

HOUSE BILL NO. 399

INTRODUCED BY O'KEEFE, WEEDING, IVERSON, HARPER
BY REQUEST OF THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

IN THE HOUSE

| | |
|-------------------|---|
| JANUARY 24, 1989 | INTRODUCED AND REFERRED TO COMMITTEE ON NATURAL RESOURCES. |
| JANUARY 25, 1989 | FIRST READING. |
| FEBRUARY 16, 1989 | COMMITTEE RECOMMEND BILL DO PASS AS AMENDED. REPORT ADOPTED. PRINTING REPORT. |
| FEBRUARY 18, 1989 | SECOND READING, DO PASS AS AMENDED. |
| FEBRUARY 20, 1989 | ENGROSSING REPORT. |
| FEBRUARY 21, 1989 | THIRD READING, PASSED. AYES, 97; NOES, 0. TRANSMITTED TO SENATE. |

IN THE SENATE

| | |
|-------------------|---|
| FEBRUARY 28, 1989 | INTRODUCED AND REFERRED TO COMMITTEE ON AGRICULTURE, LIVESTOCK & IRRIGATION. FIRST READING. |
| MARCH 18, 1989 | COMMITTEE RECOMMEND BILL BE CONCURRED IN. REPORT ADOPTED. |
| MARCH 20, 1989 | PASS CONSIDERATION. |
| MARCH 21, 1989 | SECOND READING, CONCURRED IN. |
| MARCH 23, 1989 | THIRD READING, CONCURRED IN. AYES, 41; NOES, 8. RETURNED TO HOUSE. |

MARCH 23, 1989

IN THE HOUSE

RECEIVED FROM SENATE.

SENT TO ENROLLING.

REPORTED CORRECTLY ENROLLED.

1 *House* BILL NO. *399*
2 INTRODUCED BY *Orfe* *Wendy Jones*
3 BY REQUEST OF THE DEPARTMENT OF NATURAL RESOURCES
4 AND CONSERVATION *Hayes*
5

6 A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING THE
7 WATER USE LAWS; REQUIRING A POSSESSORY INTEREST IN THE
8 PROPERTY ON WHICH WATER WILL BE APPLIED IN ORDER TO OBTAIN A
9 PERMIT OR TO APPROPRIATE GROUNDWATER; MODIFYING THE CRITERIA
10 FOR ISSUING A PERMIT AND FOR APPROVING A CHANGE APPLICATION;
11 PROVIDING FOR A TRIAL CHANGE IN APPROPRIATION RIGHT;
12 CLARIFYING THE JURISDICTION OF A WATER COMMISSIONER TO
13 MAINTAIN HEADGATES; AMENDING SECTIONS 85-2-306, 85-2-311,
14 85-2-402, AND 85-5-302, MCA; AND PROVIDING AN IMMEDIATE
15 EFFECTIVE DATE AND A RETROACTIVE APPLICABILITY DATE."
16

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

18 **Section 1.** Section 85-2-306, MCA, is amended to read:

19 **"85-2-306. Exceptions to permit requirements. (1)**

20 Groundwater may be appropriated only by a person who has
21 either a possessory interest in the property where the water
22 is to be put to beneficial use and exclusive property rights
23 in the groundwater development works or, if another person
24 has rights in the groundwater development works, the written
25 consent of the person with those property rights. Outside

1 the boundaries of a controlled groundwater area, a permit is
2 not required before appropriating groundwater by means of a
3 well or developed spring with a maximum appropriation of
4 less than 100 gallons per minute, except that a combined
5 appropriation from the same source from two or more wells or
6 developed springs exceeding this limitation requires a
7 permit. Within 60 days of completion of the well or
8 developed spring and appropriation of the groundwater for
9 beneficial use, the appropriator shall file a notice of
10 completion with the department on a form provided by the
11 department at its offices and at the offices of the county
12 clerk and recorders. Upon receipt of the notice, the
13 department shall review the notice and may, before issuing a
14 certificate of water right, return a defective notice for
15 correction or completion, together with the reasons for
16 returning it. A notice does not lose priority of filing
17 because of defects if the notice is corrected, completed,
18 and refiled with the department within 30 days or within a
19 further time as the department may allow, not to exceed 6
20 months. If a notice is not corrected and completed within
21 the time allowed, the priority date of appropriation shall
22 be the date of refiling a correct and complete notice with
23 the department. A certificate of water right may not be
24 issued until a correct and complete notice has been filed
25 with the department. The original of the certificate shall

1 be sent to the appropriator. The department shall keep a
2 copy of the certificate in its office in Helena. The date of
3 filing of the notice of completion is the date of priority
4 of the right.

5 (2) An appropriator of groundwater by means of a well
6 or developed spring, first put to beneficial use between
7 January 1, 1962, and July 1, 1973, who did not file a notice
8 of completion, as required by laws in force prior to April
9 14, 1981, with the county clerk and recorder shall file a
10 notice of completion, as provided in subsection (1) of this
11 section, with the department to perfect the water right. The
12 filing of a claim of existing water right pursuant to
13 85-2-221 is sufficient notice of completion under this
14 subsection. The priority date of the appropriation shall be
15 the date of the filing of a notice as provided in subsection
16 (1) of this section or the date of the filing of the claim
17 of existing water right. An appropriation under this
18 subsection is an existing right, and a permit is not
19 required; however, the department shall acknowledge the
20 receipt of a correct and complete filing of a notice of
21 completion, except that for an appropriation of less than
22 100 gallons per minute, the department shall issue a
23 certificate of water right. If a certificate is issued
24 under this section, a certificate need not be issued under
25 the adjudication proceedings provided for in 85-2-236.

1 (3) A permit is not required before constructing an
2 impoundment or pit and appropriating water for use by
3 livestock if the maximum capacity of the impoundment or pit
4 is less than 15 acre-feet and the appropriation is less than
5 30 acre-feet per year and is from a source other than a
6 perennial flowing stream and the impoundment or pit is to be
7 constructed on and will be accessible to a parcel of land
8 that is owned or under the control of the applicant and that
9 is 40 acres or larger. As used in this subsection, a
10 perennial flowing stream means a stream which historically
11 has flowed continuously at all seasons of the year, during
12 dry as well as wet years. However, within 60 days after
13 constructing the impoundment or pit, the appropriator shall
14 apply for a permit as prescribed by this part. Upon receipt
15 of a correct and complete application for a stockwater
16 provisional permit, the department shall then automatically
17 issue a provisional permit. If the department determines
18 after a hearing that the rights of other appropriators have
19 been or will be adversely affected, it may revoke the permit
20 or require the permittee to modify the impoundment or pit
21 and may then make the permit subject to such terms,
22 conditions, restrictions, or limitations it considers
23 necessary to protect the rights of other appropriators.

24 (4) A person may also appropriate water without
25 applying for or prior to receiving a permit under rules

adopted by the board under 85-2-113."

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

"85-2-311. Criteria for issuance of permit. (1) Except as provided in subsections (2) through (4), the department shall issue a permit if the applicant proves by substantial credible evidence that the following criteria are met:

(a) there are unappropriated waters in the source of supply at the proposed point of diversion:

(i) at times when the water can be put to the use proposed by the applicant;

(ii) in the amount the applicant seeks to appropriate; and

(iii) throughout during the period during in which the applicant seeks to appropriate, the amount requested is reasonably available;

(b) the water rights of a prior appropriator will not be adversely affected;

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

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

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

(f) the applicant has a possessory interest, or the written consent of the person with the possessory interest,

in the property where the water is to be put to beneficial use.

(2) The department may not issue a permit for an appropriation of 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water unless the applicant proves by clear and convincing evidence that:

(a) the criteria in subsection (1) are met;

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

(c) the proposed appropriation is a reasonable use. Such a finding shall be based on a consideration of the following:

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

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

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

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

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

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

(3) (a) The state of Montana has long recognized the importance of conserving its public waters and the necessity to maintain adequate water supplies for the state's water requirements, including requirements for reserved water rights held by the United States for federal reserved lands and in trust for the various Indian tribes within the state's boundaries. Although the state of Montana also recognizes that, under appropriate conditions, the out-of-state transportation and use of its public waters are not in conflict with the public welfare of its citizens or the conservation of its waters, the criteria in this subsection (3) must be met before out-of-state use may occur.

