

REPORTED CORRECTLY ENROLLED.

1 *Senate* BILL NO. *265*
 2 INTRODUCED BY *Groffeld Bengtson Ream*
 3 *Wendy* BY REQUEST OF THE GOVERNOR *Stacy Brady*
 4 *Stacy*
 5 A BILL FOR AN ACT ENTITLED: "AN ACT CLARIFYING THE RIGHT TO
 6 BENEFICIAALLY USE, SELL, OR LEASE SALVAGED WATER; DEFINING
 7 "SALVAGE"; PROVIDING CRITERIA FOR APPROVAL OF CHANGES IN
 8 APPROPRIATION RIGHTS INVOLVING SALVAGED WATER; ESTABLISHING
 9 THE PERIOD AFTER WHICH THE RIGHT TO SALVAGED WATER IS
 10 FORFEITED; AND AMENDING SECTIONS 85-2-102 AND 85-2-402,
 11 MCA."

STATEMENT OF INTENT

12
 13
 14 A statement of intent is required for this bill in order
 15 to provide guidance to the department of natural resources
 16 and conservation concerning the adoption of rules to allow
 17 the appropriation, use, and change of use of salvaged water.
 18 The legislature directs the department of natural resources
 19 and conservation to adopt rules that promote the
 20 conservation and efficient use of water by implementing the
 21 provisions of this bill.

22
 23 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:
 24 NEW SECTION. **Section 1.** Salvaged water. It is the
 25 declared policy of the state in 85-1-101 to encourage the

1 conservation and full use of water. Consistent with this
 2 policy, holders of appropriation rights who salvage water,
 3 as defined in 85-2-102, may retain the right to the salvaged
 4 water for beneficial use. Any use of the right to salvaged
 5 water for any purpose or in any place other than that
 6 associated with the original appropriation right must be
 7 approved by the department as a change in appropriation
 8 right in accordance with 85-2-402. Sale of the right to
 9 salvaged water must also be in accordance with 85-2-403, and
 10 the lease of the right to salvaged water for instream flow
 11 purposes must be in accordance with 85-2-436.

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

12
 13 **"85-2-102. (Temporary) Definitions.** Unless the context
 14 requires otherwise, in this chapter the following
 15 definitions apply:

- 16 (1) "Appropriate" means to:
 - 17 (a) divert, impound, or withdraw (including by stock
 - 18 for stock water) a quantity of water;
 - 19 (b) in the case of a public agency, to reserve water in
 - 20 accordance with 85-2-316; or
 - 21 (c) in the case of the department of fish, wildlife,
 - 22 and parks, to lease water in accordance with 85-2-436.
- 23 (2) "Beneficial use", unless otherwise provided, means:
 - 24 (a) a use of water for the benefit of the appropriator,
 - 25 other persons, or the public, including but not limited to

1 agricultural (including stock water), domestic, fish and
2 wildlife, industrial, irrigation, mining, municipal, power,
3 and recreational uses;

4 (b) a use of water appropriated by the department for
5 the state water leasing program under 85-2-141 and of water
6 leased under a valid lease issued by the department under
7 85-2-141; and

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

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

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

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

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

19 (7) "Declaration" means the declaration of an existing
20 right filed with the department under section 8, Chapter
21 452, Laws of 1973.

22 (8) "Department" means the department of natural
23 resources and conservation provided for in Title 2, chapter
24 15, part 33.

25 (9) "Existing right" means a right to the use of water

1 which would be protected under the law as it existed prior
2 to July 1, 1973.

3 (10) "Ground water" means any water beneath the land
4 surface or beneath the bed of a stream, lake, reservoir, or
5 other body of surface water, and which is not a part of that
6 surface water.

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

10 (12) "Person" means an individual, association,
11 partnership, corporation, state agency, political
12 subdivision, the United States or any agency thereof, or any
13 other entity.

14 (13) "Political subdivision" means any county,
15 incorporated city or town, public corporation, or district
16 created pursuant to state law or other public body of the
17 state empowered to appropriate water but not a private
18 corporation, association, or group.

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

22 ~~(14)~~ (15) "Waste" means the unreasonable loss of water
23 through the design or negligent operation of an
24 appropriation or water distribution facility or the
25 application of water to anything but a beneficial use.

1 ~~15~~16 "Water" means all water of the state, surface
2 and subsurface, regardless of its character or manner of
3 occurrence, including but not limited to geothermal water,
4 diffuse surface water, and sewage effluent.

5 ~~16~~17 "Water division" means a drainage basin as
6 defined in 3-7-102.

7 ~~17~~18 "Water judge" means a judge as provided for in
8 Title 3, chapter 7.

