

HOUSE BILL NO. 893

Introduced: 02/23/83

Referred to Committee on natural Resources: 02/23/83

Hearing: 3/16/83

Report: 03/25/83, Do Not Pass, As Amended

Objection: 3/25/83

2nd Reading: 03/26/83, Do Not Pass, As Amended

2nd Reading: 03/28/83, Do Not Pass, As Amended

Bill Killed

1 *House* BILL NO. *893*  
 2 INTRODUCED BY *Murray Mark ROUSH, Lucian Larson*  
 3 *Curtiss, George, Malde, Whalen, Manuel Kuehnle*  
 4 *Edison, Beighton, Graham, Gresham, West, Haud, Hoff, Jones, Durr, Hall*  
 5 A BILL FOR AN ACT ENTITLED: "AN ACT TO AUTHORIZE, TO  
 6 FACILITATE, AND EFFECTUATE THE MARKETING OF WATER BY THE  
 7 DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION; TO  
 8 AUTHORIZE A STUDY OF WATER MARKETING, ESTABLISH A WATER  
 9 RESOURCES OVERSIGHT COMMITTEE, AND APPROPRIATE MONEY FOR  
 10 THOSE PURPOSES; TO ESTABLISH A WATER MARKETING ACCOUNT; TO  
 11 REQUIRE THE DEPARTMENT AND BOARD OF NATURAL RESOURCES AND  
 12 CONSERVATION TO EXERCISE THEIR PUBLIC TRUST RESPONSIBILITIES  
 13 IN ISSUING PERMITS AND MARKETING WATER; AMENDING SECTIONS  
 14 75-20-104, 85-1-101, 85-1-102, 85-1-121, 85-1-202, 85-1-204,  
 15 85-1-205, 85-2-104, AND 85-2-311, MCA; AND PROVIDING AN  
 16 IMMEDIATE EFFECTIVE DATE."  
 17 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:  
 18 Section 1. Section 85-1-101, MCA, is amended to read:  
 19 "85-1-101. Policy considerations. It is hereby  
 20 declared as follows:  
 21 (1) The general welfare of the people of Montana, in  
 22 view of the state's population growth and expanding economy,  
 23 requires that water resources of the state be put to optimum  
 24 beneficial use and not wasted.  
 25 (2) The public policy of the state is to promote the

1 conservation, development, and beneficial use of the state's  
 2 water resources to secure maximum economic and social  
 3 prosperity for its citizens.

4 (3) The state, in the exercise of its sovereign power,  
 5 acting through the department of natural resources and  
 6 conservation, shall coordinate the development and use of  
 7 the water resources of the state so as to effect full  
 8 utilization, conservation, and protection of its water  
 9 resources.

10 (4) The development and utilization of water resources  
 11 and the efficient, economic distribution thereof are vital  
 12 to the people in order to protect existing uses and to  
 13 assure adequate future supplies for domestic, industrial,  
 14 agricultural, and other beneficial uses.

15 (5) The water resources of the state must be protected  
 16 and conserved to assure adequate supplies for public  
 17 recreational purposes and for the conservation of wildlife  
 18 and aquatic life.

19 (6) The public interest requires the construction,  
 20 operation, and maintenance of a system of works for the  
 21 conservation, development, storage, distribution, and  
 22 utilization of water, which construction, operation, and  
 23 maintenance is a single object and is in all respects for  
 24 the welfare and benefit of the people of the state.

25 (7) It is necessary to coordinate local, state, and

1 federal water resource development and utilization plans and  
2 projects through a single agency of state government, the  
3 department of natural resources and conservation.

4 (U) The greatest economic benefit to the people of  
5 Montana can be secured only by the sound coordination of  
6 development and utilization of water resources with the  
7 development and utilization of all other resources of the  
8 state.

9 (9) Any attempt to gain control of or speculate on  
10 large quantities of surface or ground water of the state of  
11 Montana is not in the interest of the people and is to be  
12 restricted.

13 ~~(10) The marketing of water from storage facilities by~~  
14 ~~the state is consistent with sound water conservation and~~  
15 ~~development if existing water rights are adequately~~  
16 ~~protected and foreseeable future water demands are provided~~  
17 ~~for.~~

18 ~~(11) To achieve these objectives and to protect the~~  
19 ~~waters of Montana from diversion to other areas of the~~  
20 ~~nation, it is essential that a comprehensive, coordinated~~  
21 ~~multiple-use water resource plan be progressively~~  
22 ~~formulated, to be known as the "state water plan".~~

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

24 "85-1-102. Definitions. Unless the context requires  
25 otherwise, in this chapter the following definitions apply:

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

3 (2) "Cost of works" means the cost of construction;  
4 the cost of all lands, property, rights, easements, and  
5 franchises acquired which are deemed necessary for the  
6 construction; the cost of all water rights acquired or  
7 exercised by the department in connection with those works;  
8 the cost of all machinery and equipment, financing charges,  
9 interest prior to and during construction and for a period  
10 not exceeding 3 years after the completion of construction;  
11 cost of engineering and legal expenses, plans,  
12 specifications, surveys, estimates of cost, and other  
13 expenses necessary or incident to determining the  
14 feasibility or practicability of any project; administrative  
15 expense; and such other expenses as may be necessary or  
16 incident to the financing herein authorized and the  
17 construction of the works and the placing of the same in  
18 operation.

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

22 ~~(4) "Energy industry use" means the use of water as a~~  
23 ~~medium for carrying coal or other energy minerals or the use~~  
24 ~~of water in the extraction or refining of coal or other~~  
25 ~~energy minerals.~~

~~(5) "Energy industry user" means a natural person, firm, partnership, association, syndicate, corporation, joint venture, public entity, or state or federal agency using or supplying water for energy industry use.~~

~~(6) "Energy minerals" means any mineral fuel, including but not limited to coal, lignite, petroleum, oil, natural gas, uranium, and thorium and any combination of minerals used in the production of energy.~~

~~(4)(11) "Owner" means all individuals, irrigation districts, drainage districts, flood control districts, incorporated companies, societies, or associations having any title or interest in any properties, rights, easements, or franchises to be acquired.~~

~~(5)(8) "Private person" means any individual, association, partnership, corporation, or other nongovernmental entity not eligible for loans and grants under 85-1-605 but does not include a governmental entity such as an agency, local government, or political subdivision of the state, the United States, or any agency thereof, or any other governmental entity.~~

~~(6)(12) "Project" means any one of the works herein defined or any combination of such works which are physically connected or jointly managed and operated as a single unit.~~

~~(7)(13) "Public benefits" means those benefits that~~

accrue from a water development project or activity to persons other than the private grant or loan recipient and that enhance the common well-being of the people of Montana. Public benefits include but are not limited to recreation, flood control, erosion reduction, agricultural flood damage reduction, water quality enhancement, sediment reduction, access to recreation opportunities, and wildlife conservation.

~~(11) "Storage facility" means a facility used to store water in state, federal, or private ownership.~~

~~(8)(12) "Water development clearance account" means a separate account created by 85-1-617 within the bond proceeds and insurance clearance fund of the state treasury to finance loans under the provisions of the water development program to agencies, local governments, and political subdivisions of the state, private persons, and any other eligible recipients from proceeds of bonds issued under part 6 of this chapter.~~

~~(9)(13) "Water development activity" means an action or program to protect and enhance water-based recreation or to protect or enhance water resources for the benefit of agriculture, flood control, or other uses, including but not limited to such purposes as the promotion of efficient use of water in agriculture, the improvement of water quality in agriculture and other nonpoint source uses, the protection~~

1 and enhancement of water-based recreation; the control of  
2 erosion of streambanks and control of sedimentation of  
3 rivers and streams, and providing greater local and state  
4 control of Montana water resources. Water development  
5 activities may provide any combination of marketable and  
6 nonmarketable benefits.

7 ~~(10)~~(14) "Water development earmarked account" means a  
8 separate account created by 85-1-604 within the earmarked  
9 revenue fund of the state treasury for the purposes of the  
10 water development program as set forth in 85-1-604.

11 ~~(11)~~(15) "Water development project" means a project as  
12 defined in subsection ~~(6)~~ (9), except that water development  
13 projects are not limited to projects owned or operated by  
14 the department.

15 ~~(12)~~(16) "Water development sinking account" means a  
16 separate account created by 85-1-603 within the sinking fund  
17 of the state treasury to be used as provided in 85-1-619.

18 ~~(13)~~(17) "Works" means all property, rights, easements,  
19 and franchises relating thereto and deemed necessary or  
20 convenient for their operation and all water rights acquired  
21 or exercised by the department in connection with those  
22 works and includes all means of conserving and distributing  
23 water, including, without limiting the generality of the  
24 foregoing, reservoirs, dams, diversion canals, distributing  
25 canals, waste canals, drainage canals, dikes, lateral

1 ditches and pumping units, mains, pipelines, and waterworks  
2 systems and includes all such works for the conservation,  
3 development, storage, distribution, and utilization of  
4 water, including without limiting the generality of the  
5 foregoing, works for the purpose of irrigation, flood  
6 prevention, drainage, fish and wildlife, recreation,  
7 development of power, watering of stock, supplying of water  
8 for public, domestic, industrial, or other uses and for fire  
9 protection."

10 Section 3. Section 85-1-121, MCA, is amended to read:

11 "85-1-121. Out-of-state use of water. ~~(1)~~ None of the  
12 waters in the state of Montana shall ever be appropriated,  
13 diverted, impounded, or otherwise restrained or controlled  
14 while within the state for use outside the boundaries  
15 thereof, except pursuant to a petition to and an act of the  
16 legislature of the state of Montana permitting such action  
17 as provided in this section and Title 85, chapter 2. Any  
18 appropriation, diversion, impounding, restraining, or  
19 attempted appropriation, diversion, impounding, or  
20 restraining contrary to the provisions of this section shall  
21 be null and void. ~~All officers, agents, agencies, and~~  
22 ~~employees of the state are prohibited from knowingly~~  
23 ~~permitting, aiding, or assisting in any manner such~~  
24 ~~unauthorized appropriation, diversion, impounding, or other~~  
25 ~~restraints.~~ It shall be unlawful for any person, persons, or

corporation, directly or indirectly, personally or through agents, officers, or employees, either to attempt to so appropriate, divert, impound, or otherwise restrain or control any of the waters within the boundaries of this state for use outside thereof, except in accordance with the terms of this section.

~~(2) None of the waters in this state may be appropriated, diverted, impounded, or otherwise restrained or controlled while within the state for use outside the boundaries thereof if the department finds that there is a need to conserve and preserve water in the state for the health, welfare, or safety of its citizens. Such a determination must be made in a hearing conducted by the department under the procedure established in Title 85, chapter 2, in which the criteria established in 85-2-311 are determined before water may be appropriated, diverted, impounded, or otherwise restrained or controlled while within the state for use outside the boundaries of the state."~~

Section 4. Section 85-1-202, MCA, is amended to read:

"85-1-202. Department actions subject to board approval. The department may not acquire by appropriation or otherwise a water right or interest therein and may not acquire real property or an interest therein (except rights of access for the purpose of construction, operation, or

maintenance of works) or mortgage or otherwise create a lien on the same or dispose of in any manner water rights or real property or interest therein without prior approval of the board. ~~The department may not, by obtaining a permit for the beneficial use of water under Title 85, chapter 2, acquire rights to appropriate water for marketing to any user without the prior approval of the board.~~ The department may not construct or cause to be constructed or contract for the construction of works or projects without prior approval of the board. The department may not loan funds to a person or water user association for the purpose of constructing or maintaining works without prior approval of the board."

Section 5. Section 85-1-204, MCA, is amended to read:

"85-1-204. Department powers over state waters. (1) The department, with the approval of the board, may sell, lease, and otherwise dispose of all waters which may be impounded under this chapter, and the water may be sold for the purpose of irrigation, development of power, watering of stock, or any other purpose. ~~Notwithstanding any other provision of the law, the department, with the approval of the board, may by obtaining a permit for the beneficial use of water under Title 85, chapter 2, acquire rights to appropriate water for marketing for such consideration and under such terms and conditions as are fixed by contract or instrument of conveyance.~~ To the extent that it may be

1 necessary to carry out this chapter and subject to a  
 2 compliance with the other provisions of this chapter, the  
 3 department has full control of all the water of the state  
 4 not under the exclusive control of the United States and not  
 5 vested in private ownership, and it shall take such steps as  
 6 may be necessary to appropriate and conserve the same for  
 7 the use of the people. The authority of the department  
 8 conferred by this chapter extends and applies to rights to  
 9 the natural flow of the waters of this state which it may  
 10 acquire, with the approval of the board, by condemnation,  
 11 purchase, exchange, appropriation, or agreement.

12 (2) For the purpose of regulating the diversion of  
 13 those waters, the department may enter upon the means and  
 14 place of use of all appropriators for making surveys of  
 15 respective rights and seasonal needs.

16 (3) The department may take into consideration the  
 17 decrees of the courts of this state having jurisdiction  
 18 which purport to adjudicate the waters of a stream or its  
 19 tributaries, and a fair, reasonable, and equitable  
 20 reconciliation shall be made between the claimants asserting  
 21 rights under different decrees and between decreed rights  
 22 and asserted rights of appropriation not adjudicated by any  
 23 court.

24 (4) The department, at its discretion, may hold  
 25 hearings relating to the rights of respective claimants

1 after first giving such notice as it considers appropriate  
 2 and make findings of the date and quantity of appropriation  
 3 and use of all claimants which the department will recognize  
 4 and observe in diverting the waters which it owns. The  
 5 department may police and distribute to the owner of the  
 6 recognized appropriation the waters due him upon request and  
 7 under terms agreed upon.

8 (5) The department, when engaged in controlling and  
 9 dividing the natural flow of a stream under the authority  
 10 granted by this chapter, is exercising a police power of the  
 11 state, and water commissioners appointed by any court may  
 12 not deprive the department of any of the waters owned or  
 13 administered under agreement with respective owners. The  
 14 owner of a prior right contending that the department is not  
 15 recognizing and respecting the appropriation may resort to a  
 16 court for the purpose of determining whether or not the  
 17 rights of the claimant have been invaded, and the department  
 18 shall observe the terms of the final decree.

19 (6) When the department impounds or acquires the right  
 20 of appropriation of the waters of a stream it may divert or  
 21 authorize the diversion at any point on the stream or any  
 22 portion thereof when it is done without injury to a prior  
 23 appropriator."

24 NEW SECTION. Section 6. Water marketing from storage  
 25 facilities. (1) The department may not acquire rights to

1 appropriate water for marketing except from a storage  
2 facility, either existing or as proposed to be constructed.

3 (2) The department may not acquire rights to  
4 appropriate more than 50,000 acre-feet of water per year for  
5 the transfer of rights under this section for industrial  
6 uses, including but not limited to energy industry use.

7 (3) The department may market water as otherwise  
8 provided in this chapter or it may sell, grant, convey,  
9 assign, lease, or otherwise transfer water rights or permits  
10 to appropriate water from storage projects to users,  
11 including energy industry users, for the consideration and  
12 under the terms and conditions fixed by contract or  
13 instrument of conveyance. A contract may provide that the  
14 transfer is void for failure to perform any condition of  
15 performance, for breach, for failure of consideration, or  
16 for failure to perform any other contractual obligation. If  
17 the department determines that a failure to perform a  
18 condition of performance or breach has occurred, it may  
19 revoke the permit evidencing the transfer after compliance  
20 with any notice of breach provision or other condition  
21 precedent to cancellation specified in the contract.

22 (4) A contract or instrument of conveyance that  
23 transfers water rights or permits to appropriate water from  
24 storage under this section must require that water for such  
25 beneficial use in this state as the department may determine

1 be made available from a water storage project or from along  
2 the route of such a project in this state, in such amounts  
3 as the department may determine up to a maximum of 25% of  
4 the capacity of any privately owned project, to any user in  
5 this state, upon payment by such user of all costs of  
6 tapping into and removing water from the project.

7 (5) The department may acquire rights to appropriate  
8 water under this section for a term not to exceed 40 years.  
9 The term may be extended upon a redetermination of the  
10 criteria set forth in 85-2-311 without loss of priority  
11 date. A transfer of a permit or a right to appropriate water  
12 under this section pursuant to a contract or other  
13 instrument of conveyance may not be for a term greater than  
14 40 years, subject to renewal upon such terms and conditions  
15 as provided by this section and the contract or instrument  
16 of conveyance.