(b) The department may not issue a permit for the appropriation of water for withdrawal and transportation for use outside the state unless the applicant proves by clear and convincing evidence that:

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

(ii) the proposed out-of-state use of water is not

contrary to water conservation in Montana; and

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

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

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

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

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

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

(d) When applying for a permit or a lease to withdraw and transport water for use outside the state, the applicant shall submit to and comply with the laws of the state of Montana governing the appropriation, lease, and use of water.

(4) An appropriation, diversion, impoundment, use, restraint, or attempted appropriation, diversion,

1 impoundment, use, or restraint contrary to the provisions of
 2 this section is invalid. No officer, agent, agency, or
 3 employee of the state may knowingly permit, aid, or assist
 4 in any manner such unauthorized appropriation, diversion,
 5 impoundment, use, or other restraint. No person or
 6 corporation may, directly or indirectly, personally or
 7 through an agent, officer, or employee, attempt to
 8 appropriate, divert, impound, use, or otherwise restrain or
 9 control waters within the boundaries of this state except
 10 in accordance with this section."

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

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

16 (2) The department, after providing notice and
 17 opportunity for hearing pursuant to 85-2-307 through
 18 85-2-309, may approve an application for a trial change in
 19 appropriation right for a period not to exceed 3 years. In
 20 approving an application under this subsection, the
 21 department shall find from the available evidence that:

22 (a) substantial injury to any appropriator of water is
 23 unlikely to occur but that the precise effect of the change
 24 on other appropriators is difficult to determine in advance
 25 of the change; and

1 (b) the requirements of subsections (3)(b) through
 2 (3)(d) are met and it is likely that the other requirements
 3 of this section can be met.

4 {2}{3} Except as provided in subsections {3} {4}
 5 through {5} {6}, the department shall approve a change in
 6 appropriation right if the appropriator proves by
 7 substantial credible evidence that the following criteria
 8 are met:

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

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

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

16 (d) The applicant has a possessory interest, or the
 17 written consent of the person with the possessory interest,
 18 in the property where the water is to be put to beneficial
 19 use.

20 {3}{4} The department may not approve a change in
 21 purpose of use or place of use of an appropriation of 4,000
 22 or more acre-feet of water a year and 5.5 or more cubic feet
 23 per second of water unless the appropriator proves by
 24 substantial credible evidence that:

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

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

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

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

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

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

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

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

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

(a) the applicant proves by clear and convincing

evidence and the department finds that the criteria in subsections ~~(2)~~ (3) and ~~(3)~~ (4) are met; and

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

~~(5)~~(6) (a) The state of Montana has long recognized the importance of conserving its public waters and the necessity to maintain adequate water supplies for the state's water requirements, including requirements for reserved water rights held by the United States for federal reserved lands and in trust for the various Indian tribes within the state's boundaries. Although the state of Montana also recognizes that, under appropriate conditions, the out-of-state transportation and use of its public waters are not in conflict with the public welfare of its citizens or the conservation of its waters, the following criteria must be met before out-of-state use may occur:

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

(i) depending on the volume of water diverted or consumed, the applicable criteria and procedures of

1 subsection ~~†2†~~ (3) or ~~†3†~~ (4) are met;

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

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

7 (c) In determining whether the appropriator has proved
8 by clear and convincing evidence that the requirements of
9 subsections ~~†5†(b)†iii†~~ (6)(b)(ii) and ~~†5†(b)†iii†~~
10 (6)(b)(iii) will be met, the department and, if applicable,
11 the legislature shall consider the following factors:

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

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

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

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

23 (d) When applying for a change in appropriation right
24 to withdraw and transport water for use outside the state,
25 the applicant shall submit to and comply with the laws of

1 the state of Montana governing the appropriation and use of
2 water.

3 ~~†6†~~(7) For any application for a change in
4 appropriation right involving 4,000 or more acre-feet of
5 water a year and 5.5 or more cubic feet per second of water,
6 the department shall give notice of the proposed change in
7 accordance with 85-2-307 and shall hold one or more hearings
8 in accordance with 85-2-309 prior to its approval or denial
9 of the proposed change. The department shall provide notice
10 and may hold one or more hearings upon any other proposed
11 change if it determines that such a change might adversely
12 affect the rights of other persons.

13 ~~†7†~~(8) The department or the legislature, if
14 applicable, may approve a change subject to such terms,
15 conditions, restrictions, and limitations as it considers
16 necessary to satisfy the criteria of this section, including
17 limitations on the time for completion of the change. The
18 department may extend time limits specified in the change
19 approval under the applicable criteria and procedures of
20 85-2-312~~†3†~~(5).

21 ~~†8†~~(9) If a change is not completed as approved by the
22 department or legislature or if the terms, conditions,
23 restrictions, and limitations of the change approval are not
24 complied with, the department may, after notice and
25 opportunity for hearing, require the appropriator to show

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

4 {9}{10} The original of a change approval issued by the
5 department must be sent to the applicant, and a duplicate
6 must be kept in the office of the department in Helena.

7 {10}{11} A person holding an issued permit or change
8 approval that has not been perfected may change the place of
9 diversion, place of use, purpose of use, or place of storage
10 by filing an application for change pursuant to this
11 section.

12 {11}{12} A change in appropriation right contrary to
13 the provisions of this section is invalid. No officer,
14 agent, agency, or employee of the state may knowingly
15 permit, aid, or assist in any manner such unauthorized
16 change in appropriation right. No person or corporation
17 may, directly or indirectly, personally or through an agent,
18 officer, or employee, attempt to change an appropriation
19 right except in accordance with this section."

20 **Section 4.** Section 85-5-302, MCA, is amended to read:

21 "85-5-302. **Maintenance of headgates and measuring**
22 **devices.** All persons using water under-a-decree from any
23 stream or ditch whereon a water commissioner is appointed
24 ~~shall-be~~ is required to have suitable headgates at the point
25 ~~wherein~~ where a ditch taps a stream and shall also, at some

1 suitable place on the ditch and as near the head thereof as
2 practicable, place and maintain a proper measuring box,
3 weir, or other appliance for the measurement of the waters
4 flowing in such the ditch. In case any person or persons
5 shall fail to place or maintain a proper measuring
6 appliance, it ~~shall--be~~ is the duty of such the water
7 commissioner not to apportion or distribute any water
8 through ~~said~~ the ditch. The commissioner ~~must~~ shall notify
9 all parties interested by ~~registered-or~~ certified mail or in
10 person 1 week before making the annual repair or cleaning of
11 any stream or ditch or performing necessary labor or
12 expenses to divert water to any ditch. The sending of a
13 ~~registered-or~~ certified letter to the last known post-office
14 address of any such interested party ~~will-be~~ is prima facie
15 evidence of the fact that he was duly notified. Any work in
16 the way of repairing a ditch made necessary by any emergency
17 may be done without such notice when injury would result
18 from delay."

19 NEW SECTION. **Section 5.** Extension of authority. Any
20 existing authority to make rules on the subject of the
21 provisions of [this act] is extended to the provisions of
22 [this act].

23 NEW SECTION. **Section 6.** Retroactive applicability.
24 [Sections 1 through 7] apply retroactively, within the
25 meaning of 1-2-109, to all proceedings pending before the

LC 0224/01

1 department of natural resources and conservation on [the
2 effective date of this act].

3 NEW SECTION. **Section 7.** Effective date. [This act] is
4 effective on passage and approval.

-End-

STATE OF MONTANA - FISCAL NOTE

Form BD-15

In compliance with a written request, there is hereby submitted a Fiscal Note for HB399, as introduced.

