

SENATE BILL 450

Introduced by Yellowtail

2/15	Introduced
2/15	Referred to Agriculture, Livestock & Irrig.
2/16	Hearing
2/16	Committee Report--Bill Passed as Amended
2/18	2nd Reading Passed
2/21	3rd Reading Passed

Transmitted to House

2/28	Referred to Natural Resources
3/13	Hearing
3/14	Committee Report--Bill Concurred as Amended
3/18	2nd Reading Concurred
3/21	Taken From 3rd Reading
3/28	2nd Reading Concurred as Amended
3/29	3rd Reading Concurred

Returned to Senate With Amendments

4/05	2nd Reading Amendments Not Concurred
4/06	Conference Committee Appointed

House

4/07	Conference Committee Appointed
	Died in Process

1 Senah BILL NO. 450
2 INTRODUCED BY Yellowtail
3
4 A BILL FOR AN ACT ENTITLED: "AN ACT CLARIFYING THE RIGHT TO
5 BENEFICIALLY USE SALVAGED WATER BY DEFINING "SALVAGE" AND
6 ALLOWING FOR THE BENEFICIAL USE OF SALVAGED WATER UNDER THE
7 PROCESS FOR A CHANGE IN APPROPRIATION RIGHTS; AMENDING
8 SECTIONS 85-2-102 AND 85-2-402, MCA; AND PROVIDING AN
9 IMMEDIATE EFFECTIVE DATE."

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

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

13 "85-2-102. Definitions. Unless the context requires
14 otherwise, in this chapter the following definitions apply:

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

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

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

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

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

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

9 (5) "Change in appropriation right" means a change in
10 the place of diversion, the place of use, the purpose of
11 use, or the place of storage.

12 (6) "Declaration" means the declaration of an existing
13 right filed with the department under section 8, Chapter
14 452, Laws of 1973.

15 (7) "Department" means the department of natural
16 resources and conservation provided for in Title 2, chapter
17 15, part 33.

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

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

25 (10) "Permit" means the permit to appropriate issued by

1 the department under 85-2-301 through 85-2-303 and 85-2-306
2 through 85-2-314.

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

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

12 (13) "Salvage" means to make available for beneficial
13 use water that would otherwise be irretrievably lost to the
14 source of supply, including loss through percolation to
15 groundwater that is not physically or economically
16 retrievable, evapotranspiration, evaporation, or the
17 deterioration of water quality that renders water unusable.

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

22 ~~†4†~~(15) "Water" means all water of the state, surface
23 and subsurface, regardless of its character or manner of
24 occurrence, including but not limited to geothermal water,
25 diffuse surface water, and sewage effluent.

1 ~~†5†~~(16) "Water division" means a drainage basin as
2 defined in 3-7-102.

3 ~~†6†~~(17) "Water judge" means a judge as provided for in
4 Title 3, chapter 7.

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

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

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

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

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

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

(d) If the change in appropriation right involves salvaged water, the amount of water salvaged through the use of water-saving practices or technology will meet the demand of the proposed use.

(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) 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 water for future beneficial purposes, including municipal water supplies, irrigation systems, and minimum stream flows 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) 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) and (3) 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) (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

1 not in conflict with the public welfare of its citizens or
2 the conservation of its waters, the following criteria must
3 be met before out-of-state use may occur:

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

10 (i) depending on the volume of water diverted or
11 consumed, the applicable criteria and procedures of
12 subsection (2) or (3) are met;

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

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

18 (c) In determining whether the appropriator has proved
19 by clear and convincing evidence that the requirements of
20 subsections (5)(b)(ii) and (5)(b)(iii) will be met, the
21 department and, if applicable, the legislature shall
22 consider the following factors:

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

25 (ii) whether the water that is the subject of the

1 proposed change in appropriation might feasibly be
2 transported to alleviate water shortages within the state of
3 Montana;

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

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

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

14 (6) For any application for a change in appropriation
15 right involving 4,000 or more acre-feet of water a year and
16 5.5 or more cubic feet per second of water, the department
17 shall give notice of the proposed change in accordance with
18 85-2-307 and shall hold one or more hearings in accordance
19 with 85-2-309 prior to its approval or denial of the
20 proposed change. The department shall provide notice and may
21 hold one or more hearings upon any other proposed change if
22 it determines that such a change might adversely affect the
23 rights of other persons.

24 (7) The department or the legislature, if applicable,
25 may approve a change subject to such terms, conditions,

1 restrictions, and limitations as it considers necessary to
 2 satisfy the criteria of this section, including limitations
 3 on the time for completion of the change. The department
 4 may extend time limits specified in the change approval
 5 under the applicable criteria and procedures of 85-2-312(3).

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

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

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

22 (11) A change in appropriation right contrary to the
 23 provisions of this section is invalid. No officer, agent,
 24 agency, or employee of the state may knowingly permit, aid,
 25 or assist in any manner such unauthorized change in

1 appropriation right. No person or corporation may, directly
 2 or indirectly, personally or through an agent, officer, or
 3 employee, attempt to change an appropriation right except in
 4 accordance with this section."