17 (6) An environmental impact statement must be prepared  
18 by the department prior to the transfer of a water right or  
19 permit under this section. The department shall comply with  
20 the provisions of the Montana Environmental Policy Act prior  
21 to the transfer of a water right or permit under this  
22 section. The transferee shall pay all costs associated with  
23 compliance with the act. Except as provided in this chapter,  
24 the provisions of 85-2-124 are controlling.

25 (7) No contract or instrument of conveyance for the

1 transfer of water rights or permits to appropriate water  
2 from storage under this section is valid until ratified  
3 pursuant to a petition to the legislature and an act of the  
4 legislature approving such a transfer.

5 (d) The department may not transfer a water right or  
6 permit under this section for energy industry use until:

7 (a) July 1, 1987; or

8 (b) an environmental impact statement has been  
9 completed under subsection (6) and submitted to the  
10 legislature for its review.

11 NEW SECTION. Section 7. Water marketing account. (1)  
12 There is established a water marketing account in the  
13 earmarked revenue fund. Funds accruing to the department  
14 under contract or instrument of conveyance for beneficial  
15 use of water under [section 6] or from such other source as  
16 may be provided by law must be deposited in the water  
17 marketing account. Income and interest from investment of  
18 the money in the water marketing account must be credited to  
19 the account.

20 (2) Funds accruing to the department and deposited in  
21 the water marketing account are allocated as follows:

22 (a) All funds are committed for the construction or  
23 rehabilitation of water marketing storage facilities.

24 (b) Funds remaining after appropriation each biennium  
25 under subsection (a) are allocated in the following

1 percentages of the remaining balance:

2 (i) 50% to the water development earmarked account to  
3 be used for any of the purposes described in 85-1-604(3);

4 (ii) 25% to long-range soil and water conservation  
5 programs;

6 (iii) 25% to the general fund of the state.

7 Section 8. Section 85-1-205, MCA, is amended to read:

8 "85-1-205. Acquisition of water in ~~Fort-Peck-Reservoir~~  
9 a federal reservoir. The department may acquire water ~~or~~  
10 water storage by purchase option or agreement with the  
11 federal government from the ~~Fort-Peck-Reservoir~~ any federal  
12 reservoir for the purpose of sale, rent, or distribution for  
13 industrial use ~~or other use~~. In such cases, the department  
14 is not required to construct any diversion or appropriation  
15 facilities or works, and it may sell, rent, or distribute  
16 such water at such rates and under such terms and conditions  
17 as it considers appropriate."

18 Section 9. Section 85-2-104, MCA, is amended to read:

19 "85-2-104. Slurry transport of coal. (1) The  
20 legislature finds that the use of water for the slurry  
21 transport of coal ~~is~~ may be detrimental to the conservation  
22 and protection of the water resources of the state. ~~The~~  
23 legislature finds that the use of water for slurry transport  
24 of coal threatens to deplete Montana's water resources to  
25 the significant detriment of existing and projected

1 ~~agricultural, municipal, recreational, and other uses and of~~  
 2 ~~wildlife and aquatic habitat. The legislature further finds~~  
 3 ~~that the use of water for the slurry transport of coal may~~  
 4 ~~foreclose the options of the people of this state to utilize~~  
 5 ~~water for their future beneficial purposes.~~

6 (2) ~~The use of water for the slurry transport of coal~~  
 7 ~~is not a beneficial use of water. The department may not~~  
 8 ~~accept or otherwise take any action on an application for~~  
 9 ~~the use of water for the slurry transport of coal, except as~~  
 10 ~~provided in [section 6], until July 1, 1987."~~

11 Section 10. Section 85-2-311, MCA, is amended to read:

12 "85-2-311. Criteria for issuance of permit. (1) The  
 13 department shall issue a permit if:

14 (1)(a) there are unappropriated waters in the source  
 15 of supply;

16 (1)(b) at times when the water can be put to the use  
 17 proposed by the applicant;

18 (1)(c) in the amount the applicant seeks to  
 19 appropriate; and

20 (1)(d) throughout the period during which the  
 21 applicant seeks to appropriate, the amount requested is  
 22 available;

23 (2)(a) the rights of a prior appropriator will not be  
 24 adversely affected;

25 (3)(c) the proposed means of diversion, construction,

1 and operation of the appropriation works are adequate;

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

3 (5)(e) the proposed use will not interfere  
 4 unreasonably with other planned uses or developments for  
 5 which a permit has been issued or for which water has been  
 6 reserved;

7 (f) ~~the proposed use of water is reasonable, is not~~  
 8 ~~contrary to the policies and objectives established in~~  
 9 ~~subsections (1) through (9) of 85-1-101, and is not~~  
 10 ~~otherwise detrimental to the public welfare. The criteria~~  
 11 ~~listed in this subsection (f) apply only to applications~~  
 12 ~~involving the use of 3,000 or more acre-feet of water a year~~  
 13 ~~and 15 or more cubic feet a second of water; and~~

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

18 (7)(g) except as provided in subsection (6)(2), the  
 19 applicant proves by substantial credible evidence the  
 20 criteria listed in subsections (1) (a) through (5) (f) of  
 21 this subsection (1).

22 (2) ~~An applicant for an appropriation of 10,000~~  
 23 ~~acre-feet a year or more and 15 cubic feet a second or more~~  
 24 ~~must prove by clear and convincing evidence that the rights~~  
 25 ~~of a prior appropriator will not be adversely affected.~~

1 ~~(3) For appropriations of water for use outside the~~  
 2 ~~boundaries of the state, the department shall condition the~~  
 3 ~~permit or authorization for use of water for a term not to~~  
 4 ~~exceed 40 years, subject to renewal upon a hearing and~~  
 5 ~~redetermination of the criteria listed in subsection (1),~~  
 6 ~~including subsection (f), regardless of the amount, volume,~~  
 7 ~~or rate of diversion."~~

8 **NEW SECTION.** Section 11. Department to administer  
 9 study. (1) The department of natural resources and  
 10 conservation shall conduct a study of water marketing issues  
 11 in conjunction with the water resources oversight committee  
 12 provided for in [section 12].

13 (2) The study must include but is not limited to an  
 14 examination of the following:

15 (a) the present in-state demands on water for  
 16 domestic, municipal, agricultural, industrial, and other  
 17 beneficial uses;

18 (b) projections of future demands over the next 50  
 19 years on water for in-state domestic, municipal,  
 20 agricultural, industrial, and other beneficial uses;

21 (c) the economic impacts of water marketing;

22 (d) the environmental impacts of water marketing;

23 (e) the economic impacts of energy industrial uses of  
 24 water;

25 (f) the environmental impacts of energy industrial

1 uses of water;

2 (g) a comparison of the costs of transportation by  
 3 railroad with the costs of transportation by coal slurry  
 4 pipeline; and

5 (h) other related issues.

6 (3) The department shall report the results of the  
 7 study to the 49th legislature or to a special session of the  
 8 legislature called for the purpose of legislative  
 9 ratification of water marketing pursuant to [section 7],  
 10 whichever occurs first.

11 **NEW SECTION.** Section 12. Water resources oversight  
 12 committee -- establishment -- appointment --  
 13 organization. (1) There is a water resources oversight  
 14 committee.

15 (a) The speaker of the house and the committee on  
 16 committees of the senate shall each appoint four members of  
 17 their respective houses to serve on the committee. No more  
 18 than two members from each house may be from the same party.

19 (b) Committee members shall elect a chairman and  
 20 vice-chairman from among their number.

21 (c) Committee members are entitled to compensation and  
 22 expenses as provided in 5-2-302.

23 (2) The water resources oversight committee shall work  
 24 with and oversee the efforts of state agencies charged with  
 25 the responsibility of developing and managing the state's

1 water resources, including the study of water marketing  
2 issues provided for in [section 11] and the water  
3 development program provided for in Title 85, chapter 1. The  
4 committee may study any other issues related to water  
5 development and conservation as its members consider  
6 important to the people of the state.

7 (3) The committee may make such recommendations to  
8 agencies and the legislature relating to water marketing,  
9 water development, or water conservation as it considers  
10 necessary. The recommendations may include proposals for  
11 legislation.

12 (4) The committee may continue the work of the  
13 previous water resources oversight committee of overseeing  
14 the implementation of the water rights adjudication system  
15 provided for in Title 85, chapter 2.

16 (5) The committee may arrange with the legislative  
17 council to receive support services, subject to the  
18 limitations of funds available for that purpose.

19 NEW SECTION. Section 13. Appropriation. (1) There is  
20 appropriated to the department of natural resources and  
21 conservation \$50,000 from the general fund for the purpose  
22 of funding the study conducted under [section 11].

23 (2) There is appropriated to the legislative council  
24 \$15,000 from the general fund for the purpose of supporting  
25 the activities of the water resources oversight committee.

1 Section 14. Section 75-20-104, MCA, is amended to  
2 read:

3 "75-20-104. Definitions. In this chapter, unless the  
4 context requires otherwise, the following definitions apply:

5 (1) "Addition thereto" means the installation of new  
6 machinery and equipment which would significantly change the  
7 conditions under which the facility is operated.

8 (2) "Application" means an application for a  
9 certificate submitted in accordance with this chapter and  
10 the rules adopted hereunder.

11 (3) "Associated facilities" includes but is not  
12 limited to transportation links of any kind, aqueducts,  
13 diversion dams, transmission substations, storage ponds,  
14 reservoirs, and any other device or equipment associated  
15 with the production or delivery of the energy form or  
16 product produced by a facility, except that the term does  
17 not include a facility.

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

20 (5) "Board of health" means the board of health and  
21 environmental sciences provided for in 2-15-2104.

22 (6) "Certificate" means the certificate of  
23 environmental compatibility and public need issued by the  
24 board under this chapter that is required for the  
25 construction or operation of a facility.

(7) "Commence to construct" means:

(a) any clearing of land, excavation, construction, or other action that would affect the environment of the site or route of a facility but does not mean changes needed for temporary use of sites or routes for nonutility purposes or uses in securing geological data, including necessary borings to ascertain foundation conditions;

(b) the fracturing of underground formations by any means if such activity is related to the possible future development of a gasification facility or a facility employing geothermal resources but does not include the gathering of geological data by boring of test holes or other underground exploration, investigation, or experimentation;

(c) the commencement of eminent domain proceedings under Title 70, chapter 30, for land or rights-of-way upon or over which a facility may be constructed;

(d) the relocation or upgrading of an existing facility defined by (b) or (c) of subsection (10), including upgrading to a design capacity covered by subsection (10)(b), except that the term does not include normal maintenance or repair of an existing facility.

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

(9) "Department of health" means the department of health and environmental sciences provided for in Title 2, chapter 15, part 21.

(10) "Facility" means:

(a) except for crude oil and natural gas refineries, and facilities and associated facilities designed for or capable of producing, gathering, processing, transmitting, transporting, or distributing crude oil or natural gas, and those facilities subject to The Montana Strip and Underground Mine Reclamation Act, each plant, unit, or other facility and associated facilities designed for or capable of:

(i) generating 50 megawatts of electricity or more or any addition thereto (except pollution control facilities approved by the department of health and environmental sciences added to an existing plant) having an estimated cost in excess of \$10 million;

(ii) producing 25 million cubic feet or more of gas derived from coal per day or any addition thereto having an estimated cost in excess of \$10 million;

(iii) producing 25,000 barrels of liquid hydrocarbon products per day or more or any addition thereto having an estimated cost in excess of \$10 million;

(iv) enriching uranium minerals or any addition thereto having an estimated cost in excess of \$10 million; or

1 (v) utilizing or converting 500,000 tons of coal per  
2 year or more or any addition thereto having an estimated  
3 cost in excess of \$10 million;

4 (b) each electric transmission line and associated  
5 facilities of a design capacity of more than 69 kilovolts,  
6 except that the term does not include an electric  
7 transmission line and associated facilities of a design  
8 capacity of 230 kilovolts or less and 10 miles or less in  
9 length;

10 (c) each pipeline and associated facilities designed  
11 for or capable of transporting gas (except for natural gas),  
12 water, or liquid hydrocarbon products ~~from or to a facility~~  
13 ~~located within or without this state of the size indicated~~  
14 ~~in subsection (10)(a) of this section, or water as a~~  
15 ~~transport medium;~~

16 (d) any use of geothermal resources, including the use  
17 of underground space in existence or to be created, for the  
18 creation, use, or conversion of energy, designed for or  
19 capable of producing geothermally derived power equivalent  
20 to 25 million Btu per hour or more or any addition thereto  
21 having an estimated cost in excess of \$750,000;

22 (e) any underground in situ gasification of coal.

23 (11) "Person" means any individual, group, firm,  
24 partnership, corporation, cooperative, association,  
25 government subdivision, government agency, local government,

1 or other organization or entity.

2 (12) "Transmission substation" means any structure,  
3 device, or equipment assemblage, commonly located and  
4 designed for voltage regulation, circuit protection, or  
5 switching necessary for the construction or operation of a  
6 proposed transmission line.

7 (13) "Utility" means any person engaged in any aspect  
8 of the production, storage, sale, delivery, or furnishing of  
9 heat, electricity, gas, hydrocarbon products, or energy in  
10 any form for ultimate public use."

11 NEW SECTION. Section 15. Codification instruction.  
12 Sections 6, 7, and 12 are intended to be codified as an  
13 integral part of Title 85, chapter 1, part 2, and the  
14 provisions of Title 85, chapter 1, apply to sections 6, 7,  
15 and 12.

16 NEW SECTION. Section 16. Severability. If a part of  
17 this act is invalid, all valid parts that are severable from  
18 the invalid part remain in effect. If a part of this act is  
19 invalid in one or more of its applications, the part remains  
20 in effect in all valid applications that are severable from  
21 the invalid applications.

22 NEW SECTION. Section 17. Effective date. This act is  
23 effective on passage and approval.

-End-

Committee  
on Natural Resources  
Recommend do not pass  
Objection Raised to  
Adverse Committee Report

## HOUSE BILL NO. 893

INTRODUCED BY NEUMAN, MARKS, ROUSH, HOLLIDAY, IYERSON,  
CURTISS, FABREGA, ELLISON, BENGTSON, JACOBSEN, DONALDSON,  
WINSLOW, GRAHAM, MANUEL, TVEIT, KOEHNKE, MOHAR,  
HAND, THOFT, STIMATZ, TOWE, GALT

A BILL FOR AN ACT ENTITLED: "AN ACT TO AUTHORIZE,  
FACILITATE, AND EFFECTUATE THE MARKETING OF WATER BY THE  
DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION; TO  
AUTHORIZE A STUDY OF WATER MARKETING, ESTABLISH A WATER  
RESOURCES OVERSIGHT COMMITTEE, AND APPROPRIATE MONEY FOR  
THOSE PURPOSES; TO ESTABLISH A WATER MARKETING ACCOUNT; TO  
REQUIRE THE DEPARTMENT AND BOARD OF NATURAL RESOURCES AND  
CONSERVATION TO EXERCISE THEIR PUBLIC TRUST RESPONSIBILITIES  
IN ISSUING PERMITS AND MARKETING WATER; AMENDING SECTIONS  
75-20-104, ~~75-20-218~~, 85-1-101, 85-1-102, ~~85-1-121~~,  
85-1-202, 85-1-204, 85-1-205, 85-2-104, AND 85-2-311, MCA;  
~~REPEALING SECTION 85-1-121, MCA~~; AND PROVIDING AN IMMEDIATE  
EFFECTIVE DATE."

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

Section 1. Section 85-1-101, MCA, is amended to read:

"85-1-101. Policy considerations. It is hereby  
declared as follows:

(1) The general welfare of the people of Montana, in

view of the state's population growth and expanding economy,  
requires that water resources of the state be put to optimum  
beneficial use and not wasted.

(2) The public policy of the state is to promote the  
conservation, development, and beneficial use of the state's  
water resources to secure maximum economic and social  
prosperity for its citizens.

(3) The state, in the exercise of its sovereign power,  
acting through the department of natural resources and  
conservation, shall coordinate the development and use of  
the water resources of the state so as to effect full  
utilization, conservation, and protection of its water  
resources.