DESCRIPTION OF PROPOSED LEGISLATION:

HB399 would require that a possessory interest in the proposed place of use would be required by the developer of a water use project or consent of the owner of the proposed place of use before a water right certificate, water right permit, or water right change authorization can be issued by the Department of Natural Resources (DNRC). The revisions also provide that water must be reasonably available for appropriation at the proposed point of diversion before a permit can be issued. A water commissioner will have authority to inspect and control all diversion structures within jurisdictional areas.


FISCAL IMPACT: None

ASSUMPTIONS:

1. DNRC will absorb the costs associated with the proposed revisions to the water right statutes with existing resources and through the anticipated savings of less work required for responding to complaints.
2. The net result is that no additional costs are contemplated with the proposed revisions.

EFFECT ON COUNTY OR OTHER LOCAL REVENUE OR EXPENDITURES:

Proving ownership interest in property may require applicants to retrieve copies of documents from county clerk and recorders for proof of ownership information. If, for example, one-third of the persons filing notice of completions required such information, then 1,100 could be anticipated and, at \$5.00 each, an additional \$5,500 would be generated at the county offices.

 2/1/89
RAY SHACKLEFORD, BUDGET DIRECTOR DATE
OFFICE OF BUDGET AND PROGRAM PLANNING

 2/02/89
MARK O'KEEFE, PRIMARY SPONSOR DATE

Fiscal Note for HB399, as introduced

HB 399

APPROVED BY COMM. ON
NATURAL RESOURCES

HOUSE BILL NO. 399

INTRODUCED BY O'KEEFE, WEEDING, IVERSON, HARPER
BY REQUEST OF THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING THE
WATER USE LAWS; REQUIRING A POSSESSORY INTEREST IN THE
PROPERTY ON WHICH WATER WILL BE APPLIED IN ORDER TO OBTAIN A
PERMIT OR TO APPROPRIATE GROUNDWATER; MODIFYING THE CRITERIA
FOR ISSUING A PERMIT AND FOR APPROVING A CHANGE APPLICATION;
PROVIDING FOR A TRIAL CHANGE IN APPROPRIATION RIGHT;
CLARIFYING THE JURISDICTION OF A WATER COMMISSIONER TO
MAINTAIN HEADGATES; AMENDING SECTIONS 85-2-306, 85-2-311,
85-2-402, AND 85-5-302, MCA; AND PROVIDING AN IMMEDIATE
EFFECTIVE DATE AND A RETROACTIVE APPLICABILITY DATE."

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

Section 1. Section 85-2-306, MCA, is amended to read:

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Groundwater may be appropriated only by a person who has
either a possessory interest in the property where the water
is to be put to beneficial use and exclusive property rights
in the groundwater development works or, if another person
has rights in the groundwater development works, the written
consent of the person with those property rights. Outside

the boundaries of a controlled groundwater area, a permit is
not required before appropriating groundwater by means of a
well or developed spring with a maximum appropriation of
less than 100 gallons per minute, except that a combined
appropriation from the same source from two or more wells or
developed springs exceeding this limitation requires a
permit. Within 60 days of completion of the well or
developed spring and appropriation of the groundwater for
beneficial use, the appropriator shall file a notice of
completion with the department on a form provided by the
department at its offices and at the offices of the county
clerk and recorders. Upon receipt of the notice, the
department shall review the notice and may, before issuing a
certificate of water right, return a defective notice for
correction or completion, together with the reasons for
returning it. A notice does not lose priority of filing
because of defects if the notice is corrected, completed,
and refiled with the department within 30 days or within a
further time as the department may allow, not to exceed 6
months. If a notice is not corrected and completed within
the time allowed, the priority date of appropriation shall
be the date of refileing a correct and complete notice with
the department. A certificate of water right may not be
issued until a correct and complete notice has been filed
with the department. The original of the certificate shall

1 be sent to the appropriator. The department shall keep a
2 copy of the certificate in its office in Helena. The date of
3 filing of the notice of completion is the date of priority
4 of the right.

5 (2) An appropriator of groundwater by means of a well
6 or developed spring, first put to beneficial use between
7 January 1, 1962, and July 1, 1973, who did not file a notice
8 of completion, as required by laws in force prior to April
9 14, 1981, with the county clerk and recorder shall file a
10 notice of completion, as provided in subsection (1) of this
11 section, with the department to perfect the water right. The
12 filing of a claim of existing water right pursuant to
13 85-2-221 is sufficient notice of completion under this
14 subsection. The priority date of the appropriation shall be
15 the date of the filing of a notice as provided in subsection
16 (1) of this section or the date of the filing of the claim
17 of existing water right. An appropriation under this
18 subsection is an existing right, and a permit is not
19 required; however, the department shall acknowledge the
20 receipt of a correct and complete filing of a notice of
21 completion, except that for an appropriation of less than
22 100 gallons per minute, the department shall issue a
23 certificate of water right. If a certificate is issued
24 under this section, a certificate need not be issued under
25 the adjudication proceedings provided for in 85-2-236.

1 (3) A permit is not required before constructing an
2 impoundment or pit and appropriating water for use by
3 livestock if the maximum capacity of the impoundment or pit
4 is less than 15 acre-feet and the appropriation is less than
5 30 acre-feet per year and is from a source other than a
6 perennial flowing stream and the impoundment or pit is to be
7 constructed on and will be accessible to a parcel of land
8 that is owned or under the control of the applicant and that
9 is 40 acres or larger. As used in this subsection, a
10 perennial flowing stream means a stream which historically
11 has flowed continuously at all seasons of the year, during
12 dry as well as wet years. However, within 60 days after
13 constructing the impoundment or pit, the appropriator shall
14 apply for a permit as prescribed by this part. Upon receipt
15 of a correct and complete application for a stockwater
16 provisional permit, the department shall then automatically
17 issue a provisional permit. If the department determines
18 after a hearing that the rights of other appropriators have
19 been or will be adversely affected, it may revoke the permit
20 or require the permittee to modify the impoundment or pit
21 and may then make the permit subject to such terms,
22 conditions, restrictions, or limitations it considers
23 necessary to protect the rights of other appropriators.

24 (4) A person may also appropriate water without
25 applying for or prior to receiving a permit under rules

1 adopted by the board under 85-2-113."

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

3 "85-2-311. Criteria for issuance of permit. (1) Except
4 as provided in subsections (2) through (4), the department
5 shall issue a permit if the applicant proves by substantial
6 credible evidence that the following criteria are met:

7 (a) there are unappropriated waters in the source of
8 supply at the proposed point of diversion;

9 (i) at times when the water can be put to the use
10 proposed by the applicant;

11 (ii) in the amount the applicant seeks to appropriate;
12 and

13 (iii) throughout during the period during in which the
14 applicant seeks to appropriate, the amount requested is
15 reasonably available;

16 (b) the water rights of a prior appropriator will not
17 be adversely affected;

18 (c) the proposed means of diversion, construction, and
19 operation of the appropriation works are adequate;

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

21 (e) the proposed use will not interfere unreasonably
22 with other planned uses or developments for which a permit
23 has been issued or for which water has been reserved; and

24 (f) the applicant has a possessory interest, or the
25 written consent of the person with the possessory interest,

1 in the property where the water is to be put to beneficial
2 use.

3 (2) The department may not issue a permit for an
4 appropriation of 4,000 or more acre-feet of water a year and
5 5.5 or more cubic feet per second of water unless the
6 applicant proves by clear and convincing evidence that:

7 (a) the criteria in subsection (1) are met;

8 (b) the rights of a prior appropriator will not be
9 adversely affected;

10 (c) the proposed appropriation is a reasonable use.
11 Such a finding shall be based on a consideration of the
12 following:

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

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

19 (iii) the effects on the quantity and quality of water
20 for existing beneficial uses in the source of supply;

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

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

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

(3) (a) The state of Montana has long recognized the importance of conserving its public waters and the necessity to maintain adequate water supplies for the state's water requirements, including requirements for reserved water rights held by the United States for federal reserved lands and in trust for the various Indian tribes within the state's boundaries. Although the state of Montana also recognizes that, under appropriate conditions, the out-of-state transportation and use of its public waters are not in conflict with the public welfare of its citizens or the conservation of its waters, the criteria in this subsection (3) must be met before out-of-state use may occur.

(b) The department may not issue a permit for the appropriation of water for withdrawal and transportation for use outside the state unless the applicant proves by clear and convincing evidence that:

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

(ii) the proposed out-of-state use of water is not

contrary to water conservation in Montana; and

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

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

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

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

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

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

(d) When applying for a permit or a lease to withdraw and transport water for use outside the state, the applicant shall submit to and comply with the laws of the state of Montana governing the appropriation, lease, and use of water.

(4) An appropriation, diversion, impoundment, use, restraint, or attempted appropriation, diversion,

1 impoundment, use, or restraint contrary to the provisions of
 2 this section is invalid. No officer, agent, agency, or
 3 employee of the state may knowingly permit, aid, or assist
 4 in any manner such unauthorized appropriation, diversion,
 5 impoundment, use, or other restraint. No person or
 6 corporation may, directly or indirectly, personally or
 7 through an agent, officer, or employee, attempt to
 8 appropriate, divert, impound, use, or otherwise restrain or
 9 control waters within the boundaries of this state except
 10 in accordance with this section."

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

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

16 (2) The department, after providing notice and
 17 opportunity for hearing pursuant to 85-2-307 through
 18 85-2-309, may approve an application for a trial change in
 19 appropriation right for a period not to exceed 3 years. In
 20 approving an application under this subsection, the
 21 department shall find from the available evidence that:

22 (a) substantial injury to any appropriator of water is
 23 unlikely to occur but that the precise effect of the change
 24 on other appropriators is difficult to determine in advance
 25 of the change; and

1 (b) the requirements of subsections (3)(b) through
 2 (3)(d) are met and it is likely that the other requirements
 3 of this section can be met.

4 (3) (A) IF THE DEPARTMENT APPROVES AN APPLICATION FOR
 5 A TRIAL CHANGE IN APPROPRIATION RIGHT UNDER SUBSECTION (2):

6 (I) THE APPROPRIATOR SHALL ALLOW ACCESS BY THE
 7 DEPARTMENT THROUGHOUT THE TRIAL PERIOD TO THE SITE WHERE THE
 8 CHANGE IS BEING IMPLEMENTED;

9 (II) THE DEPARTMENT SHALL INSPECT THE SITE UPON THE
 10 REQUEST OF ANY PERSON HOLDING A VALID WATER RIGHT IN THE
 11 SOURCE OF SUPPLY; AND

12 (III) ANY WATER USER MAY, THROUGHOUT THE TRIAL PERIOD,
 13 PETITION THE DEPARTMENT TO TERMINATE THE TRIAL CHANGE AND
 14 DENY THE APPLICATION FOR A CHANGE IN APPROPRIATION RIGHT
 15 BECAUSE WATER USERS ARE EXPERIENCING ACTUAL ADVERSE EFFECTS
 16 OF THE TRIAL CHANGE. THE DEPARTMENT SHALL INVESTIGATE THE
 17 ALLEGATIONS CONTAINED IN A PETITION AND, IF IT DETERMINES
 18 THAT THERE ARE ADVERSE EFFECTS, THE TRIAL PERIOD MUST BE
 19 TERMINATED AND THE APPLICATION FOR CHANGE IN APPROPRIATION
 20 RIGHT MUST BE DENIED UNLESS THE APPLICANT CAN ESTABLISH BY
 21 CLEAR AND CONVINCING EVIDENCE THAT THE ADVERSE EFFECTS ARE
 22 CAUSED BY UNIQUE CLIMATOLOGICAL EVENTS OR OTHER UNFORESEEN
 23 CIRCUMSTANCES THAT WILL NOT RECUR THROUGHOUT THE REMAINDER
 24 OF THE TRIAL PERIOD.

25 (B) IF THE APPLICATION FOR CHANGE IN APPROPRIATION

RIGHT IS DENIED DURING OR AFTER THE TRIAL PERIOD, THE
DEPARTMENT SHALL REQUIRE THE APPROPRIATOR TO REMOVE THE
DIVERSION STRUCTURES OR FACILITIES THAT IMPLEMENTED THE
TRIAL CHANGE.

†2††3†(4) Except as provided in subsections †3† †4†
(5) through †5† †6† (7), the department shall approve a
change in appropriation right if the appropriator proves by
substantial credible evidence that the following criteria
are met:

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

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

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

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

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

(a) the criteria in subsection †2† †3† (4) are met;

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

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

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

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

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

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

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

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

1 (a) the applicant proves by clear and convincing
2 evidence and the department finds that the criteria in
3 subsections ~~(2)~~ (3) (4) and ~~(3)~~ (4) (5) are met; and

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

7 ~~(5)~~~~(6)~~(7) (a) The state of Montana has long recognized
8 the importance of conserving its public waters and the
9 necessity to maintain adequate water supplies for the
10 state's water requirements, including requirements for
11 reserved water rights held by the United States for federal
12 reserved lands and in trust for the various Indian tribes
13 within the state's boundaries. Although the state of Montana
14 also recognizes that, under appropriate conditions, the
15 out-of-state transportation and use of its public waters are
16 not in conflict with the public welfare of its citizens or
17 the conservation of its waters, the following criteria must
18 be met before out-of-state use may occur:

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

25 (i) depending on the volume of water diverted or

1 consumed, the applicable criteria and procedures of
2 subsection ~~(2)~~ (3) (4) or ~~(3)~~ (4) (5) are met;

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

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

8 (c) In determining whether the appropriator has proved
9 by clear and convincing evidence that the requirements of
10 subsections ~~(5)~~~~(b)~~~~(iii)~~ (6)~~(b)~~~~(iii)~~ (7)(B)(II) and ~~(5)~~~~(b)~~~~(iii)~~
11 (6)~~(b)~~~~(iii)~~ (7)(B)(III) will be met, the department and, if
12 applicable, the legislature shall consider the following
13 factors:

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

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

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

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

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

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

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

15 ~~(7)~~~~(8)~~~~(9)~~ The department or the legislature, if
16 applicable, may approve a change subject to such terms,
17 conditions, restrictions, and limitations as it considers
18 necessary to satisfy the criteria of this section, including
19 limitations on the time for completion of the change. The
20 department may extend time limits specified in the change
21 approval under the applicable criteria and procedures of
22 85-2-312~~(3)~~~~(5)~~.

23 ~~(8)~~~~(9)~~~~(10)~~ If a change is not completed as approved by
24 the department or legislature or if the terms, conditions,
25 restrictions, and limitations of the change approval are not

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

6 ~~(9)~~~~(10)~~~~(11)~~ The original of a change approval issued by
7 the department must be sent to the applicant, and a
8 duplicate must be kept in the office of the department in
9 Helena.

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

15 ~~(11)~~~~(12)~~~~(13)~~ A change in appropriation right contrary
16 to the provisions of this section is invalid. No officer,
17 agent, agency, or employee of the state may knowingly
18 permit, aid, or assist in any manner such unauthorized
19 change in appropriation right. No person or corporation
20 may, directly or indirectly, personally or through an agent,
21 officer, or employee, attempt to change an appropriation
22 right except in accordance with this section."

23 **Section 4.** Section 85-5-302, MCA, is amended to read:

24 "85-5-302. Maintenance of headgates and measuring
25 devices. All persons using water under-a-decree from any

1 stream or ditch whereon a water commissioner is appointed
 2 ~~shall--be~~ is ARE required to have suitable headgates at the
 3 point ~~wherein~~ where a ditch taps a stream and shall also, at
 4 some suitable place on the ditch and as near the head
 5 thereof as practicable, place and maintain a proper
 6 measuring box, weir, or other appliance for the measurement
 7 of the waters flowing in ~~such the~~ ditch. In case any person
 8 or persons shall fail to place or maintain a proper
 9 measuring appliance, it ~~shall--be~~ is the duty of ~~such the~~
 10 water commissioner not to apportion or distribute any water
 11 through ~~said the~~ ditch. The commissioner ~~must~~ shall notify
 12 all parties interested by ~~registered-or~~ certified mail or in
 13 person 1 week before making the annual repair or cleaning of
 14 any stream or ditch or performing necessary labor or
 15 expenses to divert water to any ditch. The sending of a
 16 ~~registered-or~~ certified letter to the last known post-office
 17 address of any ~~such~~ interested party ~~will-be~~ is prima facie
 18 evidence of the fact that he was duly notified. Any work in
 19 the way of repairing a ditch made necessary by any emergency
 20 may be done without such notice when injury would result
 21 from delay."

