

HOUSE BILL NO. 894

Introduced: 02/22/83

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

Hearing: 3/16/83

Died in Committee

1 House BILL NO. 894 Leating
2 INTRODUCED BY Mark Newman Jefferson
3 Malinda Stolt Glyser Ellison Steb Smith
4 Ryan Wass Leahy Barham
5 A BILL FOR AN ACT ENTITLED: "AN ACT TO AUTHORIZE THE
6 MARKETING OF WATER BY THE STATE OF MONTANA; TO AUTHORIZE A
7 STUDY OF WATER MARKETING, ESTABLISH A WATER RESOURCES
8 OVERSIGHT COMMITTEE, AND APPROPRIATE MONEY FOR THOSE
9 PURPOSES; TO INCLUDE PIPELINES IN THE MONTANA MAJOR FACILITY
10 SITING ACT; AMENDING SECTIONS 75-20-104, 75-20-216,
11 75-20-218, 75-20-301, 75-20-303, 75-20-304, 75-20-1202,
12 85-1-101, 85-1-102, 85-1-121, 85-1-202, 85-1-204, 85-1-205,
13 85-1-604, 85-2-102, 85-2-241, AND 85-2-311, MCA; REPEALING
14 SECTION 85-2-104, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE
15 DATE."
16 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:
17 Section 1. Section 85-1-101, MCA, is amended to read:
18 "85-1-101. Policy considerations. It is hereby
19 declared as follows:
20 (1) The general welfare of the people of Montana, in
21 view of the state's population growth and expanding economy,
22 requires that water resources of the state be put to optimum
23 beneficial use and not wasted.
24 (2) The public policy of the state is to promote the
25 conservation, development, and beneficial use of the state's

1 water resources to secure maximum economic and social
2 prosperity for its citizens.

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

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

14 ~~141. The water resources of the state must be protected~~
15 ~~and conserved to comply with the constitutional requirement~~
16 ~~that the state maintain and improve a clean and healthful~~
17 ~~environment in Montana for present and future generations.~~

19 ~~5+161~~ The water resources of the state must be
19 protected and conserved to assure adequate supplies for
20 public recreational purposes and for the conservation of
21 wildlife and aquatic life.

22 ~~67-171~~ The public interest requires the construction,
23 operation, and maintenance of a system of works for the
24 conservation, development, storage, distribution, and
25 utilization of water, which construction, operation, and

1 maintenance is a single object and is in all respects for
2 the welfare and benefit of the people of the state.

3 ~~{77}181~~ It is necessary to coordinate local, state, and
4 federal water resource development and utilization plans and
5 projects through a single agency of state government, the
6 department of natural resources and conservation.

7 ~~{87}191~~ The greatest economic benefit to the people of
8 Montana can be secured only by the sound coordination of
9 development and utilization of water resources with the
10 development and utilization of all other resources of the
11 state.

12 ~~{97}101~~ Any attempt to gain control of or speculate on
13 large quantities of ground or surface water of the state of
14 Montana is not in the interest of the people and is to be
15 restricted.

16 ~~{111} A limited water marketing plan that involves only~~
17 ~~impounded water and that may be implemented only if there is~~
18 ~~no interference with the state's interests in conserving and~~
19 ~~protecting water resources and maintaining a clean and~~
20 ~~healthful environment is a reasonable means of promoting the~~
21 ~~conservation, development, and beneficial use of the state's~~
22 ~~water resources.~~

23 ~~{107}1121~~ To achieve these ~~the~~ objectives ~~and to protect~~
24 ~~the waters of Montana from diversion to other areas of the~~
25 ~~nation set forth in this section,~~ it is essential that a

1 comprehensive, coordinated multiple-use water resource plan
2 be progressively formulated, to be known as the "state water
3 plan".

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

5 "85-1-102. Definitions. Unless the context requires
6 otherwise, in this chapter the following definitions apply:

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

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

25 (3) "Department" means the department of natural

resources and conservation provided for in Title 2, chapter 15, part 33.

~~(4) "Energy industrial 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 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.~~

~~(6) "Impounded water" means water that is stored in an existing impoundment or in an impoundment to be constructed in the future.~~

~~(7) "Impoundment" means a structure used to store water.~~

~~(4)(18) "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)(19) "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)(10) "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)(11) "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.~~

~~(6)(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~~

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

12 ~~††††1141~~ "Water development earmarked account" means a
 13 separate account created by 85-1-604 within the earmarked
 14 revenue fund of the state treasury for the purposes of the
 15 water development program as set forth in 85-1-604.

16 ~~††††1151~~ "Water development project" means a project as
 17 defined in subsection ~~†††~~ 1101, except that water
 18 development projects are not limited to projects owned or
 19 operated by the department.

20 ~~††††1161~~ "Water development sinking account" means a
 21 separate account created by 85-1-603 within the sinking fund
 22 of the state treasury to be used as provided in 85-1-617.

23 ~~††††1171~~ "Works" means all property, rights, easements,
 24 and franchises relating thereto and deemed necessary or
 25 convenient for their operation and all water rights acquired

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

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

16 "85-1-121. Out-of-state use of water. ~~111~~ None of the
 17 waters in the state of Montana shall ever be appropriated,
 18 diverted, impounded, or otherwise restrained or controlled
 19 while within the state for use outside the boundaries
 20 thereof, except pursuant-to-a-petition-to-and-an-act-of-the
 21 legislature-of-the-state-of-Montana-permitting--such--action
 22 as-provided-in-this-section-and-chapter-2-of-this-title. Any
 23 appropriation, diversion, impounding, restraining, or
 24 attempted appropriation, diversion, impounding, or
 25 restraining contrary to the provisions of this section shall

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

12 ~~(2) None of the waters in the state may be~~
 13 ~~appropriated, diverted, impounded, or otherwise restrained~~
 14 ~~or controlled while within the state for use outside the~~
 15 ~~boundaries thereof unless the department makes an~~
 16 ~~affirmative finding that the applicable criteria set forth~~
 17 ~~in 85-2-311 have been met and that the proposed use will not~~
 18 ~~interfere with the state's obligation to conserve water for~~
 19 ~~the public health, welfare, and safety.~~

20 ~~(3) In making the finding required under subsection~~
 21 ~~(2), the department shall take into account existing demands~~
 22 ~~on the state water supply as well as projected demands such~~
 23 ~~as reservations on water for future beneficial purposes,~~
 24 ~~including municipal water supplies, irrigation systems, and~~
 25 ~~minimum streamflows for the protection of existing water~~

1 rights and aquatic life."

2 Section 4. Section 85-1-202, MCA, is amended to read:
 3 "85-1-202. Department actions subject to board
 4 approval. The department may not acquire by appropriation or
 5 otherwise a water right or interest therein and may not
 6 acquire real property or an interest therein (except rights
 7 of access for the purpose of construction, operation, or
 8 maintenance of works) or mortgage or otherwise create a lien
 9 on the same or dispose of in any manner water rights or real
 10 property or interest therein without prior approval of the
 11 board. The department shall obtain prior board approval of
 12 acquisition of a permit pursuant to chapter 2 of this title
 13 for the purpose of marketing water under [section 7]. The
 14 department may not construct or cause to be constructed or
 15 contract for the construction of works or projects without
 16 prior approval of the board. The department may not loan
 17 funds to a person or water user association for the purpose
 18 of constructing or maintaining works without prior approval
 19 of the board."

20 Section 5. Section 85-1-204, MCA, is amended to read:
 21 "85-1-204. Department powers over state waters. (1)
 22 The department, with the approval of the board, may sell,
 23 lease, and otherwise dispose of all waters which may be
 24 impounded under this chapter, and the water may be sold for
 25 the purpose of irrigation, development of power, watering of

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

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

22 (3) The department may take into consideration the
 23 decrees of the courts of this state having jurisdiction
 24 which purport to adjudicate the waters of a stream or its
 25 tributaries, and a fair, reasonable, and equitable

1 reconciliation shall be made between the claimants asserting
 2 rights under different decrees and between decreed rights
 3 and asserted rights of appropriation not adjudicated by any
 4 court.

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

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

25 (6) When the department impounds or acquires the right

1 of appropriation of the waters of a stream it may divert or
2 authorize the diversion at any point on the stream or any
3 portion thereof when it is done without injury to a prior
4 appropriator."

5 Section 6. Section 85-1-205, MCA, is amended to read:

6 "85-1-205. Acquisition of water in Fort-Peck-Reservoir
7 ~~federal reservoirs~~. The department may acquire water by
8 purchase option or agreement with the federal government
9 from the--Fort-Peck-Reservoir ~~any federal reservoir~~ for the
10 purpose of sale, rent, or distribution for industrial use.
11 In such cases, the department is not required to construct
12 any diversion or appropriation facilities or works, and it
13 may sell, rent, or distribute such water at such rates and
14 under such terms and conditions as it considers
15 appropriate."

16 NEW SECTION. Section 7. Marketing of impounded water.

17 (1) The department may market impounded water for beneficial
18 uses as provided in this chapter or it may convey permits to
19 appropriate impounded water for the consideration and under
20 the terms and conditions fixed by contract or instrument of
21 conveyance.

22 (2) The water resources oversight committee provided
23 for in [section 22] may oversee the negotiation of any
24 marketing under this section.

25 (3) All water appropriated for marketing must be

1 impounded water that is in excess of the water needed for
2 existing uses and foreseeable future needs.

3 (4) The department may acquire rights to appropriate
4 not more than 50,000 acre-feet per year of water for energy
5 industrial use.

6 (5) If feasible, the department and the transferee of
7 a water permit may agree that, as part of the consideration
8 for transfer, water will be made available for other
9 beneficial uses, from the impoundment or from along the
10 route of the project, in amounts up to 25% of the capacity
11 of any privately owned project, to any user in the state
12 upon payment by the user of all costs of tapping into and
13 removing water from the project.

14 (6) A conveyance of a permit under this section is
15 void if the transferee fails to perform any condition of
16 performance or breaches the contract or instrument of
17 conveyance or if there is a failure of consideration or if
18 the transferee fails to perform any other contractual
19 obligation. However, neither the transferee nor the
20 department may be considered in default if prevented from
21 fulfilling its contractual obligations by an accident or
22 casualty produced by physical cause that is not preventable
23 by human foresight, i.e., any of the misadventures termed an
24 "act of God".

25 (7) A conveyance of a permit under this section may

1 not be for a term longer than 40 years, subject to renewal
2 upon the terms and conditions as provided in this section.

3 (8) The use of water by a transferee is a license to
4 use the water for the period of the contract. It does not
5 establish a right to appropriate water within the meaning of
6 Title 85, chapter 2, part 3.

7 (9) The board may not approve the acquisition of a
8 permit by the department for the purposes of marketing water
9 under this section for a term longer than 45 years. The term
10 of the permit may be extended upon a redetermination that an
11 extension meets the criteria set forth in 85-2-311. The
12 transferee has first option to renew if the permit is
13 extended.

14 (10) No contract or instrument of conveyance for the
15 transfer of a permit to appropriate water from an
16 impoundment under this section is valid until ratified by an
17 act of the legislature approving such transfer.

18 (11) The board shall establish rules and standards for
19 the exercise of the powers set forth in this section,
20 including provisions for making water available from a
21 project.

22 (12) The department shall comply with the provisions of
23 the Montana Environmental Policy Act prior to the transfer
24 of a water right or permit under this section. The
25 transferee shall pay all costs associated with compliance

1 with provisions of that act. Except as provided in this
2 chapter, the provisions of 85-2-124 are controlling.

3 ~~NEW SECTION.~~ Section 8. Contract terms. An instrument
4 of conveyance of a permit under [section 7] must contain in
5 writing the provisions of [subsections (5) through (8) of
6 section 7].

7 ~~NEW SECTION.~~ Section 9. Revenue derived from water
8 marketing. (1) Seventy-five percent of the revenue derived
9 from water marketing pursuant to [section 7] must be used as
10 follows:

11 (a) Funds acquired prior to the completion of the
12 general adjudication of water rights under Title 85, chapter
13 2, must be paid into the water right adjudication account
14 provided for in 85-2-241.

15 (b) Funds acquired after completion of the general
16 adjudication of water rights must be paid into the water
17 development earmarked account provided for in 85-1-604.

18 (2) Twenty-five percent of the revenue derived from
19 water marketing pursuant to [section 7] must be paid into
20 the general fund.

21 Section 10. Section 85-2-241, MCA, is amended to read:

22 "85-2-241. Water right adjudication account. There is
23 established a water right adjudication account in the
24 earmarked revenue fund of the state treasury. All fees
25 collected under this section, ~~[section 2]~~, and 85-2-232

1 shall be deposited in the account to pay the expenses
2 incurred by the state for administering this part, part 7,
3 and Title 3, chapter 7."

4 Section 11. Section 85-1-604, MCA, is amended to read:

5 "85-1-604. Water development earmarked account created
6 -- revenues allocated -- limitations on appropriations from
7 account. (1) There is created a water development earmarked
8 account within the earmarked revenue fund established in
9 17-2-102.

10 (2) There shall be paid into the water development
11 earmarked account:

12 (a) all revenues of the works and other money as
13 provided in 85-1-332;

14 (b) 30% of the interest income of the resource
15 indemnity trust account as provided in and subject to the
16 conditions of 15-38-202;

17 (c) the excess of the coal severance tax proceeds
18 allocated by 85-1-603 to the water development sinking
19 account above debt service requirements as provided in and
20 subject to the conditions of 85-1-619-1 and

21 ~~(d) water marketing revenues as provided in [section~~
22 ~~9111(b)].~~

23 (3) Appropriations may be made from the water
24 development earmarked account for the following purposes and
25 subject to the following conditions:

1 (a) An amount less than or equal to that paid into the
2 account under 85-1-332 and only that amount may be
3 appropriated for the operation and maintenance of
4 state-owned projects and works. If the amount of money
5 available for appropriation under this subsection (3)(a) is
6 greater than that necessary for operation and maintenance
7 expenses, the excess may be appropriated as provided in
8 subsection (3)(b).

9 (b) An amount less than or equal to that paid into the
10 account from the resource indemnity trust account plus any
11 excess from subsection (3)(a) and only that amount may be
12 appropriated from the account for:

13 (i) the rehabilitation of state-owned projects and
14 works, including the rehabilitation of spillways of
15 state-owned dams;

16 (ii) the formulation of downstream emergency warning
17 and evacuation plans for state-owned dams;

18 (iii) the development of the hydropower potential of
19 state-owned dams;

20 (iv) assistance in the implementation of the water
21 reservations established under 85-2-316 of conservation
22 districts;

23 (v) the promotion of the development of offstream and
24 tributary storage;

25 (vi) the promotion of joint state-tribal,

state-federal, and state-tribal-federal water development;

(vii) administrative expenses, including but not limited to the salaries and expenses of personnel, equipment, office space, and other necessities incurred in the administration of the water development program except the administration of loans and grants; and

(viii) any other expenditures that meet the policies and objectives of the state water development program.

(c) An amount less than or equal to that paid into the account from the water development sinking account ~~plus an amount less than or equal to that paid into the account under [section 9]~~ and only that amount ~~sum~~ may be appropriated from the account for loans and grants for water development projects and activities and for administrative expenses, including but not limited to the salaries and expenses of personnel, equipment, office space, and other necessities incurred in administering the loans and grants."

Section 12. Section 85-2-102, MCA, is amended to read:

"85-2-102. Definitions. Unless the context requires otherwise, in this chapter the following definitions apply:

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

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

a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses.

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

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

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

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

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

(8) "Groundwater" means any water beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water, and which is not a part of that surface water.

~~(9) "Low-quality water" means municipal effluents, brackish water, or any other water that, without treatment, is not suitable for domestic or agricultural use.~~

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

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

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

13 †††(113) "Slurry" means a mixture of water and
14 insoluble material.

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

19 †††(115) "Water" means all water of the state, surface
20 and subsurface, regardless of its character or manner of
21 occurrence, including but not limited to geothermal water,
22 diffuse surface water, and sewage effluent.

23 †††(116) "Water division" means a drainage basin as
24 defined in 3-7-102.

25 †††(117) "Water judge" means a judge as provided for in

1 Title 3, chapter 7.

2 †††(118) "Water master" means a master as provided for
3 in Title 3, chapter 7.

4 †††(119) "Well" means any artificial opening or
5 excavation in the ground, however made, by which groundwater
6 is sought or can be obtained or through which it flows under
7 natural pressures or is artificially withdrawn."

8 Section 13. Section 85-2-311, MCA, is amended to read:

9 "85-2-311. Criteria for issuance of permit. (1) The
10 department ~~or, in an application under subsection (2), the~~
11 board shall issue a permit if:

12 †††(a) there are unappropriated waters in the source
13 of supply;

14 †††(b) at times when the water can be put to the use
15 proposed by the applicant;

16 †††(c) in the amount the applicant seeks to
17 appropriate; and

18 †††(d) throughout the period during which the
19 applicant seeks to appropriate, the amount requested is
20 available;

21 †††(e) the rights of a prior appropriator will not be
22 adversely affected;

23 †††(f) the proposed means of diversion, construction,
24 and operation of the appropriation works are adequate;

25 †††(g) the proposed use of water is a beneficial use;

1 ~~{5}(a)~~ the proposed use will not interfere
2 unreasonably with other planned uses or developments for
3 which a permit has been issued or for which water has been
4 reserved;

5 ~~{f1} the proposed use is consistent with the policies~~
6 ~~set forth in subsections {11} through {111} of 85-1-101, the~~
7 ~~state water plan, and the health, welfare, and safety of the~~
8 ~~citizens of the state;~~

9 ~~{g1} in the case of a proposed energy industrial use,~~
10 ~~the application is for low-quality water or the applicant~~
11 ~~has shown that use of low-quality water is not economically~~
12 ~~feasible;~~

13 ~~{6}(b)~~ an applicant for an appropriation of 10,000
14 acre-feet a year or more and 15 cubic feet per second or
15 more proves by clear and convincing evidence that the rights
16 of a prior appropriator will not be adversely affected;

17 ~~{7}(11)~~ except as provided in subsection ~~{6}~~ ~~1b~~, the
18 applicant proves by substantial credible evidence the
19 criteria listed in subsections ~~{1}~~ ~~1a~~ through ~~{5}~~ ~~1g~~.

20 ~~{21} In an application for a permit for use of water in~~
21 ~~a water marketing plan pursuant to [section 7], the~~
22 ~~department must comply with the provisions of subsection~~
23 ~~111. Upon a determination that the department has so~~
24 ~~complied, the board shall issue the permit. A permit issued~~
25 ~~under this subsection may not be issued for a period of more~~

1 ~~than 45 years, subject to renewal under this section."~~

2 ~~NEW SECTION.~~ Section 14. Department to administer
3 study. (1) The department of natural resources and
4 conservation shall conduct a study of water marketing issues
5 in conjunction with the water resources oversight committee
6 provided for in section 21.

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

9 (a) the present in-state demands on water for
10 domestic, municipal, agricultural, industrial, and other
11 beneficial uses;

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

15 (c) the economic impacts of water marketing;

16 (d) the environmental impacts of water marketing;

17 (e) the economic impacts of energy industrial uses of
18 water;

19 (f) the environmental impacts of energy industrial
20 uses of water;

21 (g) a comparison of the costs of transportation by
22 railroad with the costs of transportation by coal slurry
23 pipeline; and

24 (h) other related issues.

25 (3) The department shall report the results of the

study to the 49th legislature or to a special session of the legislature called for the purpose of legislative ratification of water marketing pursuant to [section 7], whichever occurs first.

Section 15. Section 75-20-104, MCA, is amended to read:

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

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

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

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

(4) "Board" means the board of natural resources and 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

1 maintenance or repair of an existing facility.

2 (8) "Department" means the department of natural
3 resources and conservation provided for in Title 2, chapter
4 15, part 33.

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

8 (10) "Facility" means:

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

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

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

25 (iii) producing 25,000 barrels of liquid hydrocarbon

1 products per day or more or any addition thereto having an
2 estimated cost in excess of \$10 million;

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

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

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

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

19 ~~(d) each pipeline and associated facilities designed~~
20 ~~for or capable of transporting coal slurry, having an~~
21 ~~estimated cost in excess of \$10 million;~~

22 ~~(d)(e)~~ any use of geothermal resources, including the
23 use of underground space in existence or to be created, for
24 the 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)(f)~~ 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 16. Section 75-20-301, MCA, is amended to
18 read:

19 "75-20-301. Decision of board -- findings necessary
20 for certification. (1) Within 60 days after submission of
21 the recommended decision by the hearing examiner, the board
22 shall make complete findings, issue an opinion, and render a
23 decision upon the record, either granting or denying the
24 application as filed or granting it upon such terms,
25 conditions, or modifications of the construction, operation,

1 or maintenance of the facility as the board considers
2 appropriate.

3 (2) The board may not grant a certificate either as
4 proposed by the applicant or as modified by the board unless
5 it shall find and determine:

6 (a) the basis of the need for the facility;

7 (b) the nature of the probable environmental impact;

8 (c) that the facility represents the minimum adverse
9 environmental impact, considering the state of available
10 technology and the nature and economics of the various
11 alternatives;

12 (d) each of the criteria listed in 75-20-503;

13 (e) in the case of an electric, gas, or liquid
14 transmission line or aqueduct:

15 (i) what part, if any, of the line or aqueduct shall
16 be located underground;

17 (ii) that the facility is consistent with regional
18 plans for expansion of the appropriate grid of the utility
19 systems serving the state and interconnected utility
20 systems; and

21 (iii) that the facility will serve the interests of
22 utility system economy and reliability;

23 (f) that the location of the facility as proposed
24 conforms to applicable state and local laws and regulations
25 issued thereunder, except that the board may refuse to apply

1 any local law or regulation if it finds that, as applied to
 2 the proposed facility, the law or regulation is unreasonably
 3 restrictive in view of the existing technology, of factors
 4 of cost or economics, or of the needs of consumers, whether
 5 located inside or outside of the directly affected
 6 government subdivisions;

7 (g) that the facility will serve the public interest,
 8 convenience, and necessity;

9 (h) that the department of health or board of health
 10 have issued a decision, opinion, order, certification, or
 11 permit as required by 75-20-216(3); and

12 (i) that the use of public lands for location of the
 13 facility was evaluated and public lands were selected
 14 whenever their use is as economically practicable as the use
 15 of private lands and compatible with the environmental
 16 criteria listed in 75-20-503.

17 (3) In determining that the facility will serve the
 18 public interest, convenience, and necessity under subsection
 19 (2)(g) of this section, the board shall consider:

20 (a) the items listed in subsections (2)(a) and (2)(b)
 21 of this section;

22 (b) the benefits to the applicant and the state
 23 resulting from the proposed facility;

24 (c) the effects of the economic activity resulting
 25 from the proposed facility;

1 (d) the effects of the proposed facility on the public
 2 health, welfare, and safety;

3 (e) any other factors that it considers relevant.

4 (4) Considerations of need, public need, or public
 5 convenience and necessity and demonstration thereof by the
 6 applicant shall apply only to utility facilities and do not
 7 apply to facilities defined in 75-20-104(10)(d)."

8 Section 17. Section 75-20-216, MCA, is amended to
 9 read:

10 "75-20-216. Study, evaluation, and report on proposed
 11 facility -- assistance by other agencies. (1) After receipt
 12 of an application, the department and department of health
 13 shall within 90 days notify the applicant in writing that:

14 (a) the application is in compliance and is accepted
 15 as complete; or

16 (b) the application is not in compliance and list the
 17 deficiencies therein; and upon correction of these
 18 deficiencies and resubmission by the applicant, the
 19 department and department of health shall within 30 days
 20 notify the applicant in writing that the application is in
 21 compliance and is accepted as complete.

22 (2) Upon receipt of an application complying with
 23 75-20-211 through 75-20-215, and this section, the
 24 department shall commence an intensive study and evaluation
 25 of the proposed facility and its effects, considering all

applicable criteria listed in 75-20-301 and 75-20-503 and the department of health shall commence a study to enable it or the board of health to issue a decision, opinion, order, certification, or permit as provided in subsection (3). The department and department of health shall use, to the extent they consider applicable, valid and useful existing studies and reports submitted by the applicant or compiled by a state or federal agency.

(3) The department of health shall within 1 year following the date of acceptance of an application and the board of health or department of health, if applicable, within an additional 6 months issue any decision, opinion, order, certification, or permit required under the laws administered by the department of health or the board of health and this chapter. The department of health and the board of health shall determine compliance with all standards, permit requirements, and implementation plans under their jurisdiction for the primary and reasonable alternate locations in their decision, opinion, order, certification, or permit. The decision, opinion, order, certification, or permit, with or without conditions, is conclusive on all matters that the department of health and board of health administer, and any of the criteria specified in subsections (2) through (7) of 75-20-503 that are a part of the determinations made under the laws

administered by the department of health and the board of health. Although the decision, opinion, order, certification, or permit issued under this subsection is conclusive, the board retains authority to make the determination required under 75-20-301(2)(c). The decision, opinion, order, certification, or permit of the department of health or the board of health satisfies the review requirements by those agencies and shall be acceptable in lieu of an environmental impact statement under the Montana Environmental Policy Act. A copy of the decision, opinion, order, certification, or permit shall be served upon the department and the board and shall be utilized as part of their final site selection process. Prior to the issuance of a preliminary decision by the department of health and pursuant to rules adopted by the board of health, the department of health shall provide an opportunity for public review and comment.

(4) Within 22 months following acceptance of an application for a facility as defined in (a) and ~~for~~ of 75-20-104(10) and for a facility as defined in (b) ~~and--for~~ through (d) of 75-20-104(10) which is more than 30 miles in length and within 1 year for a facility as defined in (b) ~~and--for~~ through (d) of 75-20-104(10) which is 30 miles or less in length, the department shall make a report to the board which shall contain the department's studies,

1 evaluations, recommendations, other pertinent documents
 2 resulting from its study and evaluation, and an
 3 environmental impact statement or analysis prepared pursuant
 4 to the Montana Environmental Policy Act, if any. If the
 5 application is for a combination of two or more facilities,
 6 the department shall make its report to the board within the
 7 greater of the lengths of time provided for in this
 8 subsection for either of the facilities.

9 (5) The departments of highways; commerce; fish,
 10 wildlife, and parks; state lands; revenue; and public
 11 service regulation shall report to the department
 12 information relating to the impact of the proposed site on
 13 each department's area of expertise. The report may include
 14 opinions as to the advisability of granting, denying, or
 15 modifying the certificate. The department shall allocate
 16 funds obtained from filing fees to the departments making
 17 reports to reimburse them for the costs of compiling
 18 information and issuing the required report."

19 Section 18. Section 75-20-218, MCA, is amended to
 20 read:

21 "75-20-218. Hearing date -- location -- department to
 22 act as staff -- hearings to be held jointly. (1) Upon
 23 receipt of the department's report submitted under
 24 75-20-216, the board shall set a date for a hearing to begin
 25 not more than 120 days after the receipt. Except for those

1 hearings involving applications submitted for facilities as
 2 defined in (b) and ~~(c)~~ through ~~(d)~~ of 75-20-104(10).
 3 certification hearings shall be conducted by the board in
 4 the county seat of Lewis and Clark County or the county in
 5 which the facility or the greater portion thereof is to be
 6 located.

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

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

22 Section 19. Section 75-20-303, MCA, is amended to
 23 read:

24 "75-20-303. Opinion issued with decision -- contents.
 25 (1) In rendering a decision on an application for a

certificate, the board shall issue an opinion stating its reasons for the action taken.

(2) If the board has found that any regional or local law or regulation which would be otherwise applicable is unreasonably restrictive pursuant to 75-20-301(2)(f), it shall state in its opinion the reasons therefor.

(3) Any certificate issued by the board shall include the following:

(a) an environmental evaluation statement related to the facility being certified. The statement shall include but not be limited to analysis of the following information:

(i) the environmental impact of the proposed facility;

(ii) any adverse environmental effects which cannot be avoided by issuance of the certificate;

(iii) problems and objections raised by other federal and state agencies and interested groups;

(iv) alternatives to the proposed facility;

(v) a plan for monitoring environmental effects of the proposed facility; and

(vi) a time limit as provided in subsection (4), during which construction of the facility must be completed;

(b) a statement signed by the applicant showing agreement to comply with the requirements of this chapter and the conditions of the certificate.

(4) The board shall issue as part of the certificate

the following time limits during which construction of a facility must be completed:

(a) For a facility as defined in (b) ~~1-101~~ or (c) ~~101~~ of 75-20-104~~(7)~~~~101~~ that is more than 30 miles in length, the time limit is 10 years.

(b) For a facility as defined in (b) ~~1-101~~ or (c) ~~101~~ of 75-20-104~~(7)~~~~101~~ that is 30 miles or less in length, the time limit is 5 years.

(c) The time limit shall be extended for periods of 2 years each upon a showing by the applicant to the board that a good faith effort is being undertaken to complete construction. Under this subsection, a good faith effort to complete construction includes the process of acquiring any necessary state or federal permit or certificate for the facility and the process of judicial review of any such permit or certificate.

(5) The provisions of subsection (4) apply to any facility for which a certificate has not been issued or for which construction is yet to be commenced."

Section 20. Section 75-20-304, MCA, is amended to read:

"75-20-304. Waiver of provisions of certification proceedings. (1) The board may waive compliance with any of the provisions of 75-20-216 through 75-20-222, 75-20-501, and this part if the applicant makes a clear and convincing

showing to the board at a public hearing that an immediate, urgent need for a facility exists and that the applicant did not have knowledge that the need for the facility existed sufficiently in advance to fully comply with the provisions of 75-20-216 through 75-20-222, 75-20-501, and this part.

(2) The board may waive compliance with any of the provisions of this chapter upon receipt of notice by a utility or person subject to this chapter that a facility or associated facility has been damaged or destroyed as a result of fire, flood, or other natural disaster or as the result of insurrection, war, or other civil disorder and there exists an immediate need for construction of a new facility or associated facility or the relocation of a previously existing facility or associated facility in order to promote the public welfare.

(3) The board shall waive compliance with the requirements of subsections (2)(c), (3)(b), and (3)(c) of 75-20-301 and 75-20-501(5) and the requirements of subsections (1)(a)(iv) and (v) of 75-20-211, 75-20-216(3), and 75-20-303(3)(a)(iv) relating to consideration of alternative sites if the applicant makes a clear and convincing showing to the board at a public hearing that:

(a) a proposed facility will be constructed in a county where a single employer within the county has permanently curtailed or ceased operations causing a loss of

250 or more permanent jobs within 2 years at the employer's operations within the preceding 10-year period;

(b) the county and municipal governing bodies in whose jurisdiction the facility is proposed to be located support by resolution such a waiver;

(c) the proposed facility will be constructed within a 15-mile radius of the operations that have ceased or been curtailed; and

(d) the proposed facility will have a beneficial effect on the economy of the county in which the facility is proposed to be located.