(4) The development and utilization of water resources  
and the efficient, economic distribution thereof are vital  
to the people in order to protect existing uses and to  
assure adequate future supplies for domestic, industrial,  
agricultural, and other beneficial uses.

(5) The water resources of the state must be protected  
and conserved to assure adequate supplies for public  
recreational purposes and for the conservation of wildlife  
and aquatic life.

(6) The public interest requires the construction,  
operation, and maintenance of a system of works for the  
conservation, development, storage, distribution, and

utilization of water, which construction, operation, and maintenance is a single object and is in all respects for the welfare and benefit of the people of the state.

(7) It is necessary to coordinate local, state, and federal water resource development and utilization plans and projects through a single agency of state government, the department of natural resources and conservation.

(8) The greatest economic benefit to the people of Montana can be secured only by the sound coordination of development and utilization of water resources with the development and utilization of all other resources of the state.

(9) Any attempt to gain control of or speculate on large quantities of surface or ground water of the state of Montana is not in the interest of the people and is to be restricted.

~~[(10) The marketing of water from storage facilities by the state is consistent with sound water conservation and development if existing water rights are adequately protected and foreseeable future water demands are provided for.]~~

~~[(11) To achieve these objectives and to protect the waters of Montana from diversion to other areas of the nation, it is essential that a comprehensive, coordinated multiple-use water resource plan be progressively~~

formulated, to be known as the "state water plan".

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

"85-1-102. Definitions. Unless the context requires otherwise, in this chapter the following definitions apply:

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

(2) "Cost of works" means the cost of construction; the cost of all lands, property, rights, easements, and franchises acquired which are deemed necessary for the construction; the cost of all water rights acquired or exercised by the department in connection with those works; the cost of all machinery and equipment, financing charges, interest prior to and during construction and for a period not exceeding 3 years after the completion of construction; cost of engineering and legal expenses, plans, specifications, surveys, estimates of cost, and other expenses necessary or incident to determining the feasibility or practicability of any project; administrative expense; and such other expenses as may be necessary or incident to the financing herein authorized and the construction of the works and the placing of the same in operation.

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

(4) "Energy industry use" means the use of water as a medium for carrying coal or other energy minerals or the use of water in the extraction or refining of coal or other energy minerals.

(5) "Energy industry user" means a natural person, firm, partnership, association, syndicate, corporation, joint venture, public entity, or state or federal agency using or supplying water for energy industry use.

(6) "Energy minerals" means any mineral fuel, including but not limited to coal, lignite, petroleum, oil, natural gas, uranium, and thorium and any combination of minerals used in the production of energy.

(7) "Owner" means all individuals, irrigation districts, drainage districts, flood control districts, incorporated companies, societies, or associations having any title or interest in any properties, rights, easements, or franchises to be acquired.

(8) "Private person" means any individual, association, partnership, corporation, or other nongovernmental entity not eligible for loans and grants under 85-1-605 but does not include a governmental entity such as an agency, local government, or political subdivision of the state, the United States, or any agency thereof, or any other governmental entity.

(9) "Project" means any one of the works herein

defined or any combination of such works which are physically connected or jointly managed and operated as a single unit.

(10) "Public benefits" means those benefits that accrue from a water development project or activity to persons other than the private grant or loan recipient and that enhance the common well-being of the people of Montana. Public benefits include but are not limited to recreation, flood control, erosion reduction, agricultural flood damage reduction, water quality enhancement, sediment reduction, access to recreation opportunities, and wildlife conservation.

(11) "Storage facility" means a facility used to store water in state, federal, or private ownership.

(12) "Water development clearance account" means a separate account created by 85-1-617 within the bond proceeds and insurance clearance fund of the state treasury to finance loans under the provisions of the water development program to agencies, local governments, and political subdivisions of the state, private persons, and any other eligible recipients from proceeds of bonds issued under part 6 of this chapter.

(13) "Water development activity" means an action or program to protect and enhance water-based recreation or to protect or enhance water resources for the benefit of

1 agriculture, flood control, or other uses, including but not  
 2 limited to such purposes as the promotion of efficient use  
 3 of water in agriculture, the improvement of water quality in  
 4 agriculture and other nonpoint source uses, the protection  
 5 and enhancement of water-based recreation, the control of  
 6 erosion of streambanks and control of sedimentation of  
 7 rivers and streams, and providing greater local and state  
 8 control of Montana water resources. Water development  
 9 activities may provide any combination of marketable and  
 10 nonmarketable benefits.

11 ~~(18)~~(14) "Water development earmarked account" means a  
 12 separate account created by 85-1-604 within the earmarked  
 13 revenue fund of the state treasury for the purposes of the  
 14 water development program as set forth in 85-1-604.

15 ~~(11)~~(12) "Water development project" means a project as  
 16 defined in subsection ~~(6)~~ (2), except that water development  
 17 projects are not limited to projects owned or operated by  
 18 the department.

19 ~~(12)~~(16) "Water development sinking account" means a  
 20 separate account created by 85-1-603 within the sinking fund  
 21 of the state treasury to be used as provided in 85-1-619.

22 ~~(13)~~(17) "Works" means all property, rights, easements,  
 23 and franchises relating thereto and deemed necessary or  
 24 convenient for their operation and all water rights acquired  
 25 or exercised by the department in connection with those

1 works and includes all means of conserving and distributing  
 2 water, including, without limiting the generality of the  
 3 foregoing, reservoirs, dams, diversion canals, distributing  
 4 canals, waste canals, drainage canals, dikes, lateral  
 5 ditches and pumping units, mains, pipelines, and waterworks  
 6 systems and includes all such works for the conservation,  
 7 development, storage, distribution, and utilization of  
 8 water, including without limiting the generality of the  
 9 foregoing, works for the purpose of irrigation, flood  
 10 prevention, drainage, fish and wildlife, recreation,  
 11 development of power, watering of stock, supplying of water  
 12 for public, domestic, industrial, or other uses and for fire  
 13 protection."

14 ~~Section 3. Section 85-1-121, MCA, is amended to read:~~  
 15 ~~"85-1-121. Out-of-state use of water. (1) None of the~~  
 16 ~~waters in the state of Montana shall ever be appropriated,~~  
 17 ~~diverted, impounded, or otherwise restrained or controlled~~  
 18 ~~while within the state for use outside the boundaries~~  
 19 ~~thereof except pursuant to a petition to and an act of the~~  
 20 ~~legislature of the state of Montana permitting such action~~  
 21 ~~as provided in this section and title 85, chapter 2. Any~~  
 22 ~~appropriation, diversion, impounding, restraining, or~~  
 23 ~~attempted appropriation, diversion, impounding, or~~  
 24 ~~restraining contrary to the provisions of this section shall~~  
 25 ~~be null and void. All officers, agents, agencies, and~~

1 employees---of---the---state---are---prohibited---from---knowingly  
 2 permitting---aiding---or---assisting---in---any---manner---such  
 3 unauthorized---appropriation---diversion---impounding---or---other  
 4 restraints---it shall be unlawful for any person---persons---or  
 5 corporation---directly---or---indirectly---personally---or---through  
 6 agency---officers---or---employees---either---to---attempt---to---so  
 7 appropriate---divert---impound---or---otherwise---restrain---or  
 8 control---any---of---the---waters---within---the---boundaries---of---this  
 9 state---for---use---outside---thereof---except---in---accordance---with---the  
 10 terms---of---this---section.