9 ~~18~~19 "Water master" means a master as provided for
10 in Title 3, chapter 7.

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

16 85-2-102. (Effective July 1, 1993) Definitions. Unless
17 the context requires otherwise, in this chapter the
18 following definitions apply:

19 (1) "Appropriate" means to divert, impound, or withdraw
20 (including by stock for stock water) a quantity of water or,
21 in the case of a public agency, to reserve water in
22 accordance with 85-2-316.

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

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

1 agricultural (including stock water), domestic, fish and
2 wildlife, industrial, irrigation, mining, municipal, power,
3 and recreational uses; and

4 (b) a use of water appropriated by the department for
5 the state water leasing program under 85-2-141 and of water
6 leased under a valid lease issued by the department under
7 85-2-141.

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

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

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

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

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

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

24 (9) "Ground water" means any water beneath the land
25 surface or beneath the bed of a stream, lake, reservoir, or

1 other body of surface water, and which is not a part of that
2 surface water.

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

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

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

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

18 ~~(13)~~(14) "Waste" means the unreasonable loss of water
19 through the design or negligent operation of an
20 appropriation or water distribution facility or the
21 application of water to anything but a beneficial use.

22 ~~(14)~~(15) "Water" means all water of the state, surface
23 and subsurface, regardless of its character or manner of
24 occurrence, including but not limited to geothermal water,
25 diffuse surface water, and sewage effluent.

1 ~~(15)~~(16) "Water division" means a drainage basin as
2 defined in 3-7-102.

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

5 ~~(17)~~(18) "Water master" means a master as provided for
6 in Title 3, chapter 7.

7 ~~(18)~~(19) "Well" means any artificial opening or
8 excavation in the ground, however made, by which ground
9 water is sought or can be obtained or through which it flows
10 under natural pressures or is artificially withdrawn."

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

12 **"85-2-402. (Temporary) Changes in appropriation rights.**

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

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

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

25 (b) Except for a lease authorization pursuant to

1 85-2-436 that does not require appropriation works, the
2 proposed means of diversion, construction, and operation of
3 the appropriation works are adequate.

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

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

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

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

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

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

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

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

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

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

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

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

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

20 (b) the department then petitions the legislature and
21 the legislature affirms the decision of the department after
22 one or more public hearings.

23 (5) (a) The state of Montana has long recognized the
24 importance of conserving its public waters and the necessity
25 to maintain adequate water supplies for the state's water

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

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

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

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

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

24 (c) In determining whether the appropriator has proved
 25 by clear and convincing evidence that the requirements of

1 subsections (5)(b)(ii) and (5)(b)(iii) will be met, the
 2 department and, if applicable, the legislature shall
 3 consider the following factors:

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

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

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

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

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

20 (e) For any application for a change in appropriation
 21 right involving 4,000 or more acre-feet of water a year and
 22 5.5 or more cubic feet per second of water, the department
 23 shall give notice of the proposed change in accordance with
 24 85-2-307 and shall hold one or more hearings in accordance
 25 with 85-2-309 prior to its approval or denial of the

1 proposed change. The department shall provide notice and may
2 hold one or more hearings upon any other proposed change if
3 it determines that a change might adversely affect the
4 rights of other persons.

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

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

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

23 (10) A person holding an issued permit or change
24 approval that has not been perfected may change the place of
25 diversion, place of use, purpose of use, or place of storage

1 by filing an application for change pursuant to this
2 section.

3 (11) A change in appropriation right contrary to the
4 provisions of this section is invalid. An officer, agent,
5 agency, or employee of the state may not knowingly permit,
6 aid, or assist in any manner an unauthorized change in
7 appropriation right. A person or corporation may not,
8 directly or indirectly, personally or through an agent,
9 officer, or employee, attempt to change an appropriation
10 right except in accordance with this section. (Terminates
11 June 30, 1993--sec. 11, Ch. 658, L. 1989.)

12 **85-2-402. (Effective July 1, 1993) Changes in**
13 **appropriation rights.** (1) An appropriator may not make a
14 change in an appropriation right except as permitted under
15 this section and with the approval of the department or, if
16 applicable, of the legislature.

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

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

25 (b) The proposed means of diversion, construction, and

1 operation of the appropriation works are adequate.

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

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

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

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

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

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

19 (i) the existing demands on the state water supply, as
20 well as projected demands for water for future beneficial
21 purposes, including municipal water supplies, irrigation
22 systems, and minimum streamflows for the protection of
23 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 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 (4) The department may not approve a change in purpose
12 of use or place of use for a diversion that results in 4,000
13 or more acre-feet of water a year and 5.5 or more cubic feet
14 per second of water being consumed unless:

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

18 (b) the department then petitions the legislature and
19 the legislature affirms the decision of the department after
20 one or more public hearings.

