

SENATE BILL 212

Introduced by Bianchi, et al.

1/26	Introduced
1/28	Referred to Natural Resources
1/28	First Reading
1/28	Fiscal Note Requested
2/04	Fiscal Note Received
2/05	Fiscal Note Printed
2/15	Hearing
2/16	Sponsor Withdrew
2/19	Tabled in Committee

1 *Bob Spivich Senate* BILL NO. *212* *Franklin*  
 2 INTRODUCED BY *Kenedy* *Sarah* *Edwe*  
 3 *Spitz* *Monty* *Val* *Kenny* *Jim* *Menasha* *Kelly*  
 4 A BILL FOR AN ACT ENTITLED; "AN ACT TO AUTHORIZE ANY PERSON *Beaudin*  
 5 TO APPROPRIATE WATER FOR INSTREAM USE; TO AUTHORIZE THE *Holloway* *Cok* *Blaylock* *Ream*  
 6 TRANSFER BY SALE OR LEASE OF EXISTING WATER RIGHTS TO ANY  
 7 PERSON FOR INSTREAM USE; TO AUTHORIZE THE TRANSFER BY SALE  
 8 OR LEASE OF INSTREAM WATER RIGHTS TO OTHER USES; TO  
 9 INTEGRATE INSTREAM USE RIGHTS INTO MONTANA'S PRIOR  
 10 APPROPRIATION SYSTEM; AMENDING SECTIONS 85-2-102, 85-2-141,  
 11 85-2-310, 85-2-311, 85-2-312, 85-2-315, 85-2-401, 85-2-402,  
 12 AND 85-2-403, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE  
 13 DATE."  
 14

15 WHEREAS, Article IX, section 3, of The Constitution of  
 16 the State of Montana provides that it is the policy of this  
 17 state that all waters within the State of Montana are the  
 18 property of the public, subject to appropriation for  
 19 beneficial use; and

20 WHEREAS, the Legislature finds that it is in the  
 21 interest of the people of Montana to provide the same  
 22 protection of law to reasonable instream uses of water for  
 23 fish and wildlife and recreational purposes that is now  
 24 accorded to other uses of water; and

25 WHEREAS, the Legislature further finds that water rights

1 for instream use may be integrated into Montana's prior  
 2 appropriation system without injury to other water users.

3 THEREFORE, the Legislature of the State of Montana finds  
 4 that it is proper to extend to all persons the rights to  
 5 appropriate water for instream use and transfer water to or  
 6 from instream use.  
 7

8 STATEMENT OF INTENT

9 A statement of intent is required for this bill in order to  
 10 provide guidance to the department of natural resources and  
 11 conservation concerning the adoption of rules to allow the  
 12 granting, transfer, and modification of water use permits  
 13 for instream flow uses. The legislature directs the  
 14 department to adopt rules that effectively and efficiently  
 15 implement the provisions of this bill. Additionally, the  
 16 legislature recognizes that enforcement of instream flow  
 17 water rights will be crucial to realizing the goals of this  
 18 bill and further directs the department to assist in the  
 19 development of streamflow measuring plans that will allow  
 20 enforcement of the instream flow water rights.  
 21

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

23 Section 1. Section 85-2-102, MCA, is amended to read:

24 "85-2-102. (Temporary) Definitions. Unless the context  
 25 requires otherwise, in this chapter the following



1 definitions apply:

2 (1) "Appropriate" means to:

3 (a) to divert, impound, or withdraw (including by stock  
4 for stock water), or use for instream use a quantity of  
5 water;

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

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

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

11 (a) a use of water for the benefit of the appropriator,  
12 other persons, or the public, including but not limited to:

13 (i) agricultural (including stock water), domestic,  
14 fish and wildlife, industrial, irrigation, mining,  
15 municipal, power, and recreational uses; and

16 (ii) the protection of public health;

17 (b) a use of water appropriated by the department for  
18 the state water leasing program under 85-2-141 and of water  
19 leased under a valid lease issued by the department under  
20 85-2-141; and

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

23 (3) "Board" means the board of natural resources and  
24 conservation provided for in 2-15-3302.

25 (4) "Certificate" means a certificate of water right

1 issued by the department.

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

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

7 (7) "Declaration" means the declaration of an existing  
8 right filed with the department under section 8, Chapter  
9 452, Laws of 1973.

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

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

16 (10) "Ground water" means any water beneath the land  
17 surface or beneath the bed of a stream, lake, reservoir, or  
18 other body of surface water, and which is not a part of that  
19 surface water.