11 ~~if---None---of---the---waters---in---this---state---may---be~~  
 12 ~~appropriated---diverted---impounded---or---otherwise---restrained~~  
 13 ~~or---controlled---while---within---the---state---for---use---outside---the~~  
 14 ~~boundaries---thereof---if---the---department---finds---that---there---is---a~~  
 15 ~~need---to---conserve---and---preserve---water---in---the---state---for---the~~  
 16 ~~health---welfare---or---safety---of---its---citizens---such---a~~  
 17 ~~determination---must---be---made---in---a---hearing---conducted---by---the~~  
 18 ~~department---under---the---procedure---established---in---Title---85,~~  
 19 ~~chapter---2---in---which---the---criteria---established---in---85-2-311---are~~  
 20 ~~determined---before---water---may---be---appropriated---diverted~~  
 21 ~~impounded---or---otherwise---restrained---or---controlled---while~~  
 22 ~~within---the---state---for---use---outside---the---boundaries---of---the~~  
 23 ~~state."~~

24 Section 3. Section 85-1-202, MCA, is amended to read:  
 25 "85-1-202. Department actions subject to board

1 approval. The department may not acquire by appropriation or  
 2 otherwise a water right or interest therein and may not  
 3 acquire real property or an interest therein (except rights  
 4 of access for the purpose of construction, operation, or  
 5 maintenance of works) or mortgage or otherwise create a lien  
 6 on the same or dispose of in any manner water rights or real  
 7 property or interest therein without prior approval of the  
 8 board. The department may not, by obtaining a permit for  
 9 the beneficial use of water under Title 85, chapter 2,  
 10 acquire rights to appropriate water for marketing to any  
 11 user without the prior approval of the board. The department  
 12 may not construct or cause to be constructed or contract for  
 13 the construction of works or projects without prior approval  
 14 of the board. The department may not loan funds to a person  
 15 or water user association for the purpose of constructing or  
 16 maintaining works without prior approval of the board."

17 Section 4. Section 85-1-204, MCA, is amended to read:  
 18 "85-1-204. Department powers over state waters. (1)  
 19 The department, with the approval of the board, may sell,  
 20 lease, and otherwise dispose of all waters which may be  
 21 impounded under this chapter, and the water may be sold for  
 22 the purpose of irrigation, development of power, watering of  
 23 stock, or any other purpose. Notwithstanding any other  
 24 provision of the law, the department, with the approval of  
 25 the board, may by obtaining a permit for the beneficial use

1 ~~of water under Title 85, chapter 2, acquire rights to~~  
 2 ~~appropriate water for marketing for such consideration and~~  
 3 ~~under such terms and conditions as are fixed by contract or~~  
 4 ~~instrument of conveyance.~~ To the extent that it may be  
 5 necessary to carry out this chapter and subject to a  
 6 compliance with the other provisions of this chapter, the  
 7 department has full control of all the water of the state  
 8 not under the exclusive control of the United States and not  
 9 vested in private ownership, and it shall take such steps as  
 10 may be necessary to appropriate and conserve the same for  
 11 the use of the people. The authority of the department  
 12 conferred by this chapter extends and applies to rights to  
 13 the natural flow of the waters of this state which it may  
 14 acquire, with the approval of the board, by condemnation,  
 15 purchase, exchange, appropriation, or agreement.

16 (2) For the purpose of regulating the diversion of  
 17 those waters, the department may enter upon the means and  
 18 place of use of all appropriators for making surveys of  
 19 respective rights and seasonal needs.

20 (3) The department may take into consideration the  
 21 decrees of the courts of this state having jurisdiction  
 22 which purport to adjudicate the waters of a stream or its  
 23 tributaries, and a fair, reasonable, and equitable  
 24 reconciliation shall be made between the claimants asserting  
 25 rights under different decrees and between decreed rights

1 and asserted rights of appropriation not adjudicated by any  
 2 court.

3 (4) The department, at its discretion, may hold  
 4 hearings relating to the rights of respective claimants  
 5 after first giving such notice as it considers appropriate  
 6 and make findings of the date and quantity of appropriation  
 7 and use of all claimants which the department will recognize  
 8 and observe in diverting the waters which it owns. The  
 9 department may police and distribute to the owner of the  
 10 recognized appropriation the waters due him upon request and  
 11 under terms agreed upon.

12 (5) The department, when engaged in controlling and  
 13 dividing the natural flow of a stream under the authority  
 14 granted by this chapter, is exercising a police power of the  
 15 state, and water commissioners appointed by any court may  
 16 not deprive the department of any of the waters owned or  
 17 administered under agreement with respective owners. The  
 18 owner of a prior right contending that the department is not  
 19 recognizing and respecting the appropriation may resort to a  
 20 court for the purpose of determining whether or not the  
 21 rights of the claimant have been invaded, and the department  
 22 shall observe the terms of the final decree.

23 (6) When the department impounds or acquires the right  
 24 of appropriation of the waters of a stream it may divert or  
 25 authorize the diversion at any point on the stream or any

1 portion thereof when it is done without injury to a prior  
2 appropriator."

3 **NEW SECTION.** Section 5. Water marketing from storage  
4 facilities. (1) The department may not acquire rights to  
5 appropriate water for marketing except from a storage  
6 facility, either existing or as proposed to be constructed.

7 (2) The department may not acquire rights to  
8 appropriate more than 50,000 acre-feet of water per year for  
9 the transfer of rights under this section for industrial  
10 uses, including but not limited to energy industry use.

11 (3) The department may market water as otherwise  
12 provided in this chapter or it may sell, grant, convey,  
13 assign, lease, or otherwise transfer water rights or permits  
14 to appropriate water from storage projects to users,  
15 including energy industry users, for the consideration and  
16 under the terms and conditions fixed by contract or  
17 instrument of conveyance. A contract may provide that the  
18 transfer is void for failure to perform any condition of  
19 performance, for breach, for failure of consideration, or  
20 for failure to perform any other contractual obligation. If  
21 the department determines that a failure to perform a  
22 condition of performance or breach has occurred, it may  
23 revoke the permit evidencing the transfer after compliance  
24 with any notice of breach provision or other condition  
25 precedent to cancellation specified in the contract.

1 (4) A contract or instrument of conveyance that  
2 transfers water rights or permits to appropriate water from  
3 storage under this section must require that water for such  
4 beneficial use in this state as the department may determine  
5 be made available from a water storage project or from along  
6 the route of such a project in this state, in such amounts  
7 as the department may determine up to a maximum of 25% of  
8 the capacity of any privately owned project, to any user in  
9 this state, upon payment by such user of all costs of  
10 tapping into and removing water from the project.

11 (5) The department may acquire rights to appropriate  
12 water under this section for a term not to exceed 40 years.  
13 The term may be extended upon a redetermination of the  
14 criteria set forth in 85-2-311 without loss of priority  
15 date. A transfer of a permit or a right to appropriate water  
16 under this section pursuant to a contract or other  
17 instrument of conveyance may not be for a term greater than  
18 40 years, subject to renewal upon such terms and conditions  
19 as provided by this section and the contract or instrument  
20 of conveyance.

21 (6) An environmental impact statement must be prepared  
22 by the department prior to the transfer of a water right or  
23 permit under this section. The department shall comply with  
24 the provisions of the Montana Environmental Policy Act prior  
25 to the transfer of a water right or permit under this

section. The transferee shall pay all costs associated with compliance with the act. Except as provided in this chapter, the provisions of 85-2-124 are controlling.

(7) No contract or instrument of conveyance for the transfer of water rights or permits to appropriate water from storage under this section is valid until ratified pursuant to a petition to the legislature and an act of the legislature approving such a transfer.

(8) The department may not transfer a water right or permit under this section for energy industry use until:

~~(a) -- duty by 1987 -- or~~

~~(b)~~ an environmental impact statement has been completed under subsection (6) and submitted to the legislature for its review.

**NEW SECTION. Section 6. Water marketing account. (1)**

There is established a water marketing account in the earmarked revenue fund. Funds accruing to the department under contract or instrument of conveyance for beneficial use of water under [section 6] or from such other source as may be provided by law must be deposited in the water marketing account. Income and interest from investment of the money in the water marketing account must be credited to the account.

(2) Funds accruing to the department and deposited in the water marketing account are allocated as follows:

(a) All funds are committed for the construction or rehabilitation of water marketing storage facilities.

(b) Funds remaining after appropriation each biennium under subsection (a) are allocated in the following percentages of the remaining balance:

(i) 50% to the water development earmarked account to be used for any of the purposes described in 85-1-604(3);

(ii) 25% to long-range soil and water conservation programs;

(iii) 25% to the general fund of the state.

Section 7. Section 85-1-205, MCA, is amended to read:

"85-1-205. Acquisition of water in Fort-Peak-Reservoir a federal reservoir. The department may acquire water or water storage by purchase option or agreement with the federal government from the Fort-Peak-Reservoir any federal reservoir for the purpose of sale, rent, or distribution for industrial use or other use. In such cases, the department is not required to construct any diversion or appropriation facilities or works, and it may sell, rent, or distribute such water at such rates and under such terms and conditions as it considers appropriate."