22 NEW SECTION. Section 5. Extension of authority. Any
 23 existing authority to make rules on the subject of the
 24 provisions of [this act] is extended to the provisions of
 25 [this act].

1 NEW SECTION. Section 6. Retroactive applicability.
 2 [Sections 1 through 7] apply retroactively, within the
 3 meaning of 1-2-109, to all proceedings pending before the
 4 department of natural resources and conservation on [the
 5 effective date of this act].

6 NEW SECTION. Section 7. Effective date. [This act] is
 7 effective on passage and approval.

-End-

HOUSE BILL NO. 399

INTRODUCED BY O'KEEFE, WEEDING, IVERSON, HARPER
BY REQUEST OF THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING THE
WATER USE LAWS; REQUIRING A POSSESSORY INTEREST IN THE
PROPERTY ON WHICH WATER WILL BE APPLIED IN ORDER TO OBTAIN A
PERMIT OR TO APPROPRIATE GROUNDWATER; MODIFYING THE CRITERIA
FOR ISSUING A PERMIT AND FOR APPROVING A CHANGE APPLICATION;
~~PROVIDING--FOR--A--TRIAL--CHANGE--IN--APPROPRIATION--RIGHT;~~
CLARIFYING THE JURISDICTION OF A WATER COMMISSIONER TO
MAINTAIN HEADGATES; AMENDING SECTIONS 85-2-306, 85-2-311,
85-2-402, AND 85-5-302, MCA; AND PROVIDING AN IMMEDIATE
EFFECTIVE DATE ~~AND-A-RETROACTIVE-APPLICABILITY-DATE.~~"

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

Section 1. Section 85-2-306, MCA, is amended to read:

"85-2-306. Exceptions to permit requirements. (1)
Groundwater may be appropriated only by a person who has
either a possessory interest in the property where the water
is to be put to beneficial use and exclusive property rights
in the groundwater development works or, if another person
has rights in the groundwater development works, the written
consent of the person with those property rights. Outside

the boundaries of a controlled groundwater area, a permit is
not required before appropriating groundwater by means of a
well or developed spring with a maximum appropriation of
less than 100 gallons per minute, except that a combined
appropriation from the same source from two or more wells or
developed springs exceeding this limitation requires a
permit. Within 60 days of completion of the well or
developed spring and appropriation of the groundwater for
beneficial use, the appropriator shall file a notice of
completion with the department on a form provided by the
department at its offices and at the offices of the county
clerk and recorders. Upon receipt of the notice, the
department shall review the notice and may, before issuing a
certificate of water right, return a defective notice for
correction or completion, together with the reasons for
returning it. A notice does not lose priority of filing
because of defects if the notice is corrected, completed,
and refiled with the department within 30 days or within a
further time as the department may allow, not to exceed 6
months. If a notice is not corrected and completed within
the time allowed, the priority date of appropriation shall
be the date of refiled a correct and complete notice with
the department. A certificate of water right may not be
issued until a correct and complete notice has been filed
with the department. The original of the certificate shall

1 be sent to the appropriator. The department shall keep a
2 copy of the certificate in its office in Helena. The date of
3 filing of the notice of completion is the date of priority
4 of the right.

5 (2) An appropriator of groundwater by means of a well
6 or developed spring, first put to beneficial use between
7 January 1, 1962, and July 1, 1973, who did not file a notice
8 of completion, as required by laws in force prior to April
9 14, 1981, with the county clerk and recorder shall file a
10 notice of completion, as provided in subsection (1) of this
11 section, with the department to perfect the water right. The
12 filing of a claim of existing water right pursuant to
13 85-2-221 is sufficient notice of completion under this
14 subsection. The priority date of the appropriation shall be
15 the date of the filing of a notice as provided in subsection
16 (1) of this section or the date of the filing of the claim
17 of existing water right. An appropriation under this
18 subsection is an existing right, and a permit is not
19 required; however, the department shall acknowledge the
20 receipt of a correct and complete filing of a notice of
21 completion, except that for an appropriation of less than
22 100 gallons per minute, the department shall issue a
23 certificate of water right. If a certificate is issued
24 under this section, a certificate need not be issued under
25 the adjudication proceedings provided for in 85-2-236.

1 (3) A permit is not required before constructing an
2 impoundment or pit and appropriating water for use by
3 livestock if the maximum capacity of the impoundment or pit
4 is less than 15 acre-feet and the appropriation is less than
5 30 acre-feet per year and is from a source other than a
6 perennial flowing stream and the impoundment or pit is to be
7 constructed on and will be accessible to a parcel of land
8 that is owned or under the control of the applicant and that
9 is 40 acres or larger. As used in this subsection, a
10 perennial flowing stream means a stream which historically
11 has flowed continuously at all seasons of the year, during
12 dry as well as wet years. However, within 60 days after
13 constructing the impoundment or pit, the appropriator shall
14 apply for a permit as prescribed by this part. Upon receipt
15 of a correct and complete application for a stockwater
16 provisional permit, the department shall then automatically
17 issue a provisional permit. If the department determines
18 after a hearing that the rights of other appropriators have
19 been or will be adversely affected, it may revoke the permit
20 or require the permittee to modify the impoundment or pit
21 and may then make the permit subject to such terms,
22 conditions, restrictions, or limitations it considers
23 necessary to protect the rights of other appropriators.

24 (4) A person may also appropriate water without
25 applying for or prior to receiving a permit under rules

adopted by the board under 85-2-113."

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

"85-2-311. Criteria for issuance of permit. (1) Except as provided in subsections (2) through (4), the department shall issue a permit if the applicant proves by substantial credible evidence that the following criteria are met:

(a) there are unappropriated waters in the source of supply at the proposed point of diversion:

(i) at times when the water can be put to the use proposed by the applicant;

(ii) in the amount the applicant seeks to appropriate; and

(iii) throughout during the period during in which the applicant seeks to appropriate, the amount requested is reasonably available;

(b) the water rights of a prior appropriator will not be adversely affected;

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

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

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

(f) the applicant has a possessory interest, or the written consent of the person with the possessory interest,

in the property where the water is to be put to beneficial use.

(2) The department may not issue a permit for an appropriation of 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water unless the applicant proves by clear and convincing evidence that:

(a) the criteria in subsection (1) are met;

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

(c) the proposed appropriation is a reasonable use. Such a finding shall be based on a consideration of the following:

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

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

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

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

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

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

(3) (a) The state of Montana has long recognized the importance of conserving its public waters and the necessity to maintain adequate water supplies for the state's water requirements, including requirements for reserved water rights held by the United States for federal reserved lands and in trust for the various Indian tribes within the state's boundaries. Although the state of Montana also recognizes that, under appropriate conditions, the out-of-state transportation and use of its public waters are not in conflict with the public welfare of its citizens or the conservation of its waters, the criteria in this subsection (3) must be met before out-of-state use may occur.

(b) The department may not issue a permit for the appropriation of water for withdrawal and transportation for use outside the state unless the applicant proves by clear and convincing evidence that:

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

(ii) the proposed out-of-state use of water is not

contrary to water conservation in Montana; and

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

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

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

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

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

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

(d) When applying for a permit or a lease to withdraw and transport water for use outside the state, the applicant shall submit to and comply with the laws of the state of Montana governing the appropriation, lease, and use of water.

(4) An appropriation, diversion, impoundment, use, restraint, or attempted appropriation, diversion,

1 impoundment, use, or restraint contrary to the provisions of
 2 this section is invalid. No officer, agent, agency, or
 3 employee of the state may knowingly permit, aid, or assist
 4 in any manner such unauthorized appropriation, diversion,
 5 impoundment, use, or other restraint. No person or
 6 corporation may, directly or indirectly, personally or
 7 through an agent, officer, or employee, attempt to
 8 appropriate, divert, impound, use, or otherwise restrain or
 9 control waters within the boundaries of this state except
 10 in accordance with this section."

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

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

16 (2) The department, after providing notice and
 17 opportunity for hearing pursuant to 85-2-307 through
 18 85-2-309, may approve an application for a trial change in
 19 appropriation right for a period not to exceed 3 years, in
 20 approving an application under this subsection, the
 21 department shall find from the available evidence that:

22 (a) substantial injury to any appropriator of water is
 23 unlikely to occur but that the precise effect of the change
 24 on other appropriators is difficult to determine in advance
 25 of the change, and

1 (b) the requirements of subsections (3)(b) through
 2 (3)(d) are met and it is likely that the other requirements
 3 of this section can be met;

4 (3) (A) if the department approves an application for
 5 a trial change in appropriation right under subsection (2);

6 (i) the appropriator shall allow access by the
 7 department throughout the trial period to the site where the
 8 change is being implemented;

9 (ii) the department shall inspect the site upon the
 10 request of any person holding a valid water right in the
 11 source of supply; and

12 (iii) any water user may, throughout the trial period,
 13 petition the department to terminate the trial change and
 14 deny the application for a change in appropriation right
 15 because water users are experiencing actual adverse effects
 16 of the trial change; the department shall investigate the
 17 allegations contained in a petition and, if it determines
 18 that there are adverse effects, the trial period must be
 19 terminated and the application for change in appropriation
 20 right must be denied unless the applicant can establish by
 21 clear and convincing evidence that the adverse effects are
 22 caused by unique climatological events or other unforeseen
 23 circumstances that will not recur throughout the remainder
 24 of the trial period;

25 (B) if the application for change in appropriation

~~RIGHT--IS--DENIED--DURING--OR--AFTER--THE--TRIAL--PERIOD,--THE
DEPARTMENT--SHALL--REQUIRE--THE--APPROPRIATOR--TO--REMOVE--THE
DIVERSION--STRUCTURES--OR--FACILITIES--THAT--IMPLEMENTED--THE
TRIAL--CHANGE.~~

~~{2}{3}{4}(2)~~ Except as provided in subsections ~~{3} {4}~~
~~{5} (3)~~ through ~~{5} {6} {7} (5)~~, the department shall
approve a change in appropriation right if the appropriator
proves by substantial credible evidence that the following
criteria are met:

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

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

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

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

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

(a) the criteria in subsection ~~{2} {3} {4}~~ (2) are
met;

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

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

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

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

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

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

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

~~{4}{5}{6}(4)~~ The department may not approve a change
in purpose of use or place of use for a diversion that
results in 4,000 or more acre-feet of water a year and 5.5

1 or more cubic feet per second of water being consumed
2 unless:

3 (a) the applicant proves by clear and convincing
4 evidence and the department finds that the criteria in
5 subsections ~~†2†~~ ~~†3†~~ ~~†4†~~ (2) and ~~†3†~~ ~~†4†~~ ~~†5†~~ (3) are met; and

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

9 ~~†5†~~~~†6†~~~~†7†~~(5) (a) The state of Montana has long
10 recognized the importance of conserving its public waters
11 and the necessity to maintain adequate water supplies for
12 the state's water requirements, including requirements for
13 reserved water rights held by the United States for federal
14 reserved lands and in trust for the various Indian tribes
15 within the state's boundaries. Although the state of Montana
16 also recognizes that, under appropriate conditions, the
17 out-of-state transportation and use of its public waters are
18 not in conflict with the public welfare of its citizens or
19 the conservation of its waters, the following criteria must
20 be met before out-of-state use may occur:

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

1 approves after one or more public hearings that:

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

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

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

10 (c) In determining whether the appropriator has proved
11 by clear and convincing evidence that the requirements of
12 subsections ~~†5†~~~~†b†~~~~†iii†~~ ~~†6†~~~~†b†~~~~†iii†~~ ~~†7†~~~~†B†~~~~†iii†~~ (5)(B)(II) and
13 ~~†5†~~~~†b†~~~~†iii†~~ ~~†6†~~~~†b†~~~~†iii†~~ ~~†7†~~~~†B†~~~~†iii†~~ (5)(B)(III) will be met,
14 the department and, if applicable, the legislature shall
15 consider the following factors:

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

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

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

25 (iv) the demands placed on the applicant's supply in

1 the state where the applicant intends to use the water.

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

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

17 ~~(7)~~~~(8)~~~~(9)~~~~(7)~~ The department or the legislature, if
18 applicable, may approve a change subject to such terms,
19 conditions, restrictions, and limitations as it considers
20 necessary to satisfy the criteria of this section, including
21 limitations on the time for completion of the change. The
22 department may extend time limits specified in the change
23 approval under the applicable criteria and procedures of
24 85-2-312~~(3)~~~~(5)~~.

25 ~~(8)~~~~(9)~~~~(10)~~~~(8)~~ If a change is not completed as approved

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

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

13 ~~(10)~~~~(11)~~~~(12)~~~~(10)~~ A person holding an issued permit or
14 change approval that has not been perfected may change the
15 place of diversion, place of use, purpose of use, or place
16 of storage by filing an application for change pursuant to
17 this section.

18 ~~(11)~~~~(12)~~~~(13)~~~~(11)~~ A change in appropriation right
19 contrary to the provisions of this section is invalid. No
20 officer, agent, agency, or employee of the state may
21 knowingly permit, aid, or assist in any manner such
22 unauthorized change in appropriation right. No person or
23 corporation may, directly or indirectly, personally or
24 through an agent, officer, or employee, attempt to change an
25 appropriation right except in accordance with this section."

Section 4. Section 85-5-302, MCA, is amended to read:

***85-5-302. Maintenance of headgates and measuring devices.** All persons using water under a decree from any stream or ditch whereon a water commissioner is appointed ~~shall--be~~ is ARE required to have suitable headgates at the point ~~wherein where~~ a ditch taps a stream and shall also, at some suitable place on the ditch and as near the head thereof as practicable, place and maintain a proper measuring box, weir, or other appliance for the measurement of the waters flowing in ~~such the~~ ditch. In case any person or persons shall fail to place or maintain a proper measuring appliance, it ~~shall--be~~ is the duty of ~~such the~~ water commissioner not to apportion or distribute any water through ~~said the~~ ditch. The commissioner ~~must~~ shall notify all parties interested by ~~registered-or~~ certified mail or in person 1 week before making the annual repair or cleaning of any stream or ditch or performing necessary labor or expenses to divert water to any ditch. The sending of a ~~registered-or~~ certified letter to the last known post-office address of any such interested party ~~will-be~~ is prima facie evidence of the fact that he was duly notified. Any work in the way of repairing a ditch made necessary by any emergency may be done without such notice when injury would result from delay."

NEW SECTION. **Section 5.** Extension of authority. Any

existing authority to make rules on the subject of the provisions of [this act] is extended to the provisions of [this act].

~~NEW-SECTION--Section 6--Retroactive--applicability--
{Sections--1--through--7}--apply--retroactively,--within-the
meaning-of-1-2-109,--to-all-proceedings--pending--before--the
department--of--natural--resources--and-conservation-on-{the
effective-date-of-this-act}:~~

NEW SECTION. **Section 6.** Effective date. [This act] is effective on passage and approval.

-End-

HOUSE BILL NO. 399

INTRODUCED BY O'KEEFE, WEEDING, IVERSON, HARPER
BY REQUEST OF THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING THE
WATER USE LAWS; REQUIRING A POSSESSORY INTEREST IN THE
PROPERTY ON WHICH WATER WILL BE APPLIED IN ORDER TO OBTAIN A
PERMIT OR TO APPROPRIATE GROUNDWATER; MODIFYING THE CRITERIA
FOR ISSUING A PERMIT AND FOR APPROVING A CHANGE APPLICATION;
~~PROVIDING--FOR--A--TRIAL--CHANGE--IN--APPROPRIATION--RIGHT;~~
CLARIFYING THE JURISDICTION OF A WATER COMMISSIONER TO
MAINTAIN HEADGATES; AMENDING SECTIONS 85-2-306, 85-2-311,
85-2-402, AND 85-5-302, MCA; AND PROVIDING AN IMMEDIATE
EFFECTIVE DATE ~~AND-A-RETROACTIVE-APPLICABILITY-DATE."~~

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

Section 1. Section 85-2-306, MCA, is amended to read:

"85-2-306. Exceptions to permit requirements. (1)
Groundwater may be appropriated only by a person who has
either a possessory interest in the property where the water
is to be put to beneficial use and exclusive property rights
in the groundwater development works or, if another person
has rights in the groundwater development works, the written
consent of the person with those property rights. Outside

the boundaries of a controlled groundwater area, a permit is
not required before appropriating groundwater by means of a
well or developed spring with a maximum appropriation of
less than 100 gallons per minute, except that a combined
appropriation from the same source from two or more wells or
developed springs exceeding this limitation requires a
permit. Within 60 days of completion of the well or
developed spring and appropriation of the groundwater for
beneficial use, the appropriator shall file a notice of
completion with the department on a form provided by the
department at its offices and at the offices of the county
clerk and recorders. Upon receipt of the notice, the
department shall review the notice and may, before issuing a
certificate of water right, return a defective notice for
correction or completion, together with the reasons for
returning it. A notice does not lose priority of filing
because of defects if the notice is corrected, completed,
and refiled with the department within 30 days or within a
further time as the department may allow, not to exceed 6
months. If a notice is not corrected and completed within
the time allowed, the priority date of appropriation shall
be the date of refiled a correct and complete notice with
the department. A certificate of water right may not be
issued until a correct and complete notice has been filed
with the department. The original of the certificate shall

1 be sent to the appropriator. The department shall keep a
2 copy of the certificate in its office in Helena. The date of
3 filing of the notice of completion is the date of priority
4 of the right.

5 (2) An appropriator of groundwater by means of a well
6 or developed spring, first put to beneficial use between
7 January 1, 1962, and July 1, 1973, who did not file a notice
8 of completion, as required by laws in force prior to April
9 14, 1981, with the county clerk and recorder shall file a
10 notice of completion, as provided in subsection (1) of this
11 section, with the department to perfect the water right. The
12 filing of a claim of existing water right pursuant to
13 85-2-221 is sufficient notice of completion under this
14 subsection. The priority date of the appropriation shall be
15 the date of the filing of a notice as provided in subsection
16 (1) of this section or the date of the filing of the claim
17 of existing water right. An appropriation under this
18 subsection is an existing right, and a permit is not
19 required; however, the department shall acknowledge the
20 receipt of a correct and complete filing of a notice of
21 completion, except that for an appropriation of less than
22 100 gallons per minute, the department shall issue a
23 certificate of water right. If a certificate is issued
24 under this section, a certificate need not be issued under
25 the adjudication proceedings provided for in 85-2-236.

1 (3) A permit is not required before constructing an
2 impoundment or pit and appropriating water for use by
3 livestock if the maximum capacity of the impoundment or pit
4 is less than 15 acre-feet and the appropriation is less than
5 30 acre-feet per year and is from a source other than a
6 perennial flowing stream and the impoundment or pit is to be
7 constructed on and will be accessible to a parcel of land
8 that is owned or under the control of the applicant and that
9 is 40 acres or larger. As used in this subsection, a
10 perennial flowing stream means a stream which historically
11 has flowed continuously at all seasons of the year, during
12 dry as well as wet years. However, within 60 days after
13 constructing the impoundment or pit, the appropriator shall
14 apply for a permit as prescribed by this part. Upon receipt
15 of a correct and complete application for a stockwater
16 provisional permit, the department shall then automatically
17 issue a provisional permit. If the department determines
18 after a hearing that the rights of other appropriators have
19 been or will be adversely affected, it may revoke the permit
20 or require the permittee to modify the impoundment or pit
21 and may then make the permit subject to such terms,
22 conditions, restrictions, or limitations it considers
23 necessary to protect the rights of other appropriators.

24 (4) A person may also appropriate water without
25 applying for or prior to receiving a permit under rules

1 adopted by the board under 85-2-113."

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

3 **"85-2-311. Criteria for issuance of permit.** (1) Except
4 as provided in subsections (2) through (4), the department
5 shall issue a permit if the applicant proves by substantial
6 credible evidence that the following criteria are met:

7 (a) there are unappropriated waters in the source of
8 supply at the proposed point of diversion:

9 (i) at times when the water can be put to the use
10 proposed by the applicant;

11 (ii) in the amount the applicant seeks to appropriate;
12 and

13 (iii) throughout during the period during in which the
14 applicant seeks to appropriate, the amount requested is
15 reasonably available;

16 (b) the water rights of a prior appropriator will not
17 be adversely affected;

18 (c) the proposed means of diversion, construction, and
19 operation of the appropriation works are adequate;

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

21 (e) the proposed use will not interfere unreasonably
22 with other planned uses or developments for which a permit
23 has been issued or for which water has been reserved; and

24 (f) the applicant has a possessory interest, or the
25 written consent of the person with the possessory interest,

1 in the property where the water is to be put to beneficial
2 use.

3 (2) The department may not issue a permit for an
4 appropriation of 4,000 or more acre-feet of water a year and
5 5.5 or more cubic feet per second of water unless the
6 applicant proves by clear and convincing evidence that:

7 (a) the criteria in subsection (1) are met;

8 (b) the rights of a prior appropriator will not be
9 adversely affected;

10 (c) the proposed appropriation is a reasonable use.
11 Such a finding shall be based on a consideration of the
12 following:

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

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

19 (iii) the effects on the quantity and quality of water
20 for existing beneficial uses in the source of supply;

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

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

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

(3) (a) The state of Montana has long recognized the importance of conserving its public waters and the necessity to maintain adequate water supplies for the state's water requirements, including requirements for reserved water rights held by the United States for federal reserved lands and in trust for the various Indian tribes within the state's boundaries. Although the state of Montana also recognizes that, under appropriate conditions, the out-of-state transportation and use of its public waters are not in conflict with the public welfare of its citizens or the conservation of its waters, the criteria in this subsection (3) must be met before out-of-state use may occur.

(b) The department may not issue a permit for the appropriation of water for withdrawal and transportation for use outside the state unless the applicant proves by clear and convincing evidence that:

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

(ii) the proposed out-of-state use of water is not

contrary to water conservation in Montana; and

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

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

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

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

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

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

(d) When applying for a permit or a lease to withdraw and transport water for use outside the state, the applicant shall submit to and comply with the laws of the state of Montana governing the appropriation, lease, and use of water.

(4) An appropriation, diversion, impoundment, use, restraint, or attempted appropriation, diversion,

1 impoundment, use, or restraint contrary to the provisions of
 2 this section is invalid. No officer, agent, agency, or
 3 employee of the state may knowingly permit, aid, or assist
 4 in any manner such unauthorized appropriation, diversion,
 5 impoundment, use, or other restraint. No person or
 6 corporation may, directly or indirectly, personally or
 7 through an agent, officer, or employee, attempt to
 8 appropriate, divert, impound, use, or otherwise restrain or
 9 control waters within the boundaries of this state except
 10 in accordance with this section."

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

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

16 (2)--The--department,--after---providing---notice---and
 17 opportunity---for---hearing--pursuant--to--85-2-307--through
 18 85-2-309,--may--approve--an--application--for--a--trial--change--in
 19 appropriation--right--for--a--period--not--to--exceed--3--years,--in
 20 approving--an--application--under---this---subsection,--the
 21 department--shall--find--from--the--available--evidence--that:

22 (a)--substantial--injury--to--any--appropriator--of--water--is
 23 unlikely--to--occur--but--that--the--precise--effect--of--the--change
 24 on--other--appropriators--is--difficult--to--determine--in--advance
 25 of--the--change;--and

1 (b)--the--requirements--of--subsections--(3)(b)--through
 2 (3)(d)--are--met--and--it--is--likely--that--the--other--requirements
 3 of--this--section--can--be--met;

4 (3)--(A)--IF--THE--DEPARTMENT--APPROVES--AN--APPLICATION--FOR
 5 A--TRIAL--CHANGE--IN--APPROPRIATION--RIGHT--UNDER--SUBSECTION--(2);

6 (I)--THE--APPROPRIATOR--SHALL--ALLOW--ACCESS--BY--THE
 7 DEPARTMENT--THROUGHOUT--THE--TRIAL--PERIOD--TO--THE--SITE--WHERE--THE
 8 CHANGE--IS--BEING--IMPLEMENTED;

9 (II)--THE--DEPARTMENT--SHALL--INSPECT--THE--SITE--UPON--THE
 10 REQUEST--OF--ANY--PERSON--HOLDING--A--VALID--WATER--RIGHT--IN--THE
 11 SOURCE--OF--SUPPLY;--AND

12 (III)--ANY--WATER--USER--MAY,--THROUGHOUT--THE--TRIAL--PERIOD,
 13 PETITION--THE--DEPARTMENT--TO--TERMINATE--THE--TRIAL--CHANGE--AND
 14 DENY--THE--APPLICATION--FOR--A--CHANGE--IN--APPROPRIATION--RIGHT
 15 BECAUSE--WATER--USERS--ARE--EXPERIENCING--ACTUAL--ADVERSE--EFFECTS
 16 OF--THE--TRIAL--CHANGE;--THE--DEPARTMENT--SHALL--INVESTIGATE--THE
 17 ALLEGATIONS--CONTAINED--IN--A--PETITION--AND,--IF--IT--DETERMINES
 18 THAT--THERE--ARE--ADVERSE--EFFECTS,--THE--TRIAL--PERIOD--MUST--BE
 19 TERMINATED--AND--THE--APPLICATION--FOR--CHANGE--IN--APPROPRIATION
 20 RIGHT--MUST--BE--DENIED--UNLESS--THE--APPLICANT--CAN--ESTABLISH--BY
 21 CLEAR--AND--CONVINCING--EVIDENCE--THAT--THE--ADVERSE--EFFECTS--ARE
 22 CAUSED--BY--UNIQUE--CLIMATOLOGICAL--EVENTS--OR--OTHER--UNFORESEEN
 23 CIRCUMSTANCES--THAT--WILL--NOT--RECUR--THROUGHOUT--THE--REMAINDER
 24 OF--THE--TRIAL--PERIOD;

25 (B)--IF--THE--APPLICATION--FOR--CHANGE--IN--APPROPRIATION

~~RIGHT--IS--DENIED--DURING--OR--AFTER--THE--TRIAL--PERIOD,--THE
DEPARTMENT--SHALL--REQUIRE--THE--APPROPRIATOR--TO--REMOVE--THE
DIVERSION--STRUCTURES--OR--FACILITIES--THAT--IMPLEMENTED--THE
TRIAL--CHANGE.~~

~~{2}{3}{4}{2}~~ Except as provided in subsections ~~{3}~~ ~~{4}~~
~~{5}~~ (3) through ~~{5}~~ ~~{6}~~ ~~{7}~~ (5), the department shall
approve a change in appropriation right if the appropriator
proves by substantial credible evidence that the following
criteria are met:

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

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

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

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

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

(a) the criteria in subsection ~~{2}~~ ~~{3}~~ ~~{4}~~ (2) are
met;

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

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

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

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

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

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

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

~~{4}{5}{6}{4}~~ The department may not approve a change
in purpose of use or place of use for a diversion that
results in 4,000 or more acre-feet of water a year and 5.5

1 or more cubic feet per second of water being consumed
2 unless:

3 (a) the applicant proves by clear and convincing
4 evidence and the department finds that the criteria in
5 subsections ~~(2)~~ ~~(3)~~ ~~(4)~~ (2) and ~~(3)~~ ~~(4)~~ ~~(5)~~ (3) are met; and

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

9 ~~(5)~~~~(6)~~~~(7)~~(5) (a) The state of Montana has long
10 recognized the importance of conserving its public waters
11 and the necessity to maintain adequate water supplies for
12 the state's water requirements, including requirements for
13 reserved water rights held by the United States for federal
14 reserved lands and in trust for the various Indian tribes
15 within the state's boundaries. Although the state of Montana
16 also recognizes that, under appropriate conditions, the
17 out-of-state transportation and use of its public waters are
18 not in conflict with the public welfare of its citizens or
19 the conservation of its waters, the following criteria must
20 be met before out-of-state use may occur:

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

1 approves after one or more public hearings that:

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

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

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

10 (c) In determining whether the appropriator has proved
11 by clear and convincing evidence that the requirements of
12 subsections ~~(5)~~~~(b)~~~~(iii)~~ ~~(6)~~~~(b)~~~~(iii)~~ ~~(7)~~~~(B)~~~~(iii)~~ (5)(B)(II) and
13 ~~(5)~~~~(b)~~~~(iii)~~ ~~(6)~~~~(b)~~~~(iii)~~ ~~(7)~~~~(B)~~~~(iii)~~ (5)(B)(III) will be met,
14 the department and, if applicable, the legislature shall
15 consider the following factors:

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

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

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

25 (iv) the demands placed on the applicant's supply in

the state where the applicant intends to use the water.

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

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

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

~~(8)~~~~(9)~~~~(10)~~~~(8)~~ If a change is not completed as approved

by the department or legislature or if the terms, conditions, restrictions, and limitations of the change approval are not complied with, the department may, after notice and opportunity for hearing, require the appropriator to show cause why the change approval should not be modified or revoked. If the appropriator fails to show sufficient cause, the department may modify or revoke the change approval.

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

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

~~(11)~~~~(12)~~~~(13)~~~~(11)~~ A change in appropriation right contrary to the provisions of this section is invalid. No officer, agent, agency, or employee of the state may knowingly permit, aid, or assist in any manner such unauthorized change in appropriation right. No person or corporation may, directly or indirectly, personally or through an agent, officer, or employee, attempt to change an appropriation right except in accordance with this section."

Section 4. Section 85-5-302, MCA, is amended to read:

"85-5-302. Maintenance of headgates and measuring devices. All persons using water under a decree from any stream or ditch whereon a water commissioner is appointed shall--be is ARE required to have suitable headgates at the point wherein where a ditch taps a stream and shall also, at some suitable place on the ditch and as near the head thereof as practicable, place and maintain a proper measuring box, weir, or other appliance for the measurement of the waters flowing in such the ditch. In case any person or persons shall fail to place or maintain a proper measuring appliance, it shall--be is the duty of such the water commissioner not to apportion or distribute any water through said the ditch. The commissioner ~~must~~ shall notify all parties interested by ~~registered-or~~ certified mail or in person 1 week before making the annual repair or cleaning of any stream or ditch or performing necessary labor or expenses to divert water to any ditch. The sending of a ~~registered-or~~ certified letter to the last known post-office address of any such interested party ~~will-be~~ is prima facie evidence of the fact that he was duly notified. Any work in the way of repairing a ditch made necessary by any emergency may be done without such notice when injury would result from delay."

NEW SECTION. **Section 5.** Extension of authority. Any

existing authority to make rules on the subject of the provisions of [this act] is extended to the provisions of [this act].

~~NEW SECTION. Section 6. Retroactive applicability. Sections 1 through 7 apply retroactively, within the meaning of 1-2-1997, to all proceedings pending before the department of natural resources and conservation on the effective date of this act.~~

NEW SECTION. **Section 6.** Effective date. [This act] is effective on passage and approval.

-End-