

MINUTES OF THE SELECT COMMITTEE ON WATER
March 24, 1981

The Select Committee on Water convened at 1 p.m. in Room 436 of the Capitol with CHAIRMAN AUDREY ROTH presiding. All members were present.

CHAIRMAN ROTH said that SB 470 had been returned to the Water Committee and asked that the committee take action on it at this time.

EXECUTIVE SESSION:

SB 470.

REP. CONROY moved that SB 470 DO NOT PASS.

Members of the committee discussed federal inspections done by the DNRC.

CHAIRMAN ROTH asked if federal regulations would supercede state regulations if they were established by this bill.

GARY FRITZ, DNRC, said that this bill refers to private dams on private property. Federal regulations apply to federal dams on federal property, he said. He said that federal dam inspections have rated about 50 to 60 high hazard dams in the state. Reports are given to the county attorneys, who have the responsibility to see that the dams are drained, breeched or made safe in some manner, according to MR. FRITZ.

REP. HUENNEKENS felt the fiscal note was estimated too high, since the bill provides for funding.

REP. CONROY stated that each owner would be charged \$2,000 for inspection of his dam, and he wondered how it could be collected.

MR. FRITZ said one provision of the bill is a required inspection of a high hazard dam every five years, whether or not the owner feels it is necessary.

REP. ASAY asked how many of the 110 high hazard dams were owned by the state. MR. FRITZ said about 23 were.

REP. THOFT asked if the inspection cost would be \$2,000 for irrigation districts. MR. FRITZ answered it would. He told the committee members that, if the bill doesn't pass, the only way a dam would be inspected would be upon a complaint received by someone who felt it was unsafe, or on the prerogative of the DNRC, the county or a private individual. County commissioners can also appoint someone to inspect a dam, he said.

REP. THOFT asked how much it would cost for that inspection. MR. FRITZ said about the same as the state would charge, unless nothing wrong was found.

REP. CONROY's DO NOT PASS MOTION FAILED BY A VOTE OF 5 YES and 5 NO votes, the NO votes being cast by REPS. ROTH, CURTISS, BRIGGS, MCLANE and CONROY.

REP. HUENNEKENS moved DO PASS. The motion FAILED BY A VOTE OF 5 to 5.

HJR 53.

REP. JENSEN opened the hearing on HJR 53, the purpose of which is to gain local control of irrigation projects on tribal land now controlled by the Secretary of the Interior. REP. JENSEN said that this project is three irrigation districts, operating separately, but that all three signed contracts with the United States in 1948. The contract said that when half of the construction costs were paid back, the Secretary of the Interior would turn the project over to the farmers. Half of the project has been paid back and a Board of Control has been formed, he said. He thought the joint resolution would be a step in getting the project turned over to the owners. "We have petitioned the Secretary of the Interior to take action on this, but nothing has been done at the present; we hope to get his attention through this joint resolution," he said.

PROPOSERS:

CHARLIE CRANE, Montana Water Developers Association, said that his association has a great number of irrigation districts which are under the jurisdiction of the federal government. He felt that passage of the bill would eliminate many legal battles and save time.

OPPOSERS:

LAURENCE KENMILLE, vice-chairman, Tribal Council, Confederated Salish & Kootenai Tribes, read written testimony to the committee in opposition to the bill (EXHIBIT I). He also said that efforts have been made by the Indians to resolve the problem.

QUESTIONS FROM THE COMMITTEE:

RPE. CONROY asked who was in charge of the project at the present. REP. JENSEN answered by saying that civil service personnel and engineer appointed by an area director of the

Commissioner of Indian Affairs. It is a separate entity of the Bureau of Indian Affairs, according to REP. JENSEN.

REP. CONROY asked what the problem was. REP. JENSEN feels that matters could be better handled if policy was set locally rather than by writing to the Secretary of the Interior. He felt that he had a good relationship with the Indians. He said the only reason so few Indians participated in operating the project was that few were served by the project. He said that ownership was 85% to 93% white. When the reservation was opened up to white settlement, white people came in and purchased Indian land.

REP. CONROY asked who administers or owns the water. REP. JENSEN said that Congress set aside a block of water in 1900 to serve this project, which is primarily an Indian irrigation project. He said that several cases have gone to the Supreme Court, and he feels that white owners should have equal rights to use water there. He agreed that there are many unanswered questions, and he hoped they would be answered.

REP. HUENNEKENS asked if the ditches and canals were mostly an easement on Indian land or non-Indian land. REP. JENSEN said that most were easement on Indian tribal land with perpetual leases.

REP. HUENNEKENS asked if the original contract between the ditch companies and the federal government would provide for turning these easements over to the owners, or would they remain with the federal government.

REP. JENSEN said they would continue with the project. The United States paid \$400,000 for these easements.

REP. HUENNEKENS asked if the contract called for repayment for the easements.

REP. JENSEN said the money doesn't involve the contract.

REP. HUENNEKENS asked if ownership of the power plant and transmission lines mentioned lies with the project. MR. KENMILLE said it lies with the irrigation project. The tribe loans the Montana Power Company land, and in return receives a block of power for use by the reservation.

REP. KEMMIS stated that the Water Compact is in the process of negotiating with the tribe. Given the fact that the state has no jurisdiction, he asked if the committee thought it wise to get into the middle of the problem. He thought intervention might jeopardize negotiations.

REP. JENSEN said he would now question the advisability of it (carrying through with the resolution). He said that Rep. Seifert had introduced his resolution at the request of the Montana Power. He said he wished to apologize to the Indians, as he didn't think they would object to this resolution.

JOHN MCLURE rose and asked permission to speak. He said that he was on the tribal council. He said the tribes own the Polson dam and that there are negotiations between the council and the Montana Power which are being held in Washington, D.C. He felt this would not be a good time for the state to offer this resolution, which he thought would interfere with the negotiations.

MR. BROCHETTE said that the tribal constitution provided for tribes doing business with local, state and federal agencies.

REP. CURTISS asked if the tribes were aware of provision in the contract (with the federal government) for the project to be turned over to the irrigation people after half had been repaid.

MR. KENMILLE said he did not know.

REP. CURTISS asked if there were any Indians on the irrigation district board. MR. KENMILLE said there was one.

CHAIRMAN ROTH asked about Mr. Kenmille's statement about this bill turning the project over to non-Indians. MR. KENMILLE said that all the irrigation districts are governed by non-Indians.

CHAIRMAN ROTH told the Indian delegation that the Compact Commission is pleased with the way the Confederated Salish and Kootenai Tribes were responding to negotiations.

MR. KENMILLE stated that the tribes were working in a cooperative agreement, but that there is great turmoil among the tribes. He said that the other tribes are "leary of what we are doing."

REP. CONROY suggested that the committee write a letter to the tribal lawyer, including a copy of the bill, asking for comments. He also suggested that the committee table the bill.

REP. JENSEN said he has always had a good relationship with the tribal members and wished to continue. He said that the board is having difficulty operating at the present time and he thought this resolution might improve the situation. He said that because this is under the Indian department, there

should be preference to Indian people. At present, there are vacancies on the board, he stated, and must be filled with hired personnel rather than appointed individuals.

REP. JENSEN closed the hearing on SJR 53.

EXECUTIVE SESSION.

SJR 53.

REP. CONROY MOVED that SJR 53 be INDEFINITELY POSTPONED. The motion was seconded and PASSED UNANIMOUSLY.

SB 176.

REP. NEWMAN MOVED that SB 176 DO PASS.

BOB PERSON, legislative researcher for the committee, reminded members that two amendments had been passed on March 19, and that the committee had asked for more time to study the bill.

REP. THOFT MOVED that SB 176 DO PASS AS AMENDED. The bill PASSED UNANIMOUSLY.