Section 8. Section 85-2-104, MCA, is amended to read:

"85-2-104. Slurry transport of coal. (1) The legislature finds that the use of water for the slurry transport of coal is ~~may be~~ detrimental to the conservation

1 and protection of the water resources of the state. The  
 2 legislature finds that the use of water for slurry transport  
 3 of coal threatens to deplete Montana's water resources to  
 4 the significant detriment of existing and projected  
 5 agricultural, municipal, recreational, and other uses and of  
 6 wildlife and aquatic habitat. The legislature further finds  
 7 that the use of water for the slurry transport of coal may  
 8 foreclose the options of the people of this state to utilize  
 9 water for their future beneficial purposes.

10 (2) ~~The use of water for the slurry transport of coal~~  
 11 ~~is not a beneficial use of water. The department may not~~  
 12 ~~accept or otherwise take any action on an application for~~  
 13 ~~the use of water for the slurry transport of coal, except as~~  
 14 ~~provided in [section 63-2-311, MCA, 1981 5]."~~

15 Section 9. Section 85-2-311, MCA, is amended to read:

16 "85-2-311. Criteria for issuance of permit. (1) The  
 17 EXCEPT AS PROVIDED IN SUBSECTIONS (2) AND (4), THE  
 18 department shall issue a permit if THE APPLICANT PROVES BY  
 19 SUBSTANTIAL CREDIBLE EVIDENCE THAT THE FOLLOWING CRITERIA  
 20 ARE MET:

21 (1)(a) there are unappropriated waters in the source  
 22 of supply;

23 (1)(b) at times when the water can be put to the use  
 24 proposed by the applicant;

25 (1)(c) in the amount the applicant seeks to

1 appropriate; and

2 (1)(iii) throughout the period during which the  
 3 applicant seeks to appropriate, the amount requested is  
 4 available;

5 (1)(b) the rights of a prior appropriator will not be  
 6 adversely affected;

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

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

10 AND

11 (1)(e) the proposed use will not interfere  
 12 unreasonably with other planned uses or developments for  
 13 which a permit has been issued or for which water has been  
 14 reserved;

15 ~~if the proposed use of water is reasonable, is not~~  
 16 ~~contrary to the policies and objectives established in~~  
 17 ~~subsections (1) through (9) of 85-2-311, and is not~~  
 18 ~~otherwise detrimental to the public welfare. The criteria~~  
 19 ~~listed in this subsection (1) apply only to applications~~  
 20 ~~involving the use of 3,000 or more acre-feet of water a year~~  
 21 ~~and 15 or more cubic feet a second of water and~~

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

1 ~~(7)(g) except as provided in subsection (6) (2)(v) the~~  
 2 ~~applicant proves by substantial credible evidence the~~  
 3 ~~criteria listed in subsections (1) (a) through (5) (f) of~~  
 4 ~~this subsection (1)(v)~~

5 (2) ~~an applicant~~ THE DEPARTMENT MAY NOT ISSUE A PERMIT  
 6 ~~for an appropriation of 10,000 or more acre-feet of water a~~  
 7 ~~year or more and 15 or more cubic feet a per second or more~~  
 8 ~~must prove by clear and convincing evidence that the rights~~  
 9 ~~of a prior appropriator will not be adversely affected of~~  
 10 ~~water unless the department makes an affirmative finding~~  
 11 ~~that:~~

12 (A) ~~the criteria in subsection (1) are met;~~

13 (B) ~~the applicant has proven by clear and convincing~~  
 14 ~~evidence that the rights of a prior appropriator will not be~~  
 15 ~~adversely affected; and~~

16 (C) ~~the proposed appropriation is in the public~~  
 17 ~~interest.~~

18 (3) ~~in making a finding under subsection (2)(c), the~~  
 19 ~~department shall consider:~~

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

25 (B) ~~the benefits to the applicant and the state;~~

1 (C) ~~the economic feasibility of the project;~~

2 (D) ~~the effects on the quantity, quality, and~~  
 3 ~~potability of water of existing beneficial uses in the~~  
 4 ~~source of supply;~~

5 (E) ~~the effects on private property rights by any~~  
 6 ~~creation of or contribution to saline seep;~~

7 (F) ~~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 (G) ~~the use of water is reasonable; and~~

12 (H) ~~the use of water is not detrimental to the public~~  
 13 ~~welfare.~~

14 (4) ~~a permit for an appropriation for a diversion for~~  
 15 ~~a consumptive use of 10,000 or more acre-feet of water per~~  
 16 ~~year or 15 or more cubic feet per second of water under~~  
 17 ~~subsection (2) is not valid and water may not be used~~  
 18 ~~pursuant to the permit until the legislature affirms the~~  
 19 ~~findings of the department.~~

20 ~~(5) For appropriations of water for use outside the~~  
 21 ~~boundaries of the state, the department shall condition the~~  
 22 ~~permit or authorization for use of water for a term not to~~  
 23 ~~exceed 40 years, subject to renewal upon a hearing and~~  
 24 ~~redetermination of the criteria listed in subsection (1)(v)~~  
 25 ~~including subsection (f) SUBSECTIONS (1) THROUGH (4).~~

1 ~~regardless of the amount, volume, or rate of diversion,~~  
 2 ~~(6) AN APPROPRIATION, DIVERSION, IMPOUNDMENT,~~  
 3 ~~RESTRAINT, OR ATTEMPTED APPROPRIATION, DIVERSION,~~  
 4 ~~IMPOUNDMENT, OR RESTRAINT CONTRARY TO THE PROVISIONS OF THIS~~  
 5 ~~SECTION IS NULL AND VOID. NO OFFICER, AGENT, AGENCY, OR~~  
 6 ~~EMPLOYEE OF THE STATE MAY KNOWINGLY PERMIT, AID, OR ASSIST~~  
 7 ~~IN ANY MANNER SUCH UNAUTHORIZED APPROPRIATION, DIVERSION,~~  
 8 ~~IMPOUNDMENT, OR OTHER RESTRAINT. NO PERSON OR CORPORATION~~  
 9 ~~MAY, DIRECTLY OR INDIRECTLY, PERSONALLY OR THROUGH AN AGENT,~~  
 10 ~~OFFICER, OR EMPLOYEE, ATTEMPT TO APPROPRIATE, DIVER,~~  
 11 ~~IMPOUND, OR OTHERWISE RESTRAIN OR CONTROL ANY OF THE WATERS~~  
 12 ~~WITHIN THE BOUNDARIES OF THIS STATE EXCEPT IN ACCORDANCE~~  
 13 ~~WITH THIS SECTION."~~

14 ~~NEW SECTION.~~ Section 10. Department to administer  
 15 study. (1) The department of natural resources and  
 16 conservation shall conduct a study of water marketing issues  
 17 in conjunction with the water resources oversight committee  
 18 provided for in [section 12].

19 (2) The study must include but is not limited to an  
 20 examination of the following:

21 (a) the present in-state demands on water for  
 22 domestic, municipal, agricultural, industrial, and other  
 23 beneficial uses;

24 (b) projections of future demands over the next 50  
 25 years on water for in-state domestic, municipal,

1 agricultural, industrial, and other beneficial uses;  
 2 (c) the economic impacts of water marketing;  
 3 (d) the environmental impacts of water marketing;  
 4 (e) the economic impacts of energy industrial uses of  
 5 water;  
 6 (f) the environmental impacts of energy industrial  
 7 uses of water;  
 8 (g) a comparison of the costs of transportation by  
 9 railroad with the costs of transportation by coal slurry  
 10 pipeline; and  
 11 (h) other related issues.  
 12 (3) The department shall report the results of the  
 13 study to the 49th legislature or to a special session of the  
 14 legislature called for the purpose of legislative  
 15 ratification of water marketing pursuant to [section 7],  
 16 whichever occurs first.

17 ~~NEW SECTION.~~ Section 11. Water resources oversight  
 18 committee -- establishment -- appointment --  
 19 organization. (1) There is a water resources oversight  
 20 committee.

21 (a) The speaker of the house and the committee on  
 22 committees of the senate shall each appoint four members of  
 23 their respective houses to serve on the committee. No more  
 24 than two members from each house may be from the same party.

25 (b) Committee members shall elect a chairman and

1 vice-chairman from among their number.

2 (c) Committee members are entitled to compensation and  
3 expenses as provided in 5-2-302.

