations:**

1. What, if any, are the limitations in federal law for implementing the State Water Plan? Do current statutes reflect the needs of today? Federal limitations to State Water Plan implementation will be compiled and reviewed.
2. Issues and limitations exist related to changing water rights with places of use that are encompassed within service areas (e.g., municipalities, irrigation districts, water & sewer districts, etc.) that must be addressed, along with an exploration of the limitations related to water storage changes or additions in service areas. Places of use that are encompassed by service areas have unique considerations in that water use may be flexibly moved around for different purposes within the service area boundaries. When needed, adequate access to stored water is crucial for delivering water for the varied uses and to water users located within service area boundaries. An informational guidance document will be drafted to address service area storage limitations and update public and internal procedural guidance for reviewing/preparing changes to water rights with service area places of use.
3. Existing water policy does not allow secondary use of a water right for storage purposes (e.g., water losses during conveyance along a ditch that are purposefully infiltrated to groundwater). Some secondary uses of water should be reviewed as possible sources of mitigation water, or water that is marketed for mitigation. Does the state need new policies that allow for off-stream storage options or 'buckets' to hold water for a predetermined period of time for later use? If so and if a water right change authorization is required, should there be fewer roadblocks to allow for this? Options should be explored for allowing some entities like irrigation districts and ditch companies to store water

without undergoing the water right change process or consider possible obstacle reductions for different entities and/or storage solutions.

4. How can the DNRC address the ownership and allocation of new and existing stored water for all beneficial uses? Other states have statutory provisions that enable the institutional management of stored groundwater; are similar statutory provisions appropriate for Montana? If so, which ones? Existing [aquifer storage/dominion and control statutes in Colorado should be reviewed](#).
5. Storage is especially difficult in basins that are closed to new appropriations of water; should exceptions for storing water during high spring runoff events in large river systems or in groundwater focus areas and closed basins be utilized more where in statute and added when modifying statute? Such exceptions may require legal availability analyses for the storage of new water while considering trigger streamflows and exceedance probabilities.
6. The state does not currently recognize aquifer recharge with the sole intent of increasing or improving storability as a beneficial use of water unless it is specifically required to mitigate other new uses. The storage of water with nature-based solutions or known aquifer recharge methodologies should be explored as a standalone beneficial use that is not directly tied to the mitigation of new water uses elsewhere due to the known human and environmental benefits associated with these methods. Groundwater restoration policy could also be explored.
7. With regard to natural water storage, questions arise regarding ownership of water stored with nature-based methods and infrastructure (e.g., beaver dam analogs to slow the flow of surface water and promote groundwater infiltration, or floodplain & wetland restoration to reconnect streams to their floodplains which also promotes aquifer recharge), the level of 'control' required in physically managing the source of stored water, and under what circumstances natural water storage projects may require a water right change or beneficial use permit application. Existing [wetland restoration water right policies](#) should be reviewed, updated, and clarified, and additional considerations for other types of nature-based water storage methods will be explored.
8. What, if any, are the policy options for transferring existing federal contracts (e.g., Hungry Horse, Canyon Ferry contract water) to the state to provide mitigation water for future development? *Can* the state consider federal facilities for mitigation water contracting? Could federal facilities be transferred to the state?

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## 2. Mitigation

Mitigation is required for new water right permits and water right changes when water is not legally available. Legal availability is equal to the total legal demand of water (i.e., the sum of water right flow rates in a surface or groundwater source) subtracted from the physical availability of water. Mitigation water is required to offset any net depletions to surface water that may result from either new beneficial water use permits for (surface or ground) water, or changes to ground water rights that are tributary to surface water sources. Net depletion is considered to be any reduction in the flow rate or monthly timing of depletion to surface water, or a change in the location of depletions of surface water. All three components of net depletion (flow rate, timing and location) must be offset by mitigation water when surface water is not legally available. Mitigation water may be secured by changing the beneficial use of an existing water right to offset a proposed new use of water or net depletion; however, this approach presents challenges in that existing water rights proposed to be changed to mitigation purposes must have priority dates of sufficient seniority to adequately and reliably offset the proposed new use of water during the time when mitigation is needed, and in the location where it is needed. An additional challenge is that mitigation water is often needed to offset new uses of water or net depletions to surface water that occur outside of the irrigation season, yet many water rights of sufficient seniority are used for irrigation purposes with only seasonal periods of use; thus, water rights with seasonal periods of use (e.g., April 15 to October 10) cannot be used to mitigate net depletions to or new uses of surface water that occur outside of their decreed or permitted periods of use (e.g., October 11 to April 14).

**Mitigation Recommendations:**

DNRC recommends formation of a technical working group to further explore the challenges and potential solutions to making mitigation a more effective tool to meet the needs of a growing state.

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**3. Municipalities**

Municipal water rights are different than most others in that they have places of use comprised of a "service area" within which the redistribution of water does not require pre-approval by DNRC. Other types of water right-owning entities (e.g., irrigation districts, ditch companies) also have service areas; however, the nature of the municipal beneficial use listed on municipal water rights is unique because municipal water encompasses a wide variety of uses such as domestic, commercial, fire protection, street cleaning, industrial, and recreation, among others. Water rights listing a "municipal" purpose can be held by municipalities, as well as unincorporated cities and towns and water and sewer districts. The municipal purpose cannot be used by individual water right owners regardless of the number of purposes on their water rights (i.e., a rancher would not have a municipal water right even though he/she may have a water right for domestic, lawn and garden, stock, and irrigation uses - those purposes must be individually listed on their water right). Municipalities may own any type of water right for any purpose including and other than "municipal", and if a municipality owns water rights for specific purposes, those water rights may only be used for the identified purposes.