21 (5) (a) The state of Montana has long recognized the
22 importance of conserving its public waters and the necessity
23 to maintain adequate water supplies for the state's water
24 requirements, including requirements for reserved water
25 rights held by the United States for federal reserved lands

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

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

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

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

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

22 (c) In determining whether the appropriator has proved
 23 by clear and convincing evidence that the requirements of
 24 subsections (5)(b)(ii) and (5)(b)(iii) will be met, the
 25 department and, if applicable, the legislature shall

1 consider the following factors:

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

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

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

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

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

18 (6) For any application for a change in appropriation
 19 right involving 4,000 or more acre-feet of water a year and
 20 5.5 or more cubic feet per second of water, the department
 21 shall give notice of the proposed change in accordance with
 22 85-2-307 and shall hold one or more hearings in accordance
 23 with 85-2-309 prior to its approval or denial of the
 24 proposed change. The department shall provide notice and may
 25 hold one or more hearings upon any other proposed change if

1 it determines that such a change might adversely affect the
2 rights of other persons.

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

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

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

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

1 (11) A change in appropriation right contrary to the
2 provisions of this section is invalid. No officer, agent,
3 agency, or employee of the state may knowingly permit, aid,
4 or assist in any manner such unauthorized change in
5 appropriation right. No person or corporation may, directly
6 or indirectly, personally or through an agent, officer, or
7 employee, attempt to change an appropriation right except in
8 accordance with this section."

9 NEW SECTION. **Section 4.** Codification instruction.

10 [Section 1] is intended to be codified as an integral part
11 of Title 85, chapter 2, part 4, and the provisions of Title
12 85, chapter 2, part 4, apply to [section 1].

13 NEW SECTION. **Section 5.** Saving clause. [This act] does

14 not affect rights and duties that matured, penalties that
15 were incurred, or proceedings that were begun before [the
16 effective date of this act].

-End-

STATE OF MONTANA - FISCAL NOTE

Form BD-15

In compliance with a written request, there is hereby submitted a Fiscal Note for SB0265, as introduced.

DESCRIPTION OF PROPOSED LEGISLATION:

This bill clarifies the statute with respect to the right to salvaged water, a right DNRC already recognizes. By clarifying the statute, however, there is likely to be an increase in the number of applications to DNRC for change in appropriation rights.


ASSUMPTIONS:

1. There will be an additional four change applications involving salvage water per year.
2. Objections will be received on three of the applications.
3. Two applications with objections will proceed to contested-case hearing.
4. The DNRC cost to administratively process one change application is \$300 (\$50 operating expense and \$250 personal services, shown as contracted services).
5. The DNRC cost to address and handle objections for each application is \$500 (\$50 operating expense and \$450 personal services).
6. The DNRC cost to hold one contested-case hearing is \$1,200 (\$120 operating expense and \$1,080 personal services).
7. The DNRC collects \$50 for each application for a change in appropriation right.
8. The DNRC cost to adopt and publish administrative rules to implement this legislation will be \$1,500 for FY92 (\$1,000 operating expense and \$500 personal services).
9. The DNRC cost to prepare and print new forms to implement this legislation will be \$1,225 for FY92 (\$1,225 operating expense).
10. No FTE are indicated at this time, but FTE may be requested later, depending on the total workload resulting from session bills.

FISCAL IMPACT:

Department of Natural Resources and Conservation:

	FY 92			FY 93		
	Current Law	Proposed Law	Difference	Current Law	Proposed Law	Difference
<u>Expenditures:</u>						
Operating Costs	224,816	232,641	7,825	224,175	229,275	5,100
<u>Funding:</u>						
General Fund	1,493,710	1,501,335	7,625	1,491,118	1,496,018	4,900
Water Rights Fees (02)	79,979	80,179	200	79,911	80,111	200
Total	1,573,689	1,581,514	7,825	1,571,029	1,576,129	5,100

 2-7-91
 ROD SUNDSTED BUDGET DIRECTOR DATE
 Office of Budget and Program Planning

LORENTS GROSFIELD PRIMARY SPONSOR DATE 2/11/91
 Fiscal Note for SB0265 as introduced **SB 265**

STATE OF MONTANA - FISCAL NOTE
Form BD-15

In compliance with a written request, there is hereby submitted a Fiscal Note for SB0265, as introduced, revised.

DESCRIPTION OF PROPOSED LEGISLATION:

This bill clarifies the statute with respect to the right to salvaged water, a right DNRC already recognizes. By clarifying the statute, however, there is likely to be an increase in the number of applications to DNRC for change in appropriation rights.