(4) The waiver provided for in subsection (3) applies only to permanent job losses by a single employer. The waiver provided for in subsection (3) does not apply to jobs of a temporary or seasonal nature, including but not limited to construction jobs or job losses during labor disputes.

(5) The waiver provided for in subsection (3) does not apply to consideration of alternatives or minimum adverse environmental impact for a facility defined in subsections (10)(b), (c), (d), ~~(e)~~, or ~~(f)~~ of 75-20-104, for an associated facility defined in subsection (3) of 75-20-104, or for any portion of or process in a facility defined in subsection (10)(a) of 75-20-104 to the extent that the process or portion of the facility is not subject to a permit issued by the department of health or board of

1 health.

2 (5) The applicant shall pay all expenses required to
3 process and conduct a hearing on a waiver request under
4 subsection (3). However, any payments made under this
5 subsection shall be credited toward the fee paid under
6 75-20-215 to the extent the data or evidence presented at
7 the hearing or the decision of the board under subsection
8 (3) can be used in making a certification decision under
9 this chapter.

10 (7) The board may grant only one waiver under
11 subsections (3) and (4) for each permanent loss of jobs as
12 defined in subsection (3)(a)."

13 Section 21. Section 75-20-1202, MCA, is amended to
14 read:

15 "75-20-1202. Definitions. As used in this part and
16 75-20-201 through 75-20-203, the following definitions
17 apply:

18 (1) (a) "Nuclear facility" means each plant, unit, or
19 other facility designed for, or capable of,

20 (i) generating 50 megawatts of electricity or more by
21 means of nuclear fission;

22 (ii) converting, enriching, fabricating, or
23 reprocessing uranium minerals or nuclear fuels, or

24 (iii) storing or disposing of radioactive wastes or
25 materials from a nuclear facility;

1 (b) "nuclear facility" does not include any
2 small-scale facility used solely for educational, research,
3 or medical purposes not connected with the commercial
4 generation of energy.

5 (2) "Facility," as defined in 75-20-104~~(7)~~(10) is
6 further defined to include any nuclear facility as defined
7 in subsection (1)(a) of this section."

8 ~~NEW SECTION.~~ Section 22. Water resources oversight
9 committee -- establishment -- appointment -- organization.
10 (1) There is a water resources oversight committee.

11 (a) The speaker of the house and the committee on
12 committees of the senate shall each appoint four members of
13 their respective house to serve on the committee. No more
14 than two members from each house may be from the same party.

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

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

19 (2) The water resources oversight committee shall work
20 with and oversee the efforts of state agencies charged with
21 the responsibility of developing and managing the state's
22 water resources, including the study of water marketing
23 issues provided for in [section 14] and the water
24 development program provided for in Title 85, chapter 1.
25 The committee may study any other issues related to water

1 development and conservation as its members consider
2 important to the people of the state.

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

8 (4) The committee may continue the work of the
9 previous water resources oversight committee of overseeing
10 the implementation of the water rights adjudication system
11 provided for in Title 85, chapter 2.

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

15 NEW SECTION. Section 23. Appropriation. (1) There is
16 appropriated to the department of natural resources and
17 conservation \$50,000 from the general fund for the purpose
18 of funding the study conducted under [section 14].

19 (2) There is appropriated to the legislative council
20 \$15,000 from the general fund for the purpose of supporting
21 the activities of the water resources oversight committee.

22 NEW SECTION. Section 24. Repealer. Section 85-2-104,
23 MCA, is repealed.

24 NEW SECTION. Section 25. Codification instruction.
25 Sections 7, 8, and 22 are intended to be codified as an

1 integral part of Title 85, chapter 1, part 2, and the
2 provisions of Title 85, chapter 1, apply to sections 7, 8,
3 and 22.

4 NEW SECTION. Section 26. Severability. If a part of
5 this act is invalid, all valid parts that are severable from
6 the invalid part remain in effect. If a part of this act is
7 invalid in one or more of its applications, the part remains
8 in effect in all valid applications that are severable from
9 the invalid applications.

10 NEW SECTION. Section 27. Effective date. This act is
11 effective on passage and approval.

-End-