REP. NEWMAN will CARRY THE BILL.

SB 243.

The committee discussed the proposed amendments.

BOB PERSON explained the DNRC amendments. (See Exhibit II in 3/12/81 Minutes.)

It was the consensus of the committee that the amendments should be addressed one at a time. The following amendments were approved by the committee:

- p.2, line 3
- p.2, line 5
- p.3, line 1

REP. THOFT MOVED for a DO PASS AS AMENDED.

After further discussion, REP. KEMMIS MOVED an amendment on page 2, line 4, that the committee insert "from the basin", and also on page 3, line 3, to do the same. The MOTION CARRIED UNANIMOUSLY.

REP. HUENNEKENS called attention to the word "tending" on page 3, line 6, asking if that wasn't a "weak assertion."

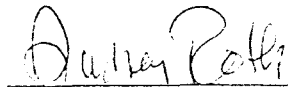
LEO BERRY, DNRC, said that "tending" was referring only to the application, and the word was used as it was felt that a burden should not be placed on an applicant.

REP. HUENNEKENS still felt the word should be changed. He MOVED that on page 3, line 6 "tending to show" be stricken, and "show" be inserted. The motion FAILED by a vote of 4 YES and 6 NO, the NO votes being cast by REPRESENTATIVES ROTH, CURTISS, BRIGGS, MCLANE, ASAY and CONROY. MR. BERRY said that the application is a preliminary thing and needn't be worded that strongly.

REP. THOFT'S MOTION of DO PASS AS AMENDED PASSED BY A VOTE OF 7 YES and 3 NO, the NO votes being cast by REPRESENTATIVES BRIGGS, MCLANE AND CURTISS.

REP. THOFT was assigned to CARRY THE BILL.

The meeting adjourned at 3 p.m.



CHAIRMAN AUDREY ROTH

rj

VISITORS' REGISTER

HOUSE

Water

COMMITTEE

WILL

HJR

53

Date _____

3-24-81

SPONSOR

Gender and Ternage

[illegible]

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR LONGER FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

TESTIMONY BEFORE THE MONTANA HOUSE AND SENATE

PRESENTED BY

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION

JOINT HOUSE/SENATE RESOLUTION 53

MARCH 24, 1981

Thank you for allowing me this opportunity to testify before the State Legislative Body on behalf of the Confederated Salish and Kootenai Tribes of the Flathead Reservation.

The Tribal Council has asked me to appear today for the purpose of expressing official objection to the Joint House/Senate action encouraging the Secretary of the Interior to take steps to turn over the management of certain irrigation districts to a local non-Indian entity.

This action concerns the Tribes for obvious reasons--the location of the "certain irrigation districts" is on private, tribally owned properties for which the Secretary of the Interior has only an easement for irrigation and power purposes. The Flathead Indian Irrigation Project consists of some 20 reservoirs, approximately 1,000 miles of canals and laterals with control structures to regulate water, and as an integral part of the Project, the Flathead Power System, consisting of over 120 miles of transmission lines, over 1,000 miles of distribution lines and 17 major substations; most of which is on Tribal land.

Perhaps a bit of history is in order. The Confederated Tribes' reservation was recognized by the United States and established pursuant to the Treaty of Hell Gate, July 16, 1855, 12 Stat. 975. Article II

Of the Treaty provided with respect to the Reservation:

"All which tract shall be set apart, and, so far as necessary, surveyed and marked out for the exclusive use and benefit of said Confederated Tribes as an Indian Reservation. Nor shall any white man, excepting those in the employment of the Indian department, be permitted to reside upon the said reservation without permission of the Confederated Tribes, and the Superintendent and agent. And the said Confederated Tribes' agree to remove to and settle upon the same within one year after the ratification of this treaty....." (At 976).

The Confederated Tribes occupied their reservation in satisfaction, prosperity and harmony; but the United States, as the demand for land grew more incessant, was not content to honor its treaty. At first it negotiated with the Confederated Tribes to secure an agreement by which the Tribal members would take allotments and the unallotted lands would be opened to white entry. The Confederated Tribes refused to enter into such an agreement, so the United States, by the Act of April 23, 1904, 33 Stat. 302, breached the treaty and forced the Tribal members to take allotments against their will, and provided that the unallotted lands should be opened to white entry.

The Act of April 23, 1904, was amended several times. By the Act of May 29, 1908, 35 Stat. 444, it was amended to provide for the construction of an irrigation project on the reservation. The construction costs of the project were to come from the proceeds received from the sales of the unallotted lands.

The Reservation was opened to non-Indian entry in 1910. The Irrigation Project was then under construction and enlarged and developed over the years. We understand that it was substantially completed in its present size in the late 1950's. However, we know that the Project continues to expand and develop its facilities and

its services. As early as the 1920's it was estimated that approximately 87% of the land serviced by the Irrigation Project was non-Indian owned. At the present time, this figure is nearly 95%, according to our information.

On the Flathead Reservation there are a conglomeration of claimed water rights. These rights extend from those which belong to the Tribes by virtue of their ownership of the Reservation, to those exercised and claimed by the Irrigation Project. In between are the rights relating to individual tribal members holding original allotments, successors to those allotments by heirship or fee patent, and rights claimed by individuals but taken by trespass in obvious violation of tribal rights, individual Indian rights, or from the Irrigation Project. Unfortunately, because of lack of representation by the Confederated Tribes when their reservation was opened and when the Irrigation Project was initiated, there has never been a clear delineation of what rights belong to whom and why.

This situation has now become intolerable and is resulting in irreparable harm to the Confederated Tribes. Numerous non-Indians are unlawfully appropriating tribal water rights, water rights belonging to individual Indians and water from the Irrigation Project. If these illegal appropriations are to be stopped maybe it is necessary that judicial proceedings be brought to foreclose them.

Unless tribal water rights are judicially determined prior to any transfer, it would be impossible to fully determine and protect them thereafter, for the Irrigation Project will no longer be a bureau

function, but one administered by elements hostile to Indians' rights. The result will be a further taking of Tribal rights, with the impossible burden placed upon the Tribes of trying to define and protect their rights by litigation that would require joining three irrigation districts plus all of the districts water users, not to mention the various individuals outside the project presently appropriating Tribal rights.

We think that it would be unfair to the great majority of water users who utilize their allocation in conformity with the Secretary's regulations to have to hire attorneys to represent them in an adjudication case. What about taxes? Wouldn't the projects works be subject to country property taxes if it were no longer under federal control.

We also believe that takeover by the water users would violate PL 93-638 the Indian Self-determination and Education Act which encourages Tribes to operate programs on Indian Reservations that serve Indian people. Further, federal legislation would probably be required to turn over any part of the project that serves Indian land and there is no way to separate that part out.

Then we wonder what happened to the spirit of HB 25 which talks about cooperative agreement with Indian Tribes. Then our own senator and representatives introduce resolutions such as this and HJR 18 without consulting the most interested party, the Tribes.

Testimony
March 24, 1981
Page Five

There have been many discussions over the recent years about the need for Indian Tribes and the state government to develop better working relationships and cooperative agreements. Such an approach has seemed a viable goal to the Confederated Salish and Kootenai Tribes; but examples such as the State has now given by entertaining HJR 53 and HJR 18 should make it clear why Indian Tribes are reluctant to continue participation in these efforts. The state should actively seek the Tribes advice on matters like these before they are introduced, instead of trying to sneak them through to fulfill campaign obligations.

Respectfully submitted,


Laurence Kenmille
Vice-Chairman, Tribal Council
Confederated Salish & Kootenai Tribes

SENATE BILL 243

Proposed Amendments

DNPC

- 1 Page 1, Line 7
Following: "THE"
Strike: "DEPARTMENT"
Insert: "BOARD"
- 2 Page 1, Line 20
Following: "The" on line 19
Strike: "department"
Insert: "Board"
- 3 Page 2, Line 3
Following: "basin"
Insert: "from the basin" *p. 2 line 2 no. 2* *app. UNAN*
- 4 Page 2, Line 5
Following: "the"
Strike: "department"
Insert: "board" *UNAN*
- 5 Page 3, Line 2
Following: "water" on line 1
Insert: "from the basin" *p. 3 line 1* *UNAN.*
- 6 Page 3, Line 14
Following: "the"
Strike: "department"
Insert: "board" *UNAN*
- 7 Page 3, Line 14
Following: "85-2-307"
Insert: "(1) and (2)."
Thot *UNAN*
- 8 Page 3, Line 16
Following: "the"
Strike: "department"
Insert: "board" *no 2* *UNAN*
- 9 Page 4, Line 25
Following: "the"
Strike: "department"
Insert: "board" *Asay* *UNAN*
- 10 Page 5, Line 2
Following: "the"
Strike: "department"
Insert: "board" *Asay* *UNAN*
- 11 Page 5, Line 9
Following: "the" on line 8
Strike: "department"
Insert: "board" *FS*

Senate Bill 243
Proposed Amendments
Page Two.

- 12 Page 6, Line 15
Following: "The"
Strike: "department"
Insert: "Board"
- 13 Page 6, Line 19
Following: "Montana"
Insert: "and if the diversion and ultimate use of water will not exceed the allocated share under the compact of any of the signatory states."
- 14 Page 6, Line 20
Following: "The"
Strike: "department"
Insert: "board"
- 15 Page 6, Line 24
Following: "The"
Strike: "department"
Insert: "board"
- 16 Page 7, Line 9
Following: "the"
Strike: "department"
Insert: "board"
- 17 Page 7, Line 14
Following: "THE"
Strike: "DEPARTMENT'S"
Insert: "BOARD'S"-----
- 18 Page 7, Line 18
Following: "Chapter 20."
Insert: "The board's consent shall terminate 5 years after the date of issuance of the consent unless the board issues the certificate for the facility in accordance with Title 75, Chapter 20 and approval of North Dakota and Wyoming is secured in accordance with Article X of the compact or unless consent is extended by the board."

SENATE BILL NO. 243

INTRODUCED BY GRAHAM

BY REQUEST OF THE DEPARTMENT OF

NATURAL RESOURCES AND CONSERVATION

A BILL FOR AN ACT ENTITLED: "AN ACT TO DELEGATE AUTHORITY
TO THE ^{BOARD} ~~DEPARTMENT~~ OF NATURAL RESOURCES AND CONSERVATION IN
AUTHORIZING DIVERSIONS FROM THE YELLOWSTONE RIVER BASIN UNDER
ARTICLE X OF THE YELLOWSTONE RIVER COMPACT, SECTION
85-20-101, PCA, ON BEHALF OF THE STATE OF MONTANA; AND
PROVIDING AN EFFECTIVE DATE."

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

Section 1. Definitions. Unless the context requires
otherwise, in [this act] the following definitions apply:

(1) "basin" means the Yellowstone River basin.

(2) "Compact" means the Yellowstone River Compact
provided for in 85-20-101.

Section 2. Authority to approve diversions. The
^{Board} ~~Department~~ [of natural resources and conservation] may
consent on behalf of the state of Montana to diversions of
water from the basin pursuant to Article X of the compact,
including diversions of water allocated under the terms of
the compact to the other signatory states of Wyoming and
North Dakota.

Section 3. Application -- notice -- objections --
^{report} ~~report~~ hearing. (1) Any appropriator proposing to divert water from
the basin allocated to Montana under the terms of the
compact or divest unallocated compact water within Montana
shall file an application with the department.

(2) The application must state the name and address of
the applicant and facts ^{affirmatively demonstrating} ~~showing to show~~ that:

(a) the diversion and ultimate use of the water in
Montana is for a beneficial use of water under the laws of
Montana;

(b) the diversion and ultimate use of water will not
adversely affect the water rights of other persons;

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

(d) the diversion and ultimate use will not interfere
unreasonably with other planned uses or developments for
which a water right has been established or a permit has
been issued or for which water has been reserved;

(e) the diversion and ultimate use of the water will
not exceed the allocated share under the compact of any of
the signatory states;

(f) the diversion and ultimate use of the water is are
in the public interest of Montana; and

(g) the applicant intends to comply with the laws of
the signatory states to the compact.

1 (c) ANY APPROPRIATOR PROPOSING TO DIVERT WATER
2 ALLOCATED IN NORTH DAKOTA OR WYOMING UNDER THE TERMS OF THE
3 COMPACT OR DIVERT UNALLOCATED COMPACT WATER WITHIN NORTH
4 DAKOTA OR WYOMING ^{from the basin} SHALL FILE AN APPLICATION WITH THE
5 DEPARTMENT. THE APPLICATION MUST STATE THE NAME AND ADDRESS
6 OF THE APPLICANT AND FACTS ^{of compactly demonstrating} TENDING TO SHOW THAT:

7 (A) THE PROPOSED MEANS OF DIVERSION, CONSTRUCTION, AND
8 OPERATION ARE ADEQUATE;

9 (B) THE DIVERSION AND ULTIMATE USE OF THE WATER WILL
10 NOT EXCEED THE ALLOCATED SHARE UNDER THE COMPACT OF ANY OF
11 THE SIGNATORY STATES; AND

12 (C) THE APPLICANT ^{will} ~~intends~~ TO COMPLY WITH THE COMPACT.
13 (3) Notice of the proposed diversion must be given by
14 the Department in the same manner as provided in 95-2-307, (1) and (2).
15 (4) An objection to an application must be filed by
16 the date specified by the department in the notice.

17 (5) The objector TO AN APPLICATION UNDER SUBSECTION
18 (1) shall state his name and address and facts tending to
19 show that:

20 (a) the diversion and ultimate use of the water IN
21 MONTANA are not for a beneficial use of water under the terms
22 of Montana;

23 (b) the property, rights, or interests of the objector
24 would be adversely affected by the proposed diversion or
25 ultimate use of the water;

1 (c) the proposed means of diversion, construction, and
2 operation are not adequate;

3 (d) the diversion and ultimate use will interfere
4 unreasonably with the objector's planned uses or development
5 for which the objector has a water right, a permit, or a
6 reserved water right;

7 (e) the diversion and ultimate use of the water will
8 exceed the allocated share under the compact of any
9 signatory state; or

10 (f) the diversion and ultimate use of the water are
11 not in the public interest of Montana regardless of whether
12 the water in question is allocated to Montana or one of the
13 other signatory states to the compact.

14 (6) THE OBJECTOR TO AN APPLICATION UNDER SUBSECTION
15 (2) SHALL STATE HIS NAME AND ADDRESS AND FACTS TENDING TO
16 SHOW THAT:

17 (A) THE PROPERTY, RIGHTS, OR INTERESTS OF THE OBJECTOR
18 WOULD BE ADVERSELY AFFECTED BY THE PROPOSED DIVERSION OR
19 ULTIMATE USE OF THE WATER;

20 (B) THE PROPOSED MEANS OF DIVERSION, CONSTRUCTION, AND
21 OPERATION ARE NOT ADEQUATE; OR

22 (C) THE DIVERSION AND ULTIMATE USE OF THE WATER WILL
23 EXCEED THE ALLOCATED SHARE UNDER THE COMPACT OF ANY
24 SIGNATORY STATE.

25 ⁶⁶¹¹⁽⁹⁾ If the department receives an objection to an
Insert new subsections (7) and (8)
(see attached page)

1 act upon any application for diversion of water from the
 2 basin filed pursuant to the provisions of [this act] in
 3 conjunction with any board proceedings involving the siting
 4 of a facility or associated facilities conducted under the
 5 provisions of Title 75, chapter 20, part 4, as amended, or
 6 in conjunction with any departmental proceeding involving
 7 the issuance of a permit or approval of a change conducted
 8 under Title 35, chapter 2, as amended, if in the opinion of
 9 the ~~department~~ ^{board} consideration of both applications in the
 10 same proceeding will better enable the board and department
 11 to fulfill their functions, duties, and responsibilities
 12 under the provisions of Title 75, chapter 20, part 4, or
 13 Title 35, chapter 2, and [this act]. ^{However, the board}
 14 ~~may not~~ ^{may not} ~~NECESSARILY~~ consent to the diversion of Montana
 15 water out of the basin for ultimate use in a facility as
 16 defined in Title 75, chapter 20, ^{Prior to} ~~prior to~~ ~~SECTION 6~~
 17 ~~CONVENE~~ ^{ON} the board's issuance of a certificate for
 18 the facility in accordance with Title 75, chapter 20.

19 Section 6. Department authorized to appear in
 20 administrative and legal proceedings. The department may
 21 appear on behalf of the state of Montana in proceedings
 22 before the legislatures and administrative agencies of the
 23 other signatory states to the compact and in legal
 24 proceedings commenced in federal or state court within the
 25 other signatory states involving the consent of such

1 signatory states to diversions of water from the basin under
 2 Article X of the compact and any other laws or rules of such
 3 signatory states applicable to such diversions to the extent
 4 necessary to protect the interests and the citizens of
 5 Montana in those proceedings.

6 Section 7. Codification instruction. This act is
 7 intended to be codified as a new part in Title 85, chapter
 8 2, and the provisions of Title 85, chapter 2, apply to this
 9 act.

10 Section 8. Severability. If a part of this act is
 11 invalid, all valid parts that are severable from the invalid
 12 part remain in effect. If a part of this act is invalid in
 13 one or more of its applications, the part remains in effect
 14 in all valid applications that are severable from the
 15 invalid applications.

16 Section 9. --Effective-date--This act is--effective--on
 17 passage-and-approval

-End-

PROPOSED AMENDMENTS

SB 243

(supplemental sheet)

Section 3, NEW SUBSECTION (7) to be inserted on page 4, after line 24.

"THE DEPARTMENT SHALL SUBMIT A REPORT TO THE BOARD WHICH SHALL CONTAIN THE DEPARTMENT'S STUDIES, EVALUATIONS, RECOMMENDATIONS, OTHER PERTINENT DOCUMENTS RESULTING FROM ITS STUDY AND EVALUATION, AND AN ENVIRONMENTAL IMPACT STATEMENT OR ANALYSIS PREPARED PURSUANT TO THE MONTANA ENVIRONMENTAL POLICY ACT, IF ANY.

THE DEPARTMENT SHALL SUBMIT ITS REPORT WITHIN 120 DAYS AFTER THE DATE OF RECEIVING AN APPLICATION OR CONCURRENTLY WITH AN ENVIRONMENTAL IMPACT STATEMENT OR OTHER REVIEW REQUIRED BY LAW."

Section 3, NEW SUBSECTION (8)

"THE DEPARTMENTS OF STATE LANDS; FISH, WILDLIFE AND PARKS; COMMUNITY AFFAIRS; AND PUBLIC SERVICE REGULATION SHALL REPORT TO THE DEPARTMENT INFORMATION RELATING TO THE IMPACT OF THE PROPOSED DIVERSION ON EACH DEPARTMENT'S AREA OF EXPERTISE. THE REPORT MAY INCLUDE OPINIONS AS TO THE ADVISABILITY OF GRANTING, DENYING, OR MODIFYING THE DIVERSION."

Page 5, line 1, after the first "application" insert:

"THE BOARD SHALL SET A DATE FOR A HEARING TO BE HELD NOT LESS THAN 30 DAYS BUT WITHIN 60 DAYS AFTER THE BOARD RECEIVES THE DEPARTMENT'S REPORT SUBMITTED UNDER (Section 3 (7)). HOWEVER, IF THE APPLICATION IS FOR A DIVERSION OF MONTANA WATER OUT OF THE BASIN FOR ULTIMATE USE IN A FACILITY AS DEFINED IN TITLE 75, CHAPTER 20, THE BOARD MAY SET A HEARING DATE CONCURRENT WITH THE TIMEFRAMES ESTABLISHED IN TITLE 75, CHAPTER 20."

Corbett Plains

AMENDMENTS TO SB 243

1. Page 1 line 7 (Title) strike "Department" and insert "Board"
2. Page 1, line 20, strike "department" and insert "board"
3. Page 2, line 1, Following "objections" insert "report"
4. Page 2, line 4, Following "Montana" insert "from the basin"
5. Page 2, line 7, strike "tending to show" and insert "affirmatively demonstrating" *NO*
6. Page 3, line 4, Following "Wyoming" insert "from the basin"
7. Page 3, line 6, strike "tending to show" and insert "affirmatively demonstrating" *NO*
8. Page 3, line 12, strike "intends to" and insert "will" *NO*
9. Page 3, line 14, Following "85-2-307" insert "(1) and (2)"
10. Page 4, line 24, Following line 24 insert new subsection "(7)"

New subsection (7): "The department shall submit a report to the board which shall contain the department's studies, evaluations, recommendations, other pertinent documents resulting from its study and evaluation, and an environmental impact statement or analysis prepared pursuant to the Montana Environmental Policy Act, if any."

The department shall submit its report within 120 days after the date of receiving an application or concurrently with an environmental impact statement or other review required by law."

11. Following new subsection (7) insert new subsection (8)

New subsection (8): "The departments of state lands; fish, wildlife and parks; community affairs; and public service regulation shall report to the department information relating to the impact of the proposed diversion on each department's area of expertise. The report may include opinions as to the advisability of granting, denying, or modifying the diversion."

12. Page 4, line 25, strike "(7)" and insert "(9)"
13. Page 5 lines 1 through 3, Following "application," strike "it shall hold a hearing on the application within 60 days from the date set by the department for filing objections." and insert "the board shall set a date for a hearing to be held not less than 30 days but within 60 days after the board receives the department's report submitted under Section 3 (7). [However, if the application is for a diversion of Montana water out of the basin for ultimate use in a facility as defined in Title 75, chapter 20, the board may set a hearing date concurrent with the timeframes established in Title 75, chapter 20.]"

- 14. Page 5 line 5, "(8)" and insert "(10)"
- 15. Page 5, line 9, strike "department" and insert "board"
- 16. Page 6, line 15, strike "department" and insert "board"
- 17. Page 6, line 19, Following "Montana" insert "and if the diversion and ultimate use of water will not exceed the allocated share under the compact of any of the signatory states." NO
- 18. Page 6, line 20, strike "department" and insert "board"
- 19. Page 6, line 24, strike "department" and insert "board"
- 20. Page 6 line 25, strike "upon petition by the applicant"
- 21. Page 7, line 9, strike "department" and insert "board"
- 22. Page 7, lines 13 and 14, strike "The department's" on line 14 and insert "However, the board may not" following "this act" on line 13. NO
- 23. Page 7, lines 16 and 17, strike "shall be contingent upon" and insert "prior to" following "chapter 20," on line 16 NO

1 SENATE BILL NO. 243

2 INTRODUCED BY GRAHAM

3 BY REQUEST OF THE DEPARTMENT OF

4 NATURAL RESOURCES AND CONSERVATION

5

6 A BILL FOR AN ACT ENTITLED: "AN ACT TO DELEGATE AUTHORITY
7 TO THE ~~DEPARTMENT~~ ^{BOARD} OF NATURAL RESOURCES AND CONSERVATION TO
8 AUTHORIZE DIVERSIONS FROM THE YELLOWSTONE RIVER BASIN UNDER
9 ARTICLE X OF THE YELLOWSTONE RIVER COMPACT, SECTION
10 85-20-101, MCA, ON BEHALF OF THE STATE OF MONTANA--AND
11 PROVIDING--AN--EFFECTIVE--DATE."