ASSUMPTIONS:

1. There will be an additional four change applications involving salvage water per year.
2. Objections will be received on three of the applications.
3. Two applications with objections will proceed to contested-case hearing.
4. The DNRC cost to administratively process one change application is \$300 (\$50 operating expense and \$250 personal services, shown as contracted services).
5. The DNRC cost to address and handle objections for each application is \$500 (\$50 operating expense and \$450 personal services).
6. The DNRC cost to hold one contested-case hearing is \$2,000.
7. The DNRC collects \$50 for each application for a change in appropriation right.
8. The DNRC cost to adopt and publish administrative rules to implement this legislation will be \$1,500 for FY92 (\$1,000 operating expense and \$500 personal services).

FISCAL IMPACT:

Department of Natural Resources and Conservation:

	FY 92			FY 93		
	Current Law	Proposed Law	Difference	Current Law	Proposed Law	Difference
<u>Expenditures:</u>						
Operating Costs	0	8,200	8,200	0	6,700	6,700
<u>Funding:</u>						
General Fund	0	8,000	8,000	0	6,500	6,500
Water Rights Fees (02)	0	200	200	0	200	200
Total	0	8,200	8,200	0	6,700	6,700


ROD SUNDSTED BUDGET DIRECTOR 2-16-91 DATE
Office of Budget and Program Planning


LORENTS GROSFIELD PRIMARY SPONSOR 2/18/91 DATE
Fiscal Note for SB0265 as introduced, revised **SB 265**

APPROVED BY COMM. ON
NATURAL RESOURCES

1 SENATE BILL NO. 265
2 INTRODUCED BY GROSFIELD, BENGTON, REAM,
3 WEEDING, HARPER, GRADY, THOFT, SWYSGOOD
4 BY REQUEST OF THE GOVERNOR
5

6 A BILL FOR AN ACT ENTITLED: "AN ACT CLARIFYING THE RIGHT TO
7 BENEFICIALLY USE, SELL, OR LEASE SALVAGED WATER; DEFINING
8 "SALVAGE"; PROVIDING CRITERIA FOR APPROVAL OF CHANGES IN
9 APPROPRIATION RIGHTS INVOLVING SALVAGED WATER; ESTABLISHING
10 ~~THE--PERIOD--AFTER--WHICH--THE--RIGHT--TO--SALVAGED-WATER-IS~~
11 ~~FORFEITED~~; AND AMENDING SECTIONS 85-2-102 AND 85-2-402,
12 MCA."
13

14 STATEMENT OF INTENT

15 A statement of intent is required for this bill in order
16 to provide guidance to the department of natural resources
17 and conservation concerning the adoption of rules to allow
18 the appropriation, use, and change of use of salvaged water.
19 The legislature directs the department of natural resources
20 and conservation to adopt rules that promote the
21 conservation and efficient use of water by implementing the
22 provisions of this bill.
23

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

25 NEW SECTION. Section 1. Salvaged water. It is the

1 declared policy of the state in 85-1-101 to encourage the
2 conservation and full use of water. Consistent with this
3 policy, holders of appropriation rights who salvage water,
4 as defined in 85-2-102, may retain the right to the salvaged
5 water for beneficial use. Any use of the right to salvaged
6 water for any purpose or in any place other than that
7 associated with the original appropriation right must be
8 approved by the department as a change in appropriation
9 right in accordance with 85-2-402. Sale of the right to
10 salvaged water must also be in accordance with 85-2-403, and
11 the lease of the right to salvaged water for instream flow
12 purposes must be in accordance with 85-2-436.

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

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

17 (1) "Appropriate" means to:

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

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

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

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

25 (a) a use of water for the benefit of the appropriator,

SECOND READING



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

5 (b) a use of water appropriated by the department for
6 the state water leasing program under 85-2-141 and of water
7 leased under a valid lease issued by the department under
8 85-2-141; and

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

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

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

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

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

20 (7) "Declaration" means the declaration of an existing
21 right filed with the department under section 8, Chapter
22 452, Laws of 1973.

23 (8) "Department" means the department of natural
24 resources and conservation provided for in Title 2, chapter
25 15, part 33.

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

4 (10) "Ground water" means any water beneath the land
5 surface or beneath the bed of a stream, lake, reservoir, or
6 other body of surface water, and which is not a part of that
7 surface water.

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

11 (12) "Person" means an individual, association,
12 partnership, corporation, state agency, political
13 subdivision, the United States or any agency thereof, or any
14 other entity.

15 (13) "Political subdivision" means any county,
16 incorporated city or town, public corporation, or district
17 created pursuant to state law or other public body of the
18 state empowered to appropriate water but not a private
19 corporation, association, or group.

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

23 ~~(14)~~(15) "Waste" means the unreasonable loss of water
24 through the design or negligent operation of an
25 appropriation or water distribution facility or the

1 application of water to anything but a beneficial use.

2 ~~15~~(16) "Water" means all water of the state, surface
3 and subsurface, regardless of its character or manner of
4 occurrence, including but not limited to geothermal water,
5 diffuse surface water, and sewage effluent.

6 ~~16~~(17) "Water division" means a drainage basin as
7 defined in 3-7-102.

8 ~~17~~(18) "Water judge" means a judge as provided for in
9 Title 3, chapter 7.

10 ~~18~~(19) "Water master" means a master as provided for
11 in Title 3, chapter 7.

12 ~~19~~(20) "Well" means any artificial opening or
13 excavation in the ground, however made, by which ground
14 water is sought or can be obtained or through which it flows
15 under natural pressures or is artificially withdrawn.
16 (Terminates June 30, 1993--sec. 11, Ch. 658, L. 1989)

17 85-2-102. (Effective July 1, 1993) Definitions. Unless
18 the context requires otherwise, in this chapter the
19 following definitions apply:

20 (1) "Appropriate" means to divert, impound, or withdraw
21 (including by stock for stock water) a quantity of water or,
22 in the case of a public agency, to reserve water in
23 accordance with 85-2-316.

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

25 (a) a use of water for the benefit of the appropriator,

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

5 (b) a use of water appropriated by the department for
6 the state water leasing program under 85-2-141 and of water
7 leased under a valid lease issued by the department under
8 85-2-141.

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

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

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

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

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

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

25 (9) "Ground water" means any water beneath the land

1 surface or beneath the bed of a stream, lake, reservoir, or
2 other body of surface water, and which is not a part of that
3 surface water.

4 (10) "Permit" means the permit to appropriate issued by
5 the department under 85-2-301 through 85-2-303 and 85-2-306
6 through 85-2-314.

7 (11) "Person" means an individual, association,
8 partnership, corporation, state agency, political
9 subdivision, the United States or any agency thereof, or any
10 other entity.

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

16 (13) "Salvage" means to make water available for
17 beneficial use from an existing valid appropriation through
18 application of water-saving methods.

19 (14) "Waste" means the unreasonable loss of water
20 through the design or negligent operation of an
21 appropriation or water distribution facility or the
22 application of water to anything but a beneficial use.

23 (15) "Water" means all water of the state, surface
24 and subsurface, regardless of its character or manner of
25 occurrence, including but not limited to geothermal water,

1 diffuse surface water, and sewage effluent.

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

4 (17) "Water judge" means a judge as provided for in
5 Title 3, chapter 7.

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

8 (19) "Well" means any artificial opening or
9 excavation in the ground, however made, by which ground
10 water is sought or can be obtained or through which it flows
11 under natural pressures or is artificially withdrawn."

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

13 **"85-2-402. (Temporary) Changes in appropriation rights.**

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

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

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

1 (b) Except for a lease authorization pursuant to
2 85-2-436 that does not require appropriation works, the
3 proposed means of diversion, construction, and operation of
4 the appropriation works are adequate.

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

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

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

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

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

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

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

1 existing water rights and aquatic life;

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

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

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

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

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

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

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

21 (b) the department then petitions the legislature and
22 the legislature affirms the decision of the department after
23 one or more public hearings.

24 (5) (a) The state of Montana has long recognized the
25 importance of conserving its public waters and the necessity

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

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

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

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

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

25 (c) In determining whether the appropriator has proved

1 by clear and convincing evidence that the requirements of
 2 subsections (5)(b)(ii) and (5)(b)(iii) will be met, the
 3 department and, if applicable, the legislature shall
 4 consider the following factors:

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

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

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

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

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

21 (6) For any application for a change in appropriation
 22 right involving 4,000 or more acre-feet of water a year and
 23 5.5 or more cubic feet per second of water, the department
 24 shall give notice of the proposed change in accordance with
 25 85-2-307 and shall hold one or more hearings in accordance

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

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

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

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

24 (10) A person holding an issued permit or change
25 approval that has not been perfected may change the place of

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

4 (11) A change in appropriation right contrary to the
5 provisions of this section is invalid. An officer, agent,
6 agency, or employee of the state may not knowingly permit,
7 aid, or assist in any manner an unauthorized change in
8 appropriation right. A person or corporation may not,
9 directly or indirectly, personally or through an agent,
10 officer, or employee, attempt to change an appropriation
11 right except in accordance with this section. (Terminates
12 June 30, 1993--sec. 11, Ch. 658, L. 1989.)

13 **85-2-402. (Effective July 1, 1993) Changes in**
14 **appropriation rights.** (1) An appropriator may not make a
15 change in an appropriation right except as permitted under
16 this section and with the approval of the department or, if
17 applicable, of the legislature.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19 (b) the department then petitions the legislature and
20 the legislature affirms the decision of the department after
21 one or more public hearings.

22 (5) (a) The state of Montana has long recognized the
23 importance of conserving its public waters and the necessity
24 to maintain adequate water supplies for the state's water
25 requirements, including requirements for reserved water

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

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

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

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

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

23 (c) In determining whether the appropriator has proved
 24 by clear and convincing evidence that the requirements of
 25 subsections (5)(b)(ii) and (5)(b)(iii) will be met, the

1 department and, if applicable, the legislature shall
 2 consider the following factors:

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

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

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

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

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

19 (6) For any application for a change in appropriation
 20 right involving 4,000 or more acre-feet of water a year and
 21 5.5 or more cubic feet per second of water, the department
 22 shall give notice of the proposed change in accordance with
 23 85-2-307 and shall hold one or more hearings in accordance
 24 with 85-2-309 prior to its approval or denial of the
 25 proposed change. The department shall provide notice and may

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

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

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

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

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

1 section.

2 (11) A change in appropriation right contrary to the
 3 provisions of this section is invalid. No officer, agent,
 4 agency, or employee of the state may knowingly permit, aid,
 5 or assist in any manner such unauthorized change in
 6 appropriation right. No person or corporation may, directly
 7 or indirectly, personally or through an agent, officer, or
 8 employee, attempt to change an appropriation right except in
 9 accordance with this section."

10 NEW SECTION. **Section 4.** Codification instruction.
 11 [Section 1] is intended to be codified as an integral part
 12 of Title 85, chapter 2, part 4, and the provisions of Title
 13 85, chapter 2, part 4, apply to [section 1].

14 NEW SECTION. **Section 5.** Saving clause. [This act] does
 15 not affect rights and duties that matured, penalties that
 16 were incurred, or proceedings that were begun before [the
 17 effective date of this act].

-End-

1 SENATE BILL NO. 265

2 INTRODUCED BY GROSFIELD, BENGTSON, REAM,

3 WEEDING, HARPER, GRADY, THOFT, SWYSGOOD

4 BY REQUEST OF THE GOVERNOR

5

6 A BILL FOR AN ACT ENTITLED: "AN ACT CLARIFYING THE RIGHT TO
7 BENEFICIALLY USE, SELL, OR LEASE SALVAGED WATER; DEFINING
8 "SALVAGE"; PROVIDING CRITERIA FOR APPROVAL OF CHANGES IN
9 APPROPRIATION RIGHTS INVOLVING SALVAGED WATER; ESTABLISHING
10 ~~THE--PERIOD--AFTER--WHICH--THE--RIGHT--TO--SALVAGED-WATER-IS~~
11 ~~FORFEITED;~~ AND AMENDING SECTIONS 85-2-102 AND 85-2-402,
12 MCA."

13

14 STATEMENT OF INTENT

15 A statement of intent is required for this bill in order
16 to provide guidance to the department of natural resources
17 and conservation concerning the adoption of rules to allow
18 the appropriation, use, and change of use of salvaged water.
19 The legislature directs the department of natural resources
20 and conservation to adopt rules that promote the
21 conservation and efficient use of water by implementing the
22 provisions of this bill.

23

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

25 NEW SECTION. Section 1. Salvaged water. It is the

There are no changes in this bill,
and will not be reprinted. Please
refer to yellow copy for complete
text.

1 SENATE BILL NO. 265
 2 INTRODUCED BY GROSFIELD, BENGTON, REAM,
 3 WEEDING, HARPER, GRADY, THOFT, SWYSGOOD
 4 BY REQUEST OF THE GOVERNOR
 5
 6 A BILL FOR AN ACT ENTITLED: "AN ACT CLARIFYING THE RIGHT TO
 7 BENEFICIALLY USE, SELL, OR LEASE SALVAGED WATER; DEFINING
 8 "SALVAGE"; PROVIDING CRITERIA FOR APPROVAL OF CHANGES IN
 9 APPROPRIATION RIGHTS INVOLVING SALVAGED WATER; ESTABLISHING
 10 THE--PERIOD--AFTER--WHICH--THE--RIGHT--TO--SALVAGED-WATER--IS
 11 FORFEITED; AND AMENDING SECTIONS 85-2-102 AND 85-2-402,
 12 MCA."

13
 14 STATEMENT OF INTENT
 15 A statement of intent is required for this bill in order
 16 to provide guidance to the department of natural resources
 17 and conservation concerning the adoption of rules to allow
 18 the appropriation, use, and change of use of salvaged water.
 19 The legislature directs the department of natural resources
 20 and conservation to adopt rules that promote the
 21 conservation and efficient use of water by implementing the
 22 provisions of this bill.

23
 24 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:
 25 NEW SECTION. **Section 1. Salvaged water.** It is the

1 declared policy of the state in 85-1-101 to encourage the
 2 conservation and full use of water. Consistent with this
 3 policy, holders of appropriation rights who salvage water,
 4 as defined in 85-2-102, may retain the right to the salvaged
 5 water for beneficial use. Any use of the right to salvaged
 6 water for any purpose or in any place other than that
 7 associated with the original appropriation right must be
 8 approved by the department as a change in appropriation
 9 right in accordance with 85-2-402. Sale of the right to
 10 salvaged water must also be in accordance with 85-2-403, and
 11 the lease of the right to salvaged water for instream flow
 12 purposes must be in accordance with 85-2-436.

13 **Section 2.** Section 85-2-102, MCA, is amended to read:
 14 **"85-2-102. (Temporary) Definitions.** Unless the context
 15 requires otherwise, in this chapter the following
 16 definitions apply:
 17 (1) "Appropriate" means to:
 18 (a) divert, impound, or withdraw (including by stock
 19 for stock water) a quantity of water;
 20 (b) in the case of a public agency, to reserve water in
 21 accordance with 85-2-316; or
 22 (c) in the case of the department of fish, wildlife,
 23 and parks, to lease water in accordance with 85-2-436.
 24 (2) "Beneficial use", unless otherwise provided, means:
 25 (a) a use of water for the benefit of the appropriator,



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

5 (b) a use of water appropriated by the department for
6 the state water leasing program under 85-2-141 and of water
7 leased under a valid lease issued by the department under
8 85-2-141; and

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

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

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

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

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

20 (7) "Declaration" means the declaration of an existing
21 right filed with the department under section 8, Chapter
22 452, Laws of 1973.

23 (8) "Department" means the department of natural
24 resources and conservation provided for in Title 2, chapter
25 15, part 33.

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

4 (10) "Ground water" means any water beneath the land
5 surface or beneath the bed of a stream, lake, reservoir, or
6 other body of surface water, and which is not a part of that
7 surface water.

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

11 (12) "Person" means an individual, association,
12 partnership, corporation, state agency, political
13 subdivision, the United States or any agency thereof, or any
14 other entity.

15 (13) "Political subdivision" means any county,
16 incorporated city or town, public corporation, or district
17 created pursuant to state law or other public body of the
18 state empowered to appropriate water but not a private
19 corporation, association, or group.

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

23 ~~(14)~~(15) "Waste" means the unreasonable loss of water
24 through the design or negligent operation of an
25 appropriation or water distribution facility or the

1 application of water to anything but a beneficial use.

2 †15†(16) "Water" means all water of the state, surface
3 and subsurface, regardless of its character or manner of
4 occurrence, including but not limited to geothermal water,
5 diffuse surface water, and sewage effluent.

6 †16†(17) "Water division" means a drainage basin as
7 defined in 3-7-102.

8 †17†(18) "Water judge" means a judge as provided for in
9 Title 3, chapter 7.

10 †18†(19) "Water master" means a master as provided for
11 in Title 3, chapter 7.

12 †19†(20) "Well" means any artificial opening or
13 excavation in the ground, however made, by which ground
14 water is sought or can be obtained or through which it flows
15 under natural pressures or is artificially withdrawn.
16 (Terminates June 30, 1993--sec. 11, Ch. 658, L. 1989)

17 85-2-102. (Effective July 1, 1993) Definitions. Unless
18 the context requires otherwise, in this chapter the
19 following definitions apply:

20 (1) "Appropriate" means to divert, impound, or withdraw
21 (including by stock for stock water) a quantity of water or,
22 in the case of a public agency, to reserve water in
23 accordance with 85-2-316.

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

25 (a) a use of water for the benefit of the appropriator,

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

5 (b) a use of water appropriated by the department for
6 the state water leasing program under 85-2-141 and of water
7 leased under a valid lease issued by the department under
8 85-2-141.

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

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

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

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

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

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

25 (9) "Ground water" means any water beneath the land

1 surface or beneath the bed of a stream, lake, reservoir, or
 2 other body of surface water, and which is not a part of that
 3 surface water.

4 (10) "Permit" means the permit to appropriate issued by
 5 the department under 85-2-301 through 85-2-303 and 85-2-306
 6 through 85-2-314.

7 (11) "Person" means an individual, association,
 8 partnership, corporation, state agency, political
 9 subdivision, the United States or any agency thereof, or any
 10 other entity.