4 (2) The water resources oversight committee shall work  
5 with and oversee the efforts of state agencies charged with  
6 the responsibility of developing and managing the state's  
7 water resources, including the study of water marketing  
8 issues provided for in [section 11] and the water  
9 development program provided for in Title 85, chapter 1. The  
10 committee may study any other issues related to water  
11 development and conservation as its members consider  
12 important to the people of the state.

13 (3) The committee may make such recommendations to  
14 agencies and the legislature relating to water marketing,  
15 water development, or water conservation as it considers  
16 necessary. The recommendations may include proposals for  
17 legislation.

18 (4) The committee may continue the work of the  
19 previous water resources oversight committee of overseeing  
20 the implementation of the water rights adjudication system  
21 provided for in Title 85, chapter 2.

22 (5) The committee may arrange with the legislative  
23 council to receive support services, subject to the  
24 limitations of funds available for that purpose.

25 NEW SECTION. Section 12. Appropriation. (1) There is

1 appropriated to the department of natural resources and  
2 conservation \$50,000 from the general fund for the purpose  
3 of funding the study conducted under [section 11].

4 (2) There is appropriated to the legislative council  
5 \$15,000 from the general fund for the purpose of supporting  
6 the activities of the water resources oversight committee.

7 Section 13. Section 75-20-104, MCA, is amended to  
8 read:

9 "75-20-104. Definitions. In this chapter, unless the  
10 context requires otherwise, the following definitions apply:

11 (1) "Addition thereto" means the installation of new  
12 machinery and equipment which would significantly change the  
13 conditions under which the facility is operated.

14 (2) "Application" means an application for a  
15 certificate submitted in accordance with this chapter and  
16 the rules adopted hereunder.

17 (3) "Associated facilities" includes but is not  
18 limited to transportation links of any kind, aqueducts,  
19 diversion dams, transmission substations, storage ponds,  
20 reservoirs, and any other device or equipment associated  
21 with the production or delivery of the energy form or  
22 product produced by a facility, except that the term does  
23 not include a facility.

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

(5) "Board of health" means the board of health and environmental sciences provided for in 2-15-2104.

(6) "Certificate" means the certificate of environmental compatibility and public need issued by the board under this chapter that is required for the construction or operation of a facility.

(7) "Commence to construct" means:

(a) any clearing of land, excavation, construction, or other action that would affect the environment of the site or route of a facility but does not mean changes needed for temporary use of sites or routes for nonutility purposes or uses in securing geological data, including necessary borings to ascertain foundation conditions;

(b) the fracturing of underground formations by any means if such activity is related to the possible future development of a gasification facility or a facility employing geothermal resources but does not include the gathering of geological data by boring of test holes or other underground exploration, investigation, or experimentation;

(c) the commencement of eminent domain proceedings under Title 70, chapter 30, for land or rights-of-way upon or over which a facility may be constructed;

(d) the relocation or upgrading of an existing facility defined by (b) or (c) of subsection (10), including

upgrading to a design capacity covered by subsection (10)(b), except that the term does not include normal maintenance or repair of an existing facility.

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

(9) "Department of health" means the department of health and environmental sciences provided for in Title 2, chapter 15, part 21.

(10) "Facility" means:

(a) except for crude oil and natural gas refineries, and facilities and associated facilities designed for or capable of producing, gathering, processing, transmitting, transporting, or distributing crude oil or natural gas, and those facilities subject to The Montana Strip and Underground Mine Reclamation Act, each plant, unit, or other facility and associated facilities designed for or capable of:

(i) generating 50 megawatts of electricity or more or any addition thereto (except pollution control facilities approved by the department of health and environmental sciences added to an existing plant) having an estimated cost in excess of \$10 million;

(ii) producing 25 million cubic feet or more of gas derived from coal per day or any addition thereto having an

1 estimated cost in excess of \$10 million;  
 2 (iii) producing 25,000 barrels of liquid hydrocarbon  
 3 products per day or more or any addition thereto having an  
 4 estimated cost in excess of \$10 million;  
 5 (iv) enriching uranium minerals or any addition thereto  
 6 having an estimated cost in excess of \$10 million; or  
 7 (v) utilizing or converting 500,000 tons of coal per  
 8 year or more or any addition thereto having an estimated  
 9 cost in excess of \$10 million;  
 10 (b) each electric transmission line and associated  
 11 facilities of a design capacity of more than 69 kilovolts,  
 12 except that the term does not include an electric  
 13 transmission line and associated facilities of a design  
 14 capacity of 230 kilovolts or less and 10 miles or less in  
 15 length;  
 16 (c) each pipeline and associated facilities designed  
 17 for or capable of transporting gas (except for natural gas),  
 18 ~~water--or liquid hydrocarbon products from or to a facility~~  
 19 ~~located within or without this state of the size indicated~~  
 20 ~~in subsection (10)(a) of this section, or water--or~~  
 21 ~~transport medium COAL SLURRY;~~  
 22 (d) any use of geothermal resources, including the use  
 23 of underground space in existence or to be created, for the  
 24 creation, use, or conversion of energy, designed for or  
 25 capable of producing geothermally derived power equivalent

1 to 25 million Btu per hour or more or any addition thereto  
 2 having an estimated cost in excess of \$750,000;  
 3 (e) any underground in situ gasification of coal.  
 4 (11) "Person" means any individual, group, firm,  
 5 partnership, corporation, cooperative, association,  
 6 government subdivision, government agency, local government,  
 7 or other organization or entity.  
 8 (12) "Transmission substation" means any structure,  
 9 device, or equipment assemblage, commonly located and  
 10 designed for voltage regulation, circuit protection, or  
 11 switching necessary for the construction or operation of a  
 12 proposed transmission line.  
 13 (13) "Utility" means any person engaged in any aspect  
 14 of the production, storage, sale, delivery, or furnishing of  
 15 heat, electricity, gas, hydrocarbon products, or energy in  
 16 any form for ultimate public use."  
 17 SECTION 14. SECTION 75-20-218, MCA, IS AMENDED TO  
 18 READ:  
 19 "75-20-218. Hearing date -- location -- department to  
 20 act as staff -- hearings to be held jointly. (1) Upon  
 21 receipt of the department's report submitted under  
 22 75-20-216, the board shall set a date for a hearing to begin  
 23 not more than 120 days after the receipt. ~~Except--for--those~~  
 24 ~~hearings--involving--applications--submitted--for--facilities--as~~  
 25 ~~defined--in--(b)--and--(c)--of--75-20-204(18),--certification~~

1 ~~Certification~~ hearings shall be conducted by the board in  
2 the county seat of Lewis and Clark County or the county in  
3 which the facility or the greater portion thereof is to be  
4 located.

5 (2) Except as provided in 75-20-221(2), the department  
6 shall act as the staff for the board throughout the  
7 decisionmaking process and the board may request the  
8 department to present testimony or cross-examine witnesses  
9 as the board considers necessary and appropriate.

10 (3) At the request of the applicant, the department of  
11 health and the board of health shall hold any required  
12 permit hearings required under laws administered by those  
13 agencies in conjunction with the board certification  
14 hearing. In such a conjunctive hearing the time periods  
15 established for reviewing an application and for issuing a  
16 decision on certification of a proposed facility under this  
17 chapter supersede the time periods specified in other laws  
18 administered by the department of health and the board of  
19 health."

20 ~~SECTION 15, REPEALER, SECTION 85-1-121, MCA, IS~~  
21 ~~REPEALED.~~

22 ~~NEW SECTION.~~ Section 16. Codification instruction.  
23 Sections ~~6v-7v--end-12 5, 6, AND 11~~ are intended to be  
24 codified as an integral part of Title 85, chapter 1, part 2,  
25 and the provisions of Title 85, chapter 1, apply to sections

1 ~~6v-7v--end-12 5, 6, AND 11.~~

2 ~~NEW SECTION.~~ Section 17. Severability. If a part of  
3 this act is invalid, all valid parts that are severable from  
4 the invalid part remain in effect. If a part of this act is  
5 invalid in one or more of its applications, the part remains  
6 in effect in all valid applications that are severable from  
7 the invalid applications.

8 ~~NEW SECTION.~~ Section 18. Effective date. This act is  
9 effective on passage and approval.

-End-