12

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

14 Section 1. Definitions. Unless the context requires
15 otherwise, in [this act] the following definitions apply:

16 (1) "Basin" means the Yellowstone River basin.

17 (2) "Compact" means the Yellowstone River Compact
18 provided for in 25-20-101.

19 Section 2. Authority to approve diversions. The
20 ~~department~~ ^{board} [of natural resources and conservation] may
21 consent on behalf of the state of Montana to diversions of
22 water from the basin pursuant to Article X of the compact,
23 including diversions of water allocated under the terms of
24 the compact to the other signatory states of Wyoming and
25 North Dakota.

Section 3. Application -- notice -- objections

hearing. (1) Any appropriator proposing to divert water from

the-basin ALLOCATED TO MONTANA UNDER THE TERMS OF THE
COMPACT OR DIVERSED UNALLOCATED COMPACT WATER WITHIN MONTANA
shall file an application with the department.

(2) The application must state the name and address of
the applicant and facts ^{affirming} tending to show that:

(a) the diversion and ultimate use of the water IN
MONTANA is for a beneficial use of water under-the-laws-of
Montana;

(b) the diversion and ultimate use of water will not
adversely affect the water rights of other persons;

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

(d) the diversion and ultimate use will not interfere
unreasonably with other planned uses or developments for
which a water right has been established or a permit has
been issued or for which water has been reserved;

(e) the diversion and ultimate use of the water will
not exceed the allocated share under the compact of any of
the signatory states;

(f) the diversion and ultimate use of the water is ARE
in the public interest of Montana; and

(g) the applicant intends to comply with the laws of
the signatory states to the compact.

1 (2) ANY APPROPRIATOR PROPOSING TO DIVERT WATER
 2 ALLOCATED IN NORTH DAKOTA OR WYOMING UNDER THE TERMS OF THE
 3 COMPACT OR DIVERT UNALLOCATED COMPACT WATER WITHIN NORTH
 4 DAKOTA OR WYOMING SHALL FILE AN APPLICATION WITH THE
 5 DEPARTMENT. THE APPLICATION MUST STATE THE NAME AND ADDRESS
 6 OF THE APPLICANT AND FACTS ^{showing} ~~showing~~ THAT:

7 (A) THE PROPOSED MEANS OF DIVERSION, CONSTRUCTION, AND
 8 OPERATION ARE ADEQUATE;

9 (B) THE DIVERSION AND ULTIMATE USE OF THE WATER WILL
 10 NOT EXCEED THE ALLOCATED SHARE UNDER THE COMPACT OF ANY OF
 11 THE SIGNATORY STATES; AND

12 (C) THE APPLICANT INTENDS TO COMPLY WITH THE COMPACT.

13 (3) Notice of the proposed diversion must be given by
 14 the department in the same manner as provided in 85-2-307.
 15 (4) An objection to an application must be filed by
 16 the date specified by the department in the notice.

17 (5) The objector TO AN APPLICATION UNDER SUBSECTION
 18 (1) shall state his name and address and facts tending to
 19 show that:

20 (a) the diversion and ultimate use of the water IN
 21 MONTANA are not for a beneficial use of water under the laws
 22 of Montana;

23 (b) the property, rights, or interests of the objector
 24 would be adversely affected by the proposed diversion or
 25 ultimate use of the water;

1 (c) the proposed means of diversion, construction, and
 2 operation are not adequate;

3 (d) the diversion and ultimate use will interfere
 4 unreasonably with the objector's planned uses or development
 5 for which the objector has a water right, permit, or a
 6 reserved water right;

7 (e) the diversion and ultimate use of the water will
 8 exceed the allocated share under the compact of any
 9 signatory state; or

10 (f) the diversion and ultimate use of the water are
 11 not in the public interest of Montana regardless of whether
 12 the water in question is allocated to Montana or one of the
 13 other signatory states to the compact.

14 (b) THE OBJECTOR TO AN APPLICATION UNDER SUBSECTION
 15 (2) SHALL STATE HIS NAME AND ADDRESS AND FACTS TENDING TO
 16 SHOW THAT:

17 (A) THE PROPERTY, RIGHTS, OR INTERESTS OF THE OBJECTOR
 18 WOULD BE ADVERSELY AFFECTED BY THE PROPOSED DIVERSION OR
 19 ULTIMATE USE OF THE WATER;

20 (B) THE PROPOSED MEANS OF DIVERSION, CONSTRUCTION, AND
 21 OPERATION ARE NOT ADEQUATE; OR

22 (C) THE DIVERSION AND ULTIMATE USE OF THE WATER WILL
 23 EXCEED THE ALLOCATED SHARE UNDER THE COMPACT OF ANY
 24 SIGNATORY STATE;

25 (6)(I) If the department receives an objection to an

1 application, it shall hold a hearing on the application
 2 within 60 days from the date set by the department for
 3 filing objections. Service of notice of the hearing must be
 4 made by certified mail upon the applicant and the objector.
 5 ~~(f)(1)(B)~~ The hearing shall be conducted under the
 6 contested case procedures of the Montana Administrative
 7 Procedure Act in Title 2, chapter 4, part 6.
 8 Section 4. Criteria for approval -- terms. (1) The
 9 department may issue its approval of a diversion of water
 10 allocated to Montana under the terms of the compact or
 11 unallocated compact water diverted in Montana if:
 12 (a) the diversion and the ultimate use of the water in
 13 MONTANA are for a beneficial use under the laws of Montana
 14 UP WATER;
 15 (b) the diversion and ultimate use of water will not
 16 adversely affect the water rights of other persons;
 17 (c) the proposed means of diversion, construction, and
 18 operation are adequate;
 19 (d) the diversion and ultimate use will not interfere
 20 unreasonably with other planned uses or developments for
 21 which a water right has been established or a permit has
 22 been issued or for which water has been reserved;
 23 (e) the diversion and ultimate use of water will not
 24 exceed the allocated share under the compact of any of the
 25 signatory states;

Approved
 Ann Good
 F.D.

1 (f) the diversion and ultimate use of the water are in
 2 the public interest of Montana; and
 3 (g) the applicant signs an agreement to comply with
 4 the law LAWs of the signatory states to the compact in
 5 constructing, operating, and maintaining all facilities
 6 associated with the diversion and ultimate use of the water.
 7 ~~(2) in determining if the diversion is in the public~~
 8 ~~interest of Montana the department shall consider:~~
 9 ~~(a) the benefits to the applicant and the state~~
 10 ~~resulting from the proposed diversion~~
 11 ~~(b) the effects of economic activity in Montana~~
 12 ~~resulting from the proposed diversion and~~
 13 ~~(c) the effects of the proposed diversion on the~~
 14 ~~public health, welfare, and safety~~
 15 ~~(3)(2) The department may approve a diversion of water~~
 16 ~~allocated to North Dakota or Wyoming or unallocated compact~~
 17 ~~water diverted in North Dakota or Wyoming if the diversion~~
 18 ~~will not adversely affect the property, rights, or interests~~
 19 ~~of an appropriator located in Montana.~~
 20 ~~(4)(3) The department may approve a diversion subject~~
 21 ~~to such terms, conditions, restrictions, and limitations as~~
 22 ~~it considers necessary to meet the APPLICABLE criteria~~
 23 ~~listed in subsection (1) OR (2).~~
 24 Section 5. Combined proceeding. The department, in its
 25 discretion UPON PETITION BY THE APPLICANT, may consider and

1 act upon any application for diversion of water from the
 2 basin filed pursuant to the provisions of [this act] in
 3 conjunction with any board proceedings involving the siting
 4 of a facility or associated facilities conducted under the
 5 provisions of Title 75, chapter 20, part 4, as amended, or
 6 in conjunction with any departmental proceeding involving
 7 the issuance of a permit or approval of a change conducted
 8 under Title 35, chapter 2, as amended, if in the opinion of
 9 the department consideration of both applications in the
 10 same proceeding will better enable the board and department
 11 to fulfill their functions, duties, and responsibilities
 12 under the provisions of Title 75, chapter 20, part 4, or
 13 Title 85, chapter 2, and [this act]. ~~However, the department~~
 14 ~~may not~~ ~~THE DEPARTMENT'S~~ consent to the diversion of Montana
 15 water out of the basin for ultimate use in a facility as
 16 defined in Title 75, chapter 20, prior--to SHALL BE
 17 CONTINGENT UPON the board's issuance of a certificate for
 18 the facility in accordance with Title 75, chapter 20.

19 Section 6. Department authorized to appear in
 20 administrative and legal proceedings. The department may
 21 appear on behalf of the state of Montana in proceedings
 22 before the legislatures and administrative agencies of the
 23 other signatory states to the compact and in legal
 24 proceedings commenced in federal or state court within the
 25 other signatory states involving the consent of such

1 signatory states to diversions of water from the basin under
 2 Article X of the compact and any other laws or rules of such
 3 signatory states applicable to such diversions to the extent
 4 necessary to protect the interests and the citizens of
 5 Montana in those proceedings.
 6 Section 7. Codification instruction. This act is
 7 intended to be codified as a new part in Title 85, chapter
 8 2, and the provisions of Title 85, chapter 2, apply to this
 9 act.
 10 Section 8. Severability. If a part of this act is
 11 invalid, all valid parts that are severable from the invalid
 12 part remain in effect. If a part of this act is invalid in
 13 one or more of its applications, the part remains in effect
 14 in all valid applications that are severable from the
 15 invalid applications.
 16 ~~Section 9. --Effective date--This act is--effective--on~~
 17 ~~passage--and--approval~~

-End-

SENATE BILL NO. 176

INTRODUCED BY STIMATZ

BY REQUEST OF THE DEPARTMENT OF NATURAL RESOURCES

AND CONSERVATION

A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING AND CLARIFYING THE APPROPRIATION AND PERMIT PROVISIONS OF TITLE 85, CHAPTER 2, PARTS 1 AND 3, MCA; PROVIDING FOR AN EXCEPTION TO PERMIT REQUIREMENTS WHENEVER APPROPRIATION OF GROUNDWATER IS BY MEANS OF A WELL OR DEVELOPED SPRING WITH A MAXIMUM APPROPRIATION OF LESS THAN 100 GALLONS PER MINUTE; PROVIDING FOR A REVIEW OF A NOTICE OF COMPLETION PRIOR TO THE ISSUANCE OF A CERTIFICATE OF WATER RIGHT; ESTABLISHING A PROCEDURE FOR FILING A NOTICE OF COMPLETION ON GROUNDWATER APPROPRIATIONS FIRST PUT TO BENEFICIAL USE BETWEEN JANUARY 1, 1962, AND JULY 1, 1973, IF NO NOTICE OF COMPLETION HAD BEEN FILED; PROVIDING THAT A NOTICE OF APPLICATION BE SERVED BY FIRST-CLASS MAIL; PROVIDING FOR THE HEARING OF A HEARING ON AN APPLICATION WITHIN A REASONABLE TIME; PROVIDING FOR ACTION ON OBJECTIONS HAVE BEEN RECEIVED; PROVIDING THAT AN APPLICANT HAS THE BURDEN OF PROOF; ESTABLISHING A NEW WATER RIGHT APPROPRIATION ACCOUNT; ESTABLISHING FEES PROVIDING A PROPORTIONATE FEE FOR AN ENVIRONMENTAL IMPACT STATEMENT ON AN APPLICATION FOR A RESERVATION OF WATER; AMENDING SECTIONS

85-2-306, 85-2-307, 85-2-309, 85-2-310, 85-2-311, AND 85-2-312, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA: Section 1. Section 85-2-306, MCA, is amended to read: "85-2-306. Exceptions to permit requirements. (1) Outside the boundaries of a controlled groundwater area, a permit is not required before appropriating groundwater by means of a well or developed spring with a maximum yield appropriation of less than 100 gallons per minute. Within 60 days of completion of the well or developed spring and appropriation of the groundwater for beneficial use, the appropriator shall file a notice of completion with the department on a form provided by the department at its offices and at the offices of the county clerk and recorders. Upon receipt of the notice, the department shall automatically issue a certificate of water right review the notice and may, before issuing a certificate of water right, return a defective notice for correction or completion, together with the reasons for returning it. A notice does not lose priority of filing because of defects, if the notice is corrected, completed, and refiled with the department within 30 days or within a further time as the department may allow, not to exceed 6 months. If a notice is

1 not corrected and completed within the time allowed, the
 2 priority date of appropriation shall be the date of refiling
 3 a correct and complete notice with the department. A
 4 certificate of water right may not be issued until a correct
 5 and complete notice has been filed with the department. The
 6 original of the certificate shall be sent to the county
 7 clerk and recorder in the county where the point of
 8 diversion or place of use is located for recordation. The
 9 department shall keep a copy of the certificate in its
 10 office in Helena. After recordation, the clerk and recorder
 11 shall send the certificate to the appropriator. The date of
 12 filing of the notice of completion is the date of priority
 13 of the right.

14 (2) An appropriator of groundwater by means of a well
 15 or developed spring, first put to beneficial use between
 16 January 1, 1962, and July 1, 1973, who did not file a notice
 17 of completion, as required by laws in force prior to the
 18 effective date of this act, with the county clerk and
 19 recorder shall file a notice of completion, as provided in
 20 subsection (1) of this section, with the department to
 21 perfect the water right. The priority date of the
 22 appropriation shall be the date of the filing of a notice as
 23 provided in subsection (1) of this section. An
 24 appropriation under this subsection is an existing right,
 25 and a permit is not required; however, the department shall

1 acknowledge the receipt of a correct and complete filing of
 2 a notice of completion, except that for an appropriation of
 3 less than 100 gallons per minute, the department shall issue
 4 a certificate of water right.
 5 (3) A permit is not required before constructing an
 6 impoundment or pit and appropriating water for use by
 7 livestock if the maximum capacity of the impoundment or pit
 8 is less than 15 acre-feet and the appropriation is from a
 9 source other than a perennial flowing stream. As used in
 10 this subsection, a perennial flowing stream means a stream
 11 which historically has flowed continuously at all seasons of
 12 the year, during dry as well as wet years. However, before
 13 constructing the impoundment or pit, the appropriator shall
 14 apply for a permit as prescribed by this part. If the
 15 department determines after processing the application that
 16 the rights of other appropriators have been or will be
 17 adversely affected, it may require the applicant to modify
 18 the construction of the impoundment or pit and issue the
 19 permit subject to such terms, conditions, restrictions, or
 20 limitations it considers necessary to protect the rights of
 21 other appropriators.

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

25 Section 2. Section 85-2-307, MCA, is amended to read:

1 "85-2-307. Notice of application. (1) Upon receipt of
 2 a proper application for a permit, the department shall
 3 prepare a notice containing the facts pertinent to the
 4 application and shall publish the notice in a newspaper of
 5 general circulation in the area of the source once a week
 6 for 3 consecutive weeks. Before the last date of
 7 publication, the department shall also serve the notice by
 8 certified first-class mail upon an appropriator of water or
 9 applicant for or holder of a permit who, according to the
 10 records of the department, may be affected by the proposed
 11 appropriation. A notice shall also be served upon any public
 12 agency that has reserved waters in the source under
 13 85-2-316. The department may, in its discretion, also serve
 14 notice upon any state agency or other person the department
 15 feels may be interested in or affected by the proposed
 16 appropriation. The department shall file in its records
 17 proof of service by affidavit of the publisher in the case
 18 of notice by publication and by its own affidavit in the
 19 case of service by mail.

20 (2) The notice shall state that by a date set by the
 21 department (not less than 30 days or more than 60 days after
 22 the last date of publication) persons may file with the
 23 department written objections to the application.

24 (3) The requirements of subsections (1) and (2) of
 25 this section do not apply if the department finds, on the

1 basis of information reasonably available to it, that the
 2 appropriation as proposed in the application will not
 3 adversely affect the rights of other persons."

4 Section 3. Section 85-2-309, MCA, is amended to read:
 5 "85-2-309. Hearings on objections--if the department
 6 determines that an objection to an application for a permit
 7 states a valid objection to the issuance of the permit--it
 8 shall hold a public hearing on the objection within 60 days
 9 from a reasonable time after the date set by the department
 10 for the filing of objections after serving notice of the
 11 hearing by certified mail upon the applicant--and the
 12 objector--the department may consolidate hearings if more
 13 than one objection is filed to an application--the
 14 department shall file in its records proof of the service by
 15 affidavit of the department."

16 Section 3. Section 85-2-310, MCA, is amended to read:

17 "85-2-310. Action on application. (1) The department
 18 shall grant, deny, or condition an application for a permit
 19 in whole or in part within 120 days after the last date of
 20 publication of the notice of application if no hearing is
 21 held. Objections have been received and within 60 days 180
 22 days if a hearing is held or objections have been received.
 23 However, in either case the time may be extended upon
 24 agreement of the applicant, or, in those cases where an
 25 environmental impact statement must be prepared or in other

1 extraordinary cases, not more than 60 days upon order of the
 2 department. If the department orders the time extended, it
 3 shall serve a notice of the extension and the reasons
 4 therefor by certified mail upon the applicant and each
 5 person who has filed an objection as provided by 85-2-308.
 6 (2) However, an application may not be approved in a
 7 modified form or upon terms, conditions, or limitations
 8 specified by the department or denied, unless the applicant
 9 is first granted an opportunity to be heard. If no objection
 10 is filed against the application but the department is of
 11 the opinion that the application should be approved in a
 12 modified form or upon terms, conditions, or limitations
 13 specified by it or that the application should be denied,
 14 the department shall prepare a statement of its opinion and
 15 the reasons therefor. The department shall serve a statement
 16 of its opinion by certified mail upon the applicant,
 17 together with a notice that the applicant may obtain a
 18 hearing by filing a request therefor within 30 days after
 19 the notice is mailed. The notice shall further state that
 20 the application will be modified in a specified manner or
 21 denied, unless a hearing is requested.

22 (3) The department may cease action upon an
 23 application for a permit and return it to the applicant when
 24 it finds that the application is not in good faith or does
 25 not show a bona fide intent to appropriate water for a

1 beneficial use. An application returned for any of these
 2 reasons shall be accompanied by a statement of the reasons
 3 for which it was returned, and there shall be no right to a
 4 priority date based upon the filing of the application.
 5 Returning an application pursuant to this subsection shall
 6 be deemed a final decision of the department."

7 Section 4. Section 85-2-311, MCA, is amended to read:
 8 "85-2-311. Criteria for issuance of permit. The
 9 department shall issue a permit if:

- 10 (1) there are unappropriated waters in the source of
- 11 supply;
- 12 (a) at times when the water can be put to the use
- 13 proposed by the applicant;
- 14 (b) in the amount the applicant seeks to appropriate;
- 15 and
- 16 (c) throughout the period during which the applicant
- 17 seeks to appropriate, the amount requested is available;
- 18 (2) the rights of a prior appropriator will not be
- 19 adversely affected;
- 20 (3) the proposed means of diversion, or construction,
- 21 and operation are adequate;
- 22 (4) the proposed use of water is a beneficial use;
- 23 (5) the proposed use will not interfere unreasonably
- 24 with other planned uses or developments for which a permit
- 25 has been issued or for which water has been reserved;

1 (6) an applicant for an appropriation of 10,000
 2 acre-feet a year or more or and 15 cubic feet per second or
 3 more proves by clear and convincing evidence that the rights
 4 of a prior appropriator will not be adversely affected;

5 [7] except as provided in subsection (6), the
 6 applicant proves by substantial credible evidence the
 7 criteria listed in subsections (1) through (5)."

8 NEW SECTION. Section 5. Water right appropriation
 9 account. There is established a water right appropriation
 10 account in the earmarked revenue fund of the state treasury.
 11 All fees collected as provided in 85-2-113 shall be
 12 deposited in the account to help pay the expenses incurred
 13 by the department for administering this part, part 1, part
 14 4, and part 5 of chapter 2, Title 85.

15 Section 7, Section 85-2-124, MCA, is amended to read:
 16 "85-2-124. Fees for environmental impact statements
 17 (1) Whenever the department determines that the filing of an
 18 application for a combination of applications for a permit
 19 or approval or reservation of water under this chapter
 20 requires the preparation of an environmental impact
 21 statement as prescribed by the Montana Environmental Policy
 22 Act and the application for combination of applications
 23 involves the use of 10,000 or more acre-feet per year or 15
 24 or more cubic feet per second of water, the applicant shall
 25 pay to the department the fee prescribed in this section

1 The department shall notify the applicant in writing within
 2 30 days of receipt of a correct and complete application for
 3 a combination of applications, if it determines that an
 4 environmental impact statement and fee is required.
 5 (2) Upon notification by the department under
 6 subsection (1), the applicant shall pay a fee based upon the
 7 estimated cost of constructing, repairing or changing the
 8 appropriation and diversion facilities as herein provided.
 9 The maximum fee that shall be paid to the department may not
 10 exceed the fees set forth in the following declining scales:
 11 2% of the estimated cost up to \$1 million plus 1% of the
 12 estimated cost over \$1 million and up to \$20 million plus
 13 1/2 of 1% of the estimated cost over \$20 million and up to
 14 \$100 million plus 1/4 of 1% of the estimated cost over \$100
 15 million and up to \$300 million plus 1/8 of 1% of the
 16 estimated cost over \$300 million. The fee shall be deposited
 17 in the earmarked revenue fund to be used by the department
 18 only to comply with the Montana Environmental Policy Act in
 19 connection with the application(s). Any amounts paid by the
 20 applicant but not actually expended by the department shall
 21 be refunded to the applicant.