5 NEW SECTION. **Section 3. Right to salvaged water --**
 6 **approval required.** (1) It is the declared policy of the
 7 state of Montana in 85-1-101 to encourage the conservation
 8 and full utilization of water. Allowing the salvage of water
 9 through the application of water-saving practices and
 10 technology is consistent with this policy.

11 (2) The right to beneficially use salvaged water
 12 belongs to the person holding the appropriation right under
 13 which the salvage occurs. Water salvage may be accomplished
 14 only from a valid appropriation right.

15 (3) The priority of appropriation of the right to
 16 salvaged water is the same as the priority of appropriation
 17 of the right under which the salvage occurs.

18 (4) Department approval of a change in appropriation
 19 right pursuant to 85-2-402 is required before salvaged water
 20 may be put to beneficial use.

21 (5) The right to salvaged water may be transferred
 22 subject to the requirements of 85-2-403.

23 NEW SECTION. **Section 4. Extension of authority.** Any
 24 existing authority to make rules on the subject of the
 25 provisions of [this act] is extended to the provisions of

LC 0633/01

1 [this act].

2 NEW SECTION. **Section 5.** Codification instruction.

3 [Section 3] is intended to be codified as an integral part
4 of Title 85, chapter 2, part 4, and the provisions of Title
5 85, chapter 2, part 4, apply to [section 3].

6 NEW SECTION. **Section 6.** Saving clause. [This act]
7 does not affect rights and duties that matured, penalties
8 that were incurred, or proceedings that were begun before
9 [the effective date of this act].

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

-End-

APPROVED BY COMMITTEE
ON AGRICULTURE LIVESTOCK
& IRRIGATION

SENATE BILL NO. 450
INTRODUCED BY YELLOWTAIL

A BILL FOR AN ACT ENTITLED: "AN ACT CLARIFYING THE RIGHT TO BENEFICIALLY USE SALVAGED WATER BY DEFINING "SALVAGE" AND ALLOWING FOR THE BENEFICIAL USE OF SALVAGED WATER UNDER THE PROCESS FOR A CHANGE IN APPROPRIATION RIGHTS; AMENDING SECTIONS 85-2-102 AND 85-2-402, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(10) "Permit" means the permit to appropriate issued by

1 the department under 85-2-301 through 85-2-303 and 85-2-306
2 through 85-2-314.

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

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

12 (13) "Salvage" means to make available for beneficial
13 use water that would otherwise be:

14 (A) irretrievably lost to the source of supply,
15 including loss through percolation to groundwater that is
16 not physically or economically retrievable,
17 evapotranspiration, evaporation, or the deterioration of
18 water quality that renders water unusable; OR

19 (B) LOST TO THE USE OF THE APPROPRIATOR AND NOT
20 BENEFICIALLY USED BY ANOTHER APPROPRIATOR FROM THE SOURCE OF
21 SUPPLY AFTER THE WATER RETURNS TO THE SOURCE OF SUPPLY.

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

1 ~~(14)~~(15) "Water" means all water of the state, surface
2 and subsurface, regardless of its character or manner of
3 occurrence, including but not limited to geothermal water,
4 diffuse surface water, and sewage effluent.

5 ~~(15)~~(16) "Water division" means a drainage basin as
6 defined in 3-7-102.

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

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

11 ~~(18)~~(19) "Well" means any artificial opening or
12 excavation in the ground, however made, by which groundwater
13 is sought or can be obtained or through which it flows under
14 natural pressures or is artificially withdrawn."

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

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

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

24 (a) The proposed use will not adversely affect the
25 water rights of other persons or other planned uses or

1 developments for which a permit has been issued or for which
2 water has been reserved.

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

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

6 (d) If the change in appropriation right involves
7 salvaged water, the amount of water salvaged through the use
8 of water-saving practices or technology will meet the demand
9 of the proposed use.

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

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

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

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

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

25 (iii) the effects on the quantity and quality of water

1 for existing uses in the source of supply;

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

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

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

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

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

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

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

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

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

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

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

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

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

1 consider the following factors:

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

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

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

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

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

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

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

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

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

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

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

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

9 NEW SECTION. **Section 3. Right to salvaged water --**
10 **approval required.** (1) It is the declared policy of the
11 state of Montana in 85-1-101 to encourage the conservation
12 and full utilization of water. Allowing the salvage of water
13 through the application of water-saving practices and
14 technology is consistent with this policy.

15 (2) The right to beneficially use salvaged water
16 belongs to the person holding the appropriation right under
17 which the salvage occurs. Water salvage may be accomplished
18 only from a valid appropriation right.

19 (3) The priority of appropriation of the right to
20 salvaged water is the same as the priority of appropriation
21 of the right under which the salvage occurs.

22 (4) Department approval of a change in appropriation
23 right pursuant to 85-2-402 is required before salvaged water
24 may be put to beneficial use.

25 (5) The right to salvaged water may be transferred

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1 subject to the requirements of 85-2-403.

2 NEW SECTION. **Section 4.** Extension of authority. Any
3 existing authority to make rules on the subject of the
4 provisions of [this act] is extended to the provisions of
5 [this act].