20 (11) "Instream use" means a water use that is without a  
21 diversion and that is within a natural or artificial stream,  
22 lake, pond, reservoir, wetland, or other watercourse or body  
23 of water in order to provide, maintain, or enhance fish and  
24 wildlife or recreation values or to protect public health.

25 ~~{11}~~(12) "Permit" means the permit to appropriate issued

1 by the department under 85-2-301 through 85-2-303 and  
2 85-2-306 through 85-2-314.

3 ~~(12)~~(13) "Person" means an individual, association,  
4 partnership, corporation, state agency, political  
5 subdivision, the United States or any agency thereof, or any  
6 other entity.

7 ~~(13)~~(14) "Political subdivision" means any county,  
8 incorporated city or town, public corporation, or district  
9 created pursuant to state law or other public body of the  
10 state empowered to appropriate water but not a private  
11 corporation, association, or group.

12 ~~(14)~~(15) "Waste" means the unreasonable loss of water  
13 through the design or negligent operation of an  
14 appropriation or water distribution facility or the  
15 application of water to anything but a beneficial use.

16 ~~(15)~~(16) "Water" means all water of the state, surface  
17 and subsurface, regardless of its character or manner of  
18 occurrence, including but not limited to geothermal water,  
19 diffuse surface water, and sewage effluent.

20 ~~(16)~~(17) "Water division" means a drainage basin as  
21 defined in 3-7-102.

22 ~~(17)~~(18) "Water judge" means a judge as provided for in  
23 Title 3, chapter 7.

24 ~~(18)~~(19) "Water master" means a master as provided for  
25 in Title 3, chapter 7.

1 ~~(19)~~(20) "Well" means any artificial opening or  
2 excavation in the ground, however made, by which ground  
3 water is sought or can be obtained or through which it flows  
4 under natural pressures or is artificially withdrawn.  
5 (Terminates June 30, 1993--sec. 11, Ch. 658, L. 1989.)

6 85-2-102. (Effective July 1, 1993) Definitions. Unless  
7 the context requires otherwise, in this chapter the  
8 following definitions apply:

9 (1) "Appropriate" means:

10 (a) to divert, impound, or withdraw (including by stock  
11 for stock water), or use for instream use a quantity of  
12 water; or

13 (b) in the case of a public agency, to reserve water in  
14 accordance with 85-2-316.

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

16 (a) a use of water for the benefit of the appropriator,  
17 other persons, or the public, including but not limited to:

18 (i) agricultural (including stock water), domestic,  
19 fish and wildlife, industrial, irrigation, mining,  
20 municipal, power, and recreational uses; and

21 (ii) the protection of public health; and

22 (b) a use of water appropriated by the department for  
23 the state water leasing program under 85-2-141 and of water  
24 leased under a valid lease issued by the department under  
25 85-2-141.

1 (3) "Board" means the board of natural resources and  
2 conservation provided for in 2-15-3302.

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

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

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

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

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

17 (9) "Ground water" means any water beneath the land  
18 surface or beneath the bed of a stream, lake, reservoir, or  
19 other body of surface water, and which is not a part of that  
20 surface water.

21 (10) "Instream use" means a water use that is without a  
22 diversion and that is within a natural or artificial stream,  
23 lake, pond, reservoir, wetland, or other watercourse or body  
24 of water in order to provide, maintain, or enhance fish and  
25 wildlife or recreation values or to protect public health.

1 ~~(10)~~(11) "Permit" means the permit to appropriate issued  
2 by the department under 85-2-301 through 85-2-303 and  
3 85-2-306 through 85-2-314.

4 ~~(11)~~(12) "Person" means an individual, association,  
5 partnership, corporation, state agency, political  
6 subdivision, the United States or any agency thereof, or any  
7 other entity.

8 ~~(12)~~(13) "Political subdivision" means any county,  
9 incorporated city or town, public corporation, or district  
10 created pursuant to state law or other public body of the  
11 state empowered to appropriate water but not a private  
12 corporation, association, or group.

13 ~~(13)~~(14) "Waste" means the unreasonable loss of water  
14 through the design or negligent operation of an  
15 appropriation or water distribution facility or the  
16 application of water to anything but a beneficial use.

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

21 ~~(15)~~(16) "Water division" means a drainage basin as  
22 defined in 3-7-102.

23 ~~(16)~~(17) "Water judge" means a judge as provided for in  
24 Title 3, chapter 7.

25 ~~(17)~~(18) "Water master" means a master as provided for

1 in Title 3, chapter 7.

2 ~~(18)~~(19) "Well" means any artificial opening or  
3 excavation in the ground, however made, by which ground  
4 water is sought or can be obtained or through which it flows  
5 under natural pressures or is artificially withdrawn."

6 **Section 2.** Section 85-2-310, MCA, is amended to read:

7 **"85-2-310. Action on application.** (1) The department  
8 shall grant, deny, or condition an application for a permit  
9 in whole or in part within 120 days after the last date of  
10 publication of the notice of application if no objections  
11 have been received and within 180 days if a hearing is held  
12 or objections have been received. However, in either case  
13 the time may be extended upon agreement of the applicant,  
14 or, in those cases where an environmental impact statement  
15 must be prepared or in other extraordinary cases, not more  
16 than 60 days upon order of the department. If the department  
17 orders the time extended, it shall serve a notice of the  
18 extension and the reasons therefor by certified mail upon  
19 the applicant and each person who has filed an objection as  
20 provided by 85-2-308.

21 (2) However, an application may not be approved in a  
22 modified form or upon terms, conditions, or limitations  
23 specified by the department or denied, unless the applicant  
24 is first granted an opportunity to be heard. If no objection  
25 is filed against the application but the department is of

1 the opinion that the application should be approved in a  
2 modified form or upon terms, conditions, or limitations  
3 specified by it or that the application should be denied,  
4 the department shall prepare a statement of its opinion and  
5 the reasons therefor. The department shall serve a statement  
6 of its opinion by certified mail upon the applicant,  
7 together with a notice that the applicant may obtain a  
8 hearing by filing a request therefor within 30 days after  
9 the notice is mailed. The notice shall further state that  
10 the application will be modified in a specified manner or  
11 denied, unless a hearing is requested.

12 (3) The department may cease action upon an application  
13 for a permit and return it to the applicant when it finds  
14 that the application is not in good faith or does not show a  
15 bona fide intent to appropriate water for a beneficial use.  
16 An application returned for any of these reasons shall be  
17 accompanied by a statement of the reasons for which it was  
18 returned, and there shall be no right to a priority date  
19 based upon the filing of the application. Returning an  
20 application pursuant to this subsection shall be deemed a  
21 final decision of the department.

22 (4) For all applications filed after July 1, 1973, the  
23 department shall find that an application is not in good  
24 faith or does not show a bona fide intent to appropriate  
25 water for a beneficial use if:

- 1 (a) an application is not corrected and completed as  
2 required by 85-2-302;
- 3 (b) the appropriate filing fee is not paid;
- 4 (c) the application does not document:
- 5 (i) a beneficial use of water;
- 6 (ii) the proposed place of use of all water applied for;
- 7 (iii) for an appropriation, other than for instream use,  
8 of 4,000 acre-feet a year or more and 5.5 cubic feet per  
9 second or more, a detailed project plan describing when and  
10 how much water will be put to a beneficial use. The project  
11 plan must include a reasonable time line, not to exceed 10  
12 years from the time of issuance of a permit, for the  
13 completion of the project and the actual application of the  
14 water to a beneficial use.
- 15 (iv) for appropriations not covered in subsection  
16 (4)(c)(iii), a general project plan stating when and how  
17 much water will be put to a beneficial use; and
- 18 (v) except in the case of an application for instream  
19 use, if the water applied for is to be appropriated above  
20 that which will be used solely by the applicant or if it  
21 will be marketed by the applicant to other users,  
22 information detailing:
- 23 (A) each person who will use the water and the amount  
24 of water each person will use;
- 25 (B) the proposed place of use of all water by each

- 1 person;
- 2 (C) the nature of the relationship between the  
3 applicant and each person using the water; and
- 4 (D) each firm contractual agreement for the specified  
5 amount of water for each person using the water; or
- 6 (d) the appropriate environmental impact statement fee,  
7 if any, is not paid as required by 85-2-124."
- 8 **Section 3.** Section 85-2-311, MCA, is amended to read:
- 9 **"85-2-311. Criteria for issuance of permit.** (1) Except  
10 as provided in subsections (2) ~~and (3)~~ through (4), the  
11 department shall issue a permit if the applicant proves by  
12 substantial credible evidence that the following criteria  
13 are met:
- 14 (a) there are unappropriated waters in the source of  
15 supply at the proposed point of diversion:
- 16 (i) at times when the water can be put to the use  
17 proposed by the applicant;
- 18 (ii) in the amount the applicant seeks to appropriate;  
19 and
- 20 (iii) during the period in which the applicant seeks to  
21 appropriate, the amount requested is reasonably available;
- 22 (b) the water rights of a prior appropriator will not  
23 be adversely affected;
- 24 (c) the proposed means of diversion, construction, and  
25 operation of the appropriation works are adequate;

- 1 (d) the proposed use of water is a beneficial use;
- 2 (e) the proposed use will not interfere unreasonably
- 3 with other planned uses or developments for which a permit
- 4 has been issued or for which water has been reserved; and
- 5 (f) the applicant has a possessory interest, or the
- 6 written consent of the person with the possessory interest,
- 7 in the property where the water is to be put to beneficial
- 8 use.
- 9 (2) The department may not issue a permit for an
- 10 appropriation of 4,000 or more acre-feet of water a year and
- 11 5.5 or more cubic feet per second of water unless the
- 12 applicant proves by clear and convincing evidence that:
- 13 (a) the criteria in subsection (1) are met;
- 14 (b) the rights of a prior appropriator will not be
- 15 adversely affected;
- 16 (c) the proposed appropriation is a reasonable use.
- 17 Such a finding shall be based on a consideration of the
- 18 following:
- 19 (i) the existing demands on the state water supply, as
- 20 well as projected demands such as reservations of water for
- 21 future beneficial purposes, including municipal water
- 22 supplies, irrigation systems, and minimum streamflows for
- 23 the protection of existing water rights and aquatic life;
- 24 (ii) the benefits to the applicant and the state;
- 25 (iii) the effects on the quantity and quality of water

- 1 for existing beneficial uses in the source of supply;
- 2 (iv) the availability and feasibility of using
- 3 low-quality water for the purpose for which application has
- 4 been made;
- 5 (v) the effects on private property rights by any
- 6 creation of or contribution to saline seep; and
- 7 (vi) the probable significant adverse environmental
- 8 impacts of the proposed use of water as determined by the
- 9 department pursuant to Title 75, chapter 1, or Title 75,
- 10 chapter 20.
- 11 (3) (a) The state of Montana has long recognized the
- 12 importance of conserving its public waters and the necessity
- 13 to maintain adequate water supplies for the state's water
- 14 requirements, including requirements for reserved water
- 15 rights held by the United States for federal reserved lands
- 16 and in trust for the various Indian tribes within the
- 17 state's boundaries. Although the state of Montana also
- 18 recognizes that, under appropriate conditions, the
- 19 out-of-state transportation and use of its public waters are
- 20 not in conflict with the public welfare of its citizens or
- 21 the conservation of its waters, the criteria in this
- 22 subsection (3) must be met before out-of-state use may
- 23 occur.
- 24 (b) The department may not issue a permit for the
- 25 appropriation of water for withdrawal and transportation for



1 use outside the state unless the applicant proves by clear  
2 and convincing evidence that:

3 (i) depending on the volume of water diverted or  
4 consumed, the applicable criteria and procedures of  
5 subsection (1) or (2) are met;

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

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

11 (c) In determining whether the applicant has proved by  
12 clear and convincing evidence that the requirements of  
13 subsections (3)(b)(ii) and (3)(b)(iii) are met, the  
14 department shall consider the following factors:

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

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

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

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

25 (d) When applying for a permit or a lease to withdraw

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

5 (4) In the case of an application for instream use of  
6 water, the department shall issue a permit if the applicant  
7 proves by substantial and credible evidence that the  
8 following criteria are met:

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

10 (b) the proposed use of water is in an amount  
11 reasonably necessary to provide, maintain, or enhance fish  
12 and wildlife or recreation values or to protect public  
13 health; and

14 (c) the proposed use is reasonable as provided in  
15 subsection (2)(c).

16 ~~(4)~~(5) To meet the substantial credible evidence  
17 standard in this section, the applicant shall submit  
18 independent hydrologic or other evidence, including water  
19 supply data, field reports, and other information developed  
20 by the department, the U.S. geological survey, or the U.S.  
21 soil conservation service and other specific field studies,  
22 demonstrating that the criteria are met.

23 ~~(5)~~(6) An appropriation, diversion, impoundment, use,  
24 restraint, or attempted appropriation, diversion,  
25 impoundment, use, or restraint contrary to the provisions of

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

10 **Section 4.** Section 85-2-312, MCA, is amended to read:

11 "85-2-312. Terms of permit. (1) The department may  
 12 issue a permit for less than the amount of water requested,  
 13 but in no case may it issue a permit for more water than is  
 14 requested or than can be beneficially used without waste for  
 15 the purpose stated in the application. The department may  
 16 require modification of plans and specifications for the  
 17 appropriation or related diversion or construction. The  
 18 department may issue a permit subject to terms, conditions,  
 19 restrictions, and limitations it considers necessary to  
 20 satisfy the criteria listed in 85-2-311, and it may issue  
 21 temporary or seasonal permits. A permit shall be issued  
 22 subject to existing rights and any final determination of  
 23 those rights made under this chapter.

24 (2) The Except in the case of an application for  
 25 instream use, the department shall specify in the permit or

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

17 (3) The department may, upon a showing of good cause,  
 18 extend time limits specified in the permit for commencement  
 19 of the appropriation works, completion of construction, and  
 20 actual application of the water to the proposed beneficial  
 21 use. All requests for extensions of time must be by  
 22 affidavit and must be filed with the department prior to the  
 23 expiration of the time limit specified in the permit or any  
 24 previously authorized extension of time. The department may  
 25 issue an order temporarily extending the time limit

1 specified in the permit for 120 days or until the department  
 2 has completed its action under this section, whichever is  
 3 greater. Upon receipt of a proper request for extension of  
 4 time, the department shall prepare a notice containing the  
 5 facts pertinent to the request for extension of time and  
 6 shall publish the notice in a newspaper of general  
 7 circulation in the area of the source. The department may  
 8 serve notice by first-class mail upon any public agency or  
 9 other person the department determines may be interested in  
 10 or affected by the request for extension of time. The  
 11 department shall hold a hearing on the request for extension  
 12 of time on its own motion or if requested by an interested  
 13 party. The department may grant the extension of time in the  
 14 absence of a hearing if no requests for a hearing are  
 15 received and the extension of time is granted as requested,  
 16 or the department may grant the extension of time in a  
 17 modified form by following the process established in  
 18 85-2-310(2). Subsequent extensions of time may be made in  
 19 the same manner.

20 (4) (a) In the case of a permit for an instream use,  
 21 the permit must specify the particular reach or area of the  
 22 waterway or body of water for which the permit is sought.

23 (b) The permit must also specify:

24 (i) the quantity of water appropriated, either in terms  
 25 of cubic feet per second, acre-feet, lake level, or other

1 appropriate description of flow regime; and

2 (ii) a detailed streamflow measuring plan that describes  
 3 the points where and the manner in which the streamflow may  
 4 be measured.

5 (c) The permit must specify whether the quantity of  
 6 water required for instream use varies according to season,  
 7 time of week, time of day, or hydrologic event.

8 ~~(4)~~(5) The original of the permit shall be sent to the  
 9 permittee, and a copy shall be kept in the office of the  
 10 department in Helena.

11 ~~(5)~~(6) The department shall provide to the county clerk  
 12 and recorder of the county wherein the point of diversion or  
 13 place of use is located quarterly reports and an annual  
 14 summary report of all water right permits, certificates, and  
 15 change approvals issued by the department within the  
 16 county."

17 **Section 5.** Section 85-2-315, MCA, is amended to read:

18 "85-2-315. Certificate of water right. (1) Upon actual  
 19 application of water to the proposed beneficial use within  
 20 the time allowed, the permittee shall notify the department  
 21 that the appropriation has been properly completed. The  
 22 department may then inspect the appropriation, and if it  
 23 determines that the appropriation has been completed in  
 24 substantial accordance with the permit, it shall issue the  
 25 permittee a certificate of water right. The original of the

1 certificate shall be sent to the permittee, and a duplicate  
2 shall be kept in the office of the department in Helena.

3 (2) The department shall provide to the county clerk  
4 and recorder of the county wherein the point of diversion or  
5 place of use is located quarterly reports and an annual  
6 summary report of all certificates of water right issued by  
7 the department within the county.

8 (3) In the case of an application for instream use, if  
9 the department determines that there is no need for  
10 inspection, it may issue a certificate of water right  
11 without delay."

12 **Section 6.** Section 85-2-401, MCA, is amended to read:

13 "85-2-401. Priority. (1) As between appropriators, the  
14 first in time is the first in right. Priority Except in the  
15 case of an appropriation for instream use, priority of  
16 appropriation does not include the right to prevent changes  
17 by later appropriators in the condition of water occurrence,  
18 such as the increase or decrease of streamflow or the  
19 lowering of a water table, artesian pressure, or water  
20 level, if the prior appropriator can reasonably exercise his  
21 water right under the changed conditions.

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

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

4 **Section 7.** Section 85-2-402, MCA, is amended to read:

5 "85-2-402. (Temporary) Changes in appropriation rights.

6 (1) An appropriator may not make a change in an  
7 appropriation right except as permitted under this section  
8 and with the approval of the department or, if applicable,  
9 of the legislature.

10 (2) Except as provided in subsections (3) through (5),  
11 the department shall approve a change in appropriation right  
12 if the appropriator proves by substantial credible evidence  
13 that the following criteria are met:

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

18 (b) Except for a lease authorization pursuant to  
19 85-2-436 that does not require appropriation works or in the  
20 case of a change to an instream use, the proposed means of  
21 diversion, construction, and operation of the appropriation  
22 works are adequate.

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

24 (d) The Except in the case of an instream use, the  
25 applicant has a possessory interest, or the written consent

1 of the person with the possessory interest, in the property  
2 where the water is to be put to beneficial use.

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

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

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

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

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

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

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

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

24 (vi) the probable significant adverse environmental  
25 impacts of the proposed use of water as determined by the

1 department pursuant to Title 75, chapter 1, or Title 75,  
2 chapter 20.

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

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

10 (b) the department then petitions the legislature and  
11 the legislature affirms the decision of the department after  
12 one or more public hearings.

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

25 (b) The department and, if applicable, the legislature

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

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

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

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

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

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

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

25 (iii) the supply and sources of water available to the

1 applicant in the state where the applicant intends to use  
 2 the water; and

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

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

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

20 (7) The department or the legislature, if applicable,  
 21 may approve a change subject to terms, conditions,  
 22 restrictions, and limitations as it considers necessary to  
 23 satisfy the criteria of this section, including limitations  
 24 on the time for completion of the change. The department may  
 25 extend time limits specified in the change approval under

1 the applicable criteria and procedures of 85-2-312(3).

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

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

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

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

1 June 30, 1993--sec. 11, Ch. 658, L. 1989.)

2 85-2-402. (Effective July 1, 1993) Changes in  
3 appropriation rights. (1) An appropriator may not make a  
4 change in an appropriation right except as permitted under  
5 this section and with the approval of the department or, if  
6 applicable, of the legislature.

7 (2) Except as provided in subsections (3) through (5),  
8 the department shall approve a change in appropriation right  
9 if the appropriator proves by substantial credible evidence  
10 that the following criteria are met:

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

15 (b) The Except in the case of a change to an instream  
16 use, the proposed means of diversion, construction, and  
17 operation of the appropriation works are adequate.

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

19 (d) The Except in the case of an instream use, the  
20 applicant has a possessory interest, or the written consent  
21 of the person with the possessory interest, in the property  
22 where the water is to be put to beneficial use.

23 (3) The department may not approve a change in purpose  
24 of use or place of use of an appropriation of 4,000 or more  
25 acre-feet of water a year and 5.5 or more cubic feet per

1 second of water unless the appropriator proves by  
2 substantial credible evidence that:

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

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

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

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

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

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

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

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

23 (4) The department may not approve a change in purpose  
24 of use or place of use for a diversion that results in 4,000  
25 or more acre-feet of water a year and 5.5 or more cubic feet

1 per second of water being consumed unless:

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

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

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

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



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

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

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

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

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

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

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

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

25 (d) When applying for a change in appropriation right

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

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

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

22 (8) If a change is not completed as approved by the  
23 department or legislature or if the terms, conditions,  
24 restrictions, and limitations of the change approval are not  
25 complied with, the department may, after notice and

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

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

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

13 (11) A change in appropriation right contrary to the  
 14 provisions of this section is invalid. No officer, agent,  
 15 agency, or employee of the state may knowingly permit, aid,  
 16 or assist in any manner such unauthorized change in  
 17 appropriation right. No person or corporation may, directly  
 18 or indirectly, personally or through an agent, officer, or  
 19 employee, attempt to change an appropriation right except in  
 20 accordance with this section."

21 **Section 8.** Section 85-2-403, MCA, is amended to read:

22 "85-2-403. **Transfer of appropriation right.** (1) The  
 23 Except in the case of an instream use, the right to use  
 24 water shall pass with a conveyance of the land or transfer  
 25 by operation of law, unless specifically exempted therefrom.

1 All transfers of interests in appropriation rights shall be  
 2 without loss of priority.

3 (2) Failure to comply with the provisions of 85-2-402  
 4 does not render a conveyance or reservation of a water right  
 5 void, but the right may not be used until the department has  
 6 approved the change. This subsection applies retroactively,  
 7 within the meaning of 1-2-109, to a conveyance or  
 8 reservation made after July 1, 1973.