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

16 (13) "Salvage" means to make water available for
 17 beneficial use from an existing valid appropriation through
 18 application of water-saving methods.

19 (14) "Waste" means the unreasonable loss of water
 20 through the design or negligent operation of an
 21 appropriation or water distribution facility or the
 22 application of water to anything but a beneficial use.

23 (15) "Water" means all water of the state, surface
 24 and subsurface, regardless of its character or manner of
 25 occurrence, including but not limited to geothermal water,

1 diffuse surface water, and sewage effluent.

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

4 (17) "Water judge" means a judge as provided for in
 5 Title 3, chapter 7.

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

8 (19) "Well" means any artificial opening or
 9 excavation in the ground, however made, by which ground
 10 water is sought or can be obtained or through which it flows
 11 under natural pressures or is artificially withdrawn."

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

13 **"85-2-402. (Temporary) Changes in appropriation rights.**

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

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

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

1 (b) Except for a lease authorization pursuant to
2 85-2-436 that does not require appropriation works, the
3 proposed means of diversion, construction, and operation of
4 the appropriation works are adequate.

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

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

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

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

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

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

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

1 existing water rights and aquatic life;

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

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

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

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

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

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

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

21 (b) the department then petitions the legislature and
22 the legislature affirms the decision of the department after
23 one or more public hearings.

24 (5) (a) The state of Montana has long recognized the
25 importance of conserving its public waters and the necessity

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

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

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

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

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

25 (c) In determining whether the appropriator has proved

1 by clear and convincing evidence that the requirements of
 2 subsections (5)(b)(ii) and (5)(b)(iii) will be met, the
 3 department and, if applicable, the legislature shall
 4 consider the following factors:

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

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

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

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

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

21 (6) For any application for a change in appropriation
 22 right involving 4,000 or more acre-feet of water a year and
 23 5.5 or more cubic feet per second of water, the department
 24 shall give notice of the proposed change in accordance with
 25 85-2-307 and shall hold one or more hearings in accordance

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

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

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

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

24 (10) A person holding an issued permit or change
 25 approval that has not been perfected may change the place of

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

4 (11) A change in appropriation right contrary to the
 5 provisions of this section is invalid. An officer, agent,
 6 agency, or employee of the state may not knowingly permit,
 7 aid, or assist in any manner an unauthorized change in
 8 appropriation right. A person or corporation may not,
 9 directly or indirectly, personally or through an agent,
 10 officer, or employee, attempt to change an appropriation
 11 right except in accordance with this section. (Terminates
 12 June 30, 1993--sec. 11, Ch. 658, L. 1989.)

13 **85-2-402. (Effective July 1, 1993) Changes in**
 14 **appropriation rights.** (1) An appropriator may not make a
 15 change in an appropriation right except as permitted under
 16 this section and with the approval of the department or, if
 17 applicable, of the legislature.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19 (b) the department then petitions the legislature and
20 the legislature affirms the decision of the department after
21 one or more public hearings.

22 (5) (a) The state of Montana has long recognized the
23 importance of conserving its public waters and the necessity
24 to maintain adequate water supplies for the state's water
25 requirements, including requirements for reserved water

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

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

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

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

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

23 (c) In determining whether the appropriator has proved
 24 by clear and convincing evidence that the requirements of
 25 subsections (5)(b)(ii) and (5)(b)(iii) will be met, the

1 department and, if applicable, the legislature shall
 2 consider the following factors:

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

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

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

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

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

19 (6) For any application for a change in appropriation
 20 right involving 4,000 or more acre-feet of water a year and
 21 5.5 or more cubic feet per second of water, the department
 22 shall give notice of the proposed change in accordance with
 23 85-2-307 and shall hold one or more hearings in accordance
 24 with 85-2-309 prior to its approval or denial of the
 25 proposed change. The department shall provide notice and may

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

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

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

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

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

1 section.

2 (11) A change in appropriation right contrary to the
 3 provisions of this section is invalid. No officer, agent,
 4 agency, or employee of the state may knowingly permit, aid,
 5 or assist in any manner such unauthorized change in
 6 appropriation right. No person or corporation may, directly
 7 or indirectly, personally or through an agent, officer, or
 8 employee, attempt to change an appropriation right except in
 9 accordance with this section."

10 NEW SECTION. **Section 4. Codification instruction.**
 11 [Section 1] is intended to be codified as an integral part
 12 of Title 85, chapter 2, part 4, and the provisions of Title
 13 85, chapter 2, part 4, apply to [section 1].

14 NEW SECTION. **Section 5. Saving clause.** [This act] does
 15 not affect rights and duties that matured, penalties that
 16 were incurred, or proceedings that were begun before [the
 17 effective date of this act].

-End-