Municipalities cannot always predict where and at what rate future development within or directly outside of their service areas will occur, and recurrently changing their service area places of use to accommodate new or anticipated development is challenging, especially in the face of unpredictable future water availability. Meeting future water demand for growing populations while preparing for the impacts of future drought were ongoing challenges described by municipal water users interviewed during development of the Drought Plan. According to [Drought Vulnerability Assessment](#) completed as part of the Drought Plan, cities with larger populations, higher rates of growth, and municipal dependence on surface water tend to have higher vulnerability scores.

As described in Section 2 of the Drought Plan, a holistic drought management approach requires the identification and implementation of proactive programs, policies, and strategies that will reduce future drought impacts. This preparedness (or "drought adaptation") is key to building resilience at local, regional, and state scales, with effective adaptation strategies differing by scale. Increasing flexibility and options for municipal water restrictions and evaluating strategies to increase conservation through incentives or regulations can help local governments implement programs and strategies more effectively. During Drought Plan development, water users who self-identify as members of the community development and municipal water supply sector expressed support for water (especially groundwater) supply monitoring as important parts of community planning and water management. Most local governments, however, do not have the funding or capacity to conduct extensive groundwater monitoring without state or federal support. Water use measurement, monitoring, and reporting are limited, as is state oversight, and a platform for the public to readily access water supply measurements is essentially nonexistent. The extensive gap between actual water use and public access to water use records - along with potentially extensive opposition to measurement requirements and monitoring - has made determining water availability and adverse effect difficult.

The municipal use recommendations described here reflect the ideas generated by the DNRC Comprehensive Water Review Stakeholder Working Group over the course of nearly a year's worth of monthly all-day meetings and monthly interim sub-working group meetings. Each recommendation listed below is intended to respond to the municipality-specific water resource and water right challenges discussed by and amongst working group stakeholders.

#### **Municipal Water Use Recommendations:**

1. A streamlined process for changing municipal water rights to address municipal service area expansion could be accomplished legislatively. Such a solution would limit streamlined change processes to 1) municipality service areas, 2) entities operating a public water supply exclusively, entities with separate statutory authority to annex and incorporate municipal growth, entities with established growth plans, or 3) other statutory criteria specifying use thresholds (e.g., water right volume).
2. To promote water conservation and system efficiency, legislation may be drafted to mirror or amend existing statute which states that upgrades to irrigation methods do not require prior authorization by DNRC as irrigation method upgrades are not considered changes to water use (§ 85-2-102(7)(b), MCA).
3. Isolated water rights that are disconnected from municipalities and municipal water supplies via annexation need to be addressed. Legislation can be drafted to stall questions of non-use or abandonment of such water rights until they can be changed and brought into compliance with the Montana Water Use Act.
4. Statutes and administrative rules concerning municipal intent to appropriate water for future use (i.e., municipal water reservations) need to be clarified to 1) distinguish between pre- and post-July 1, 1973, uses of water within municipalities, 2) specify existing and anticipated water use volumes and service area changes, and 3) reduce speculation when quantifying and qualifying anticipated growth.
5. Replacement well legislation can be amended to increase flow rate limitations, clarify and improve administrative rules defining "same aquifer", and allow for the re-drilling of wells within the same ¼ ¼ section, so long as they are drilled in the same aquifer.
6. Points of friction between DEQ water supply and DNRC water right regulations must be identified (e.g., increased 'emergency' flows of water required for groundwater public water supply systems as municipal populations grow, water rights dictating certain wastewater discharges that differ from actual changes in Montana Pollutant Discharge Elimination System [MPDES] permitting of discharge location and amount, or cistern and water tank storage regulation).
7. Stakeholders expressed general support of measurement of all uses of surface and groundwater. This scale of water use measurement and monitoring requires access to operable measuring devices, even in sources with no appointed water commissioners. Recommended solutions that could be introduced in phases include identifying initial water right types and sources where monitoring is most needed (based preliminarily on water commissioner records), improving accessibility to water measurement devices and automatic dataloggers, and improving water use records reporting and technology.

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#### **4. Notification and outreach plan for exempt wells**

The DNRC Comprehensive Water Review Stakeholder Working Group spent significant time considering how the use of permit exemptions currently impacts water planning and growth in Montana and whether policy changes are needed moving forward. The group developed a number of policy recommendations, including one providing for the formation of Controlled Groundwater Areas (CGWAs) within which the use of exempt wells would be greatly restricted. Successful implementation of this proposal would require clear and effective public education on the boundaries of and restrictions associated with each CGWA. DNRC recommends development of an outreach plan to inform landowners and developers of how they may be impacted. This effort should leverage key partners including well drillers, realtors, title companies, city/county planners, and partner agencies. In addition to general outreach (newsletters, mailers, digital campaigns), the strategy should target multiple common development touchpoints (e.g., property purchase, project planning, subdivision review).