22 (3) The department and the applicant may determine by
 23 agreement the estimated cost of any facility for purposes of
 24 computing the amount of the fee to be paid to the department
 25 by the applicant. The department may contract with an

1 applicant-for+

2 (a)---the-development-of-information-by-the-applicant-or

3 a---third-party-on-behalf-of-the-department-and-the-applicant

4 concerning-the-environmental-impact-of-any-proposed-activity

5 under-an-application+

6 (b)---the---division---of---responsibility---between---the

7 department---and---an---applicant-for-supervision-over-a-contract

8 of-a-and-payment-for-the-development-of---information---by---the

9 applicant---or---a-third-party-on-behalf-of-the-department-and

10 the-applicant-under-any-such-contract-or-contract+

11 (c)---the-use-or-nonuse-of-a-fee-or---any---part---thereof

12 paid-to-the-department-by-an-applicant+

13 (d)---Any---payments---made-to-the-department-or-any-third

14 party-by-an-applicant-under-any-such-contract---or---contracts

15 shall---be---credited---against---any-fee-the-applicant-must-pay

16 hereunder---the-department-and-the---applicant---may---agree---on

17 additional---credits---against---the-fee-for-environmental-work

18 performed-by-the-applicant-at-the-applicant's---own---expense+

19 (f)---No-fee---as-prescribed---by---this---section---may-be

20 assessed-against-an-applicant-for-a-permit or-approval---or

21 reservation-of---water if---the---applicant-has-also-filed-an

22 application-for-a-certificate-of-environmental-compatibility

23 or-public-need-pursuant-to-the-Montana-Major-facility-siting

24 act---and-the-appropriation-or-use-of-water-involved---in---the

25 application(s)---for---permit or-approval---or---~~reservation-of~~

1 water has-been-or-will-be-studied-by-the-department-pursuant

2 to-that-act+

3 (f)---This-section---shall---apply---to---all---applications

4 pending-or---hereinafter-filed---for-which-the-department-has

5 not---as-of-April-9---1975---commenced-writing-an-environmental

6 impact-statement---This---section---shall---not---apply---to---any

7 application---the-fee-for-which-would-not-exceed-\$2,500+

8 (g)---Failure---to---submit---the---fee---as-required-by-this

9 section---shall-void-the-application(s)+

10 (h)---The-department-may---in-its-discretion---rely---upon

11 the---environmental---studies---investigations---reports---and

12 assessments-made-by-any-other-state-agency---or---any---person+

13 including---any---applicant---in---the-preparation---of---its

14 environmental-impact-statement+

SECTION 6. SECTION 85-2-316, MCA, IS AMENDED TO READ:

16 "85-2-316. Reservation of waters. (1) The state or any

17 political subdivision or agency thereof or the United States

18 or any agency thereof may apply to the board to reserve

19 waters for existing or future beneficial uses or to maintain

20 a minimum flow, level, or quality of water throughout the

21 year or at such periods or for such length of time as the

22 board designates.

23 (2) Upon receiving an application, the department

24 shall proceed in accordance with 85-2-307 through 85-2-309.

25 After the hearing provided in 85-2-309, the board shall

1 decide whether to reserve the water for the applicant. The
 2 department's costs of giving notice, holding the hearing,
 3 conducting investigations, and making records incurred in
 4 acting upon the application to reserve water, except the
 5 cost of salaries of the department's personnel, shall be
 6 paid by the applicant. In addition, a reasonable proportion
 7 of the department's cost of preparing an environmental
 8 impact statement shall be paid by the applicant.

9 (3) The board may not adopt an order reserving water
 10 unless the applicant establishes to the satisfaction of the
 11 board:

12 (a) the purpose of the reservation;

13 (b) the need for the reservation;

14 (c) the amount of water necessary for the purpose of
 15 the reservation;

16 (d) that the reservation is in the public interest.

17 (4) If the purpose of the reservation requires
 18 construction of a storage or diversion facility, the
 19 applicant shall establish to the satisfaction of the board
 20 that there will be progress toward completion of the
 21 facility and accomplishment of the purpose with reasonable
 22 diligence in accordance with an established plan.

23 (5) The board shall limit any reservations after May
 24 9, 1974, for maintenance of minimum flow, level, or quality
 25 of water that it awards at any point on a stream or river to

1 a maximum of 50% of the average annual flow of record on
 2 gauged streams. Ungauged streams can be allocated at the
 3 discretion of the board.

4 (6) After the adoption of an order reserving waters,
 5 the department may reject an application and refuse a permit
 6 for the appropriation of reserved waters or may, with the
 7 approval of the board, issue the permit subject to such
 8 terms and conditions it considers necessary for the
 9 protection of the objectives of the reservation.

10 (7) Any person desiring to use water reserved to a
 11 conservation district for agricultural purposes shall make
 12 application for such use with the district, and the district
 13 upon approval of the application must inform the department
 14 of the approved use. The department shall maintain records
 15 of all uses of water reserved to conservation districts and
 16 be responsible for rendering technical and administrative
 17 assistance within the department's staffing and budgeting
 18 limitations in the processing of such applications for the
 19 conservation districts.

20 (8) A reservation under this section shall date from
 21 the date the order reserving the water is adopted by the
 22 board and shall not adversely affect any rights in existence
 23 at that time.

24 (9) The board shall, periodically but at least once
 25 every 10 years, review existing reservations to ensure that

1 the objectives of the reservation are being met. Where the
 2 objectives of the reservation are not being met, the board
 3 may extend, revoke, or modify the reservation.

4 (10) The board may modify an existing or future order
 5 originally adopted to reserve water for the purpose of
 6 maintaining minimum flow, level, or quality of water, so as
 7 to reallocate such reservation or portion thereof to an
 8 applicant who is a qualified reservant under this section.
 9 Reallocation of reserved water may be made by the board
 10 following notice and hearing wherein the board finds that
 11 all or part of the reservation is not required for its
 12 purpose and that the need for the reallocation has been
 13 shown by the applicant to outweigh the need shown by the
 14 original reservant. Reallocation of reserved water shall not
 15 adversely affect the priority date of the reservation, and
 16 the reservation shall retain its priority date despite
 17 reallocation to a different entity for a different use. The
 18 board may not reallocate water reserved under this section
 19 on any stream or river more frequently than once every 5
 20 years.

21 (11) Nothing in this section vests the board with the
 22 authority to alter a water right that is not a reservation."
 23 NEW SECTION. Section 7. Applicability. (1)
 24 Subsection (2) of [section 1] applies to all notices of
 25 completion filed with the department after July 1, 1973.

1 (2) Subsection (1) of [section 1], [section 4 3], and
 2 [section 5 4] apply to notices of completion and
 3 applications pending before the department and to those
 4 filed with the department after [the effective date of this
 5 act].

6 (3) [Section 7 6] applies to applications pending
 7 before the board on [the effective date of this act], as
 8 well as applications filed with the board after [the
 9 effective date of this act].

10 Section 8. Codification instruction. Section 6 5 is
 11 intended to be codified as an integral part of Title 85,
 12 chapter 2, part 3, and the provisions of Title 85, chapter
 13 2, apply to section 6 5.

14 Section 9. Effective date. This act is effective on
 15 passage and approval.

-End-

WATER COMMITTEE

AGENDA FOR MARCH 24, 1981

HEARING:

HJR 53. (Jensen-Turnage) Encouraging the Secretary of Interior to take steps to turn over the management of the Mission, Flathead, and Jocko Irrigation Districts to a local entity.

EXECUTIVE SESSION:

SB 176. (Stimatz) The following amendments were adopted by the committee on March 19:

1. An amendment on page 13, line 8 that was suggested by Ray Beck of the Association of Conservation Districts.
2. An amendment requested by Charlie Crane of MWDA.

At the hearing held March 10, the DNRC said they would be willing to work on the amendments. The language adopted by the committee was worked out by the Department.

Action: Recommendation on SB 176 as amended.

SB 285. (Story) No amendments were requested at the hearing on March 5.

Action: Recommendation on bill.

SB 243. (Graham) Extensive amendments were proposed by Northern Plains Resources Council. Those which change "department" to board" were adopted March 19.

Action: Consideration of amendments
Recommendation on bill

AMENDMENTS TO SB 176

1. Page 8, line 21.

Following: "operation"

Insert: "of the appropriation works"

2. Page 13, line 8.

Following: "applicant"

Insert: "unless waived by the department upon a showing of good cause by the applicant"