9 (3) A water right may be transferred to a new user and,  
 10 subject to the provisions of 85-2-402, to a new purpose or  
 11 place of use, either permanently by sale, gift, or operation  
 12 of law or temporarily according to the terms of a lease."

13 **Section 9.** Section 85-2-141, MCA, is amended to read:

14 "85-2-141. **Water leasing program.** (1) There is a water  
 15 leasing program administered by the department on behalf of  
 16 the state of Montana. Water leases issued under this program  
 17 must be approved by the board.

18 (2) The department may acquire rights to water needed  
 19 for leasing under this program through appropriation of  
 20 water in its own name or by agreement with or purchase from  
 21 another holder of water rights.

22 (3) Water for leasing under the water leasing program  
 23 must be obtained from the following sources:

24 (a) any existing or future reservoir in a basin  
 25 concerning which a temporary preliminary decree, a

1 preliminary decree under 85-2-231, or a final decree under  
2 85-2-234 has been entered;

3 (b) Fort Peck Reservoir, if an agreement between the  
4 department and the federal government concerning the  
5 acquisition of water and the sharing of revenues with the  
6 state is in effect;

7 (c) Tiber, Canyon Ferry, Hungry Horse, or Yellowtail  
8 Reservoirs if and for so long as there is an agreement  
9 between the department and the federal government concerning  
10 the acquisition of water and sharing of revenues with the  
11 state from one or more of these reservoirs; and

12 (d) any other existing or future federal reservoir:

13 (i) located in a basin concerning which a temporary  
14 preliminary decree, a preliminary decree under 85-2-231, or  
15 a final decree under 85-2-234 has been entered; and

16 (ii) for which and for so long as there is an agreement  
17 between the department and the federal government concerning  
18 the acquisition of water and the sharing of revenues with  
19 the state.

20 (4) Water may be leased for any beneficial use. The  
21 amount of water that can be leased under this program for  
22 all beneficial uses shall not exceed 50,000 acre-feet.

23 (5) The term of any lease may not exceed 50 years. A  
24 term may be extended up to another 50 years if the  
25 department again determines the desirability of leasing by

1 applying the considerations set forth in subsection (7). In  
2 making such a redetermination, the department may require  
3 the completion of an environmental impact statement in  
4 accordance with subsection (6).

5 (6) The department shall require the completion of an  
6 environmental impact statement under the provisions of Title  
7 75, chapter 1, for lease applications that would result in  
8 the consumption of 4,000 acre-feet a year or more and 5.5  
9 cubic feet per second or more of water and for any other  
10 application for which an environmental impact statement is  
11 required by law. The department shall require the completion  
12 of an environmental impact statement whenever the cumulative  
13 effect of more than one application for a lease would  
14 constitute a probable significant environmental impact.

15 (7) Upon application by any person to lease water, the  
16 department shall make an initial determination of whether it  
17 is desirable for the department to lease water to the  
18 applicant. Such a determination of desirability shall be  
19 made solely on the following considerations:

20 (a) the content of the environmental impact statement,  
21 if required;

22 (b) whether there is sufficient water available under  
23 the water leasing program; and

24 (c) whether the criteria, except as to legislative  
25 approval, set forth in 85-2-311 have been satisfied.

1       (8) The department shall for any agreement require  
2 commercially reasonable terms and conditions, which may  
3 include the requirement that up to 25% of the water to be  
4 leased be made available to a potential user for any  
5 beneficial use upon payment by such user of the costs of  
6 tapping into and removing water from the applicant's  
7 project. The department may differentiate in pricing,  
8 depending on the proposed beneficial use of the water.

9       (9) The lease of water under this section or the use of  
10 water under a that lease does not constitute a permit as  
11 provided in 85-2-102 and does not establish a right to  
12 appropriate water within the meaning of Title 85, chapter 2,  
13 part 3.

14       (10) For purposes of the water leasing program  
15 established in this section, it is the intent of the  
16 legislature that the state act as a proprietor."

17       NEW SECTION. Section 10. Effective date. [This act] is  
18 effective on passage and approval.

-End-

STATE OF MONTANA - FISCAL NOTE

Form BD-15

In compliance with a written request, there is hereby submitted a Fiscal Note for SB0212, as introduced.

DESCRIPTION OF PROPOSED LEGISLATION:

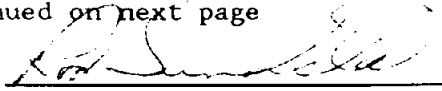
This legislation would allow private water users to apply for and receive an instream flow water right. Reasonable use criteria must be considered by the DNRC in its determination of whether to grant, modify or deny an application. Substantial and credible evidence must be provided by instream flow applicants to prove that they will meet the reasonable use criteria.

ASSUMPTIONS:


Appropriations of water for instream flow purposes may be granted to private users as proposed in this legislation. An applicant for instream flow will seek an administrative permit or change in the same manner as an applicant would for consumptive uses. However, private instream flow applications will require employment of reasonable use criteria by the DNRC (Department of Natural Resources and Conservation) in determining whether to grant, modify or deny the application. Consideration of reasonable use criteria under 85-2-311(2)(c), MCA, requires substantial and credible evidence be provided by the applicant to prove the criteria will be met.

1. Five additional permit applications for instream flows will be received each year by the DNRC.
2. Five additional change applications for instream flows will be received each year by the DNRC.
3. The DNRC cost to process a permit application for instream flow appropriation subject to the reasonable use criteria is \$800 (\$100 operating expense and \$700 personal services). Judicious processing review is required to assure that substantial and credible evidence has been properly submitted.
4. Forty percent of all instream flow applications will require preparation of an EIS.
5. The DNRC cost to prepare an EIS typically ranges between \$50,000 and \$80,000. The \$50,000 (\$15,000 Operating Expense and \$35,000 personal services) cost will be used in this fiscal estimate.
6. All applications for instream flow will receive objections.
7. The DNRC cost to attempt to settle objections is \$500 (\$50 operating expense and \$450 personal services) per application.
8. All applications for instream flow will require a contested case hearing to determine if the reasonable use criteria will be proven.
9. The DNRC additional cost to hold one contested case hearing for determining whether to grant, modify, or deny a permit application for instream flow appropriation subject to the reasonable use criteria is \$2,000 (\$200 operating expense and \$1,800 personal services).
10. The DNRC cost to adopt and publish administrative rules to implement this instream flow legislation will be \$3,500 for FY92 (\$1,000 operating expense and \$2,500 personal services).

Continued on next page

  
ROD SUNDSTED, BUDGET DIRECTOR  
Office of Budget and Program Planning

DATE

  
DON BIANCHI, PRIMARY SPONSOR

DATE

Fiscal Note for SB0212, as introduced

2/5/91  
5B212

11. The cost to prepare and print new forms to implement this legislation will be \$1,225 for FY92 (\$1,225 operating expense).
12. The DNRC collects \$100 for permit applications seeking to appropriate between 1,000 and 10,000 acre-feet per year for non-consumptive uses.
13. The DNRC collects \$50 for each change application.
14. Collection of MEPA fees is not expected.

**FISCAL IMPACT:**

**Department of Natural Resources and Conservation:**

	<u>FY 92</u>			<u>FY 93</u>		
	<u>Current Law</u>	<u>Proposed Law</u>	<u>Difference</u>	<u>Current Law</u>	<u>Proposed Law</u>	<u>Difference</u>
<b><u>Expenditures:</u></b>						
FTE	46.20	51.70	5.50	46.20	51.60	5.40
Personal Services	1,325,558	1,497,588	172,030	1,323,339	1,493,039	169,700
Operating Costs	224,816	290,541	65,725	224,175	288,900	64,725
Equipment	<u>23,315</u>	<u>23,315</u>	<u>0</u>	<u>23,315</u>	<u>23,315</u>	<u>0</u>
Total	1,573,689	1,811,444	237,755	1,570,829	1,805,254	234,425
<b><u>Funding:</u></b>						
General Fund	1,493,710	1,730,715	237,005	1,491,118	1,724,593	233,475
Water Rights Acct. (02)	<u>79,979</u>	<u>80,729</u>	<u>750</u>	<u>79,911</u>	<u>80,661</u>	<u>750</u>
Total	1,573,689	1,811,444	237,755	1,571,029	1,805,254	234,225
<b><u>Revenues:</u></b>						
Water Rights Acct. (02)	79,979	80,729	750	79,911	80,661	750

**Long-Range Effects of Proposed Legislation:**

Administrative rules to clarify the processing of permit applications for instream flow need to be prepared and adopted. Updates to these rules will be needed as problems and policy issues are confronted. Projecting the number of applications for instream flow is highly speculative. As such, the confidence interval is narrow supporting the reliability of the estimate of the number of applications for instream flow.

SB 212