6 NEW SECTION. **Section 5.** Codification instruction.
7 [Section 3] is intended to be codified as an integral part
8 of Title 85, chapter 2, part 4, and the provisions of Title
9 85, chapter 2, part 4, apply to [section 3].

10 NEW SECTION. **Section 6.** Saving clause. [This act]
11 does not affect rights and duties that matured, penalties
12 that were incurred, or proceedings that were begun before
13 [the effective date of this act].

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

-End-

SENATE BILL NO. 450

INTRODUCED BY YELLOWTAIL

A BILL FOR AN ACT ENTITLED: "AN ACT CLARIFYING THE RIGHT TO BENEFICIALLY USE SALVAGED WATER BY DEFINING "SALVAGE" AND ALLOWING FOR THE BENEFICIAL USE OF SALVAGED WATER UNDER THE PROCESS FOR A CHANGE IN APPROPRIATION RIGHTS; AMENDING SECTIONS 85-2-102 AND 85-2-402, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(10) "Permit" means the permit to appropriate issued by

1 the department under 85-2-301 through 85-2-303 and 85-2-306
2 through 85-2-314.

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

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

12 (13) "Salvage" means to make available for beneficial
13 use water that would otherwise be:

14 (A) irretrievably lost to the source of supply,
15 including loss through percolation to groundwater that is
16 not physically or economically retrievable,
17 evapotranspiration, evaporation, or the deterioration of
18 water quality that renders water unusable; OR

19 (B) LOST TO THE USE OF THE APPROPRIATOR AND NOT
20 BENEFICIALLY USED BY ANOTHER APPROPRIATOR FROM THE SOURCE OF
21 SUPPLY AFTER THE WATER RETURNS TO THE SOURCE OF SUPPLY.

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

1 (14)(15) "Water" means all water of the state, surface
2 and subsurface, regardless of its character or manner of
3 occurrence, including but not limited to geothermal water,
4 diffuse surface water, and sewage effluent.

5 (15)(16) "Water division" means a drainage basin as
6 defined in 3-7-102.

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

9 (17)(18) "Water master" means a master as provided for
10 in Title 3, chapter 7.

11 (18)(19) "Well" means any artificial opening or
12 excavation in the ground, however made, by which groundwater
13 is sought or can be obtained or through which it flows under
14 natural pressures or is artificially withdrawn."

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

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

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

24 (a) The proposed use will not adversely affect the
25 water rights of other persons or other planned uses or

1 developments for which a permit has been issued or for which
2 water has been reserved.

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

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

6 (d) If the change in appropriation right involves
7 salvaged water, the amount of water salvaged through the use
8 of water-saving practices or technology will meet the demand
9 of the proposed use.

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

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

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

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

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

25 (iii) the effects on the quantity and quality of water

1 for existing uses in the source of supply;

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

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

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

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

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

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

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

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

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

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

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

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

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

1 consider the following factors:

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

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

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

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

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

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

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

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

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

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

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

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

9 NEW SECTION. **Section 3. Right to salvaged water --**
10 **approval required.** (1) It is the declared policy of the
11 state of Montana in 85-1-101 to encourage the conservation
12 and full utilization of water. Allowing the salvage of water
13 through the application of water-saving practices and
14 technology is consistent with this policy.

15 (2) The right to beneficially use salvaged water
16 belongs to the person holding the appropriation right under
17 which the salvage occurs. Water salvage may be accomplished
18 only from a valid appropriation right.

19 (3) The priority of appropriation of the right to
20 salvaged water is the same as the priority of appropriation
21 of the right under which the salvage occurs.

22 (4) Department approval of a change in appropriation
23 right pursuant to 85-2-402 is required before salvaged water
24 may be put to beneficial use.

25 (5) The right to salvaged water may be transferred

1 subject to the requirements of 85-2-403.

2 NEW SECTION. **Section 4.** Extension of authority. Any
3 existing authority to make rules on the subject of the
4 provisions of [this act] is extended to the provisions of
5 [this act].

6 NEW SECTION. **Section 5.** Codification instruction.
7 [Section 3] is intended to be codified as an integral part
8 of Title 85, chapter 2, part 4, and the provisions of Title
9 85, chapter 2, part 4, apply to [section 3].

10 NEW SECTION. **Section 6.** Saving clause. [This act]
11 does not affect rights and duties that matured, penalties
12 that were incurred, or proceedings that were begun before
13 [the effective date of this act].

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

-End-

STANDING COMMITTEE REPORT

March 14, 1989

Page 1 of 1

Mr. Speaker: We, the committee on Natural Resources report that SENATE BILL 450 (third reading copy -- blue) be concurred in as amended .

Signed: _____

Bob Raney
Bob Raney, Chairman

[REP. GIACOMETTO WILL CARRY THIS BILL ON THE HOUSE FLOOR]

And, that such amendments read:

1. Page 3, lines 20 and 21.

Strike: "BY" on line 20 through the first "SUPPLY" on line 21

2. Page 10, line 22.

Strike: "Department"

Insert: "If the salvage of water involves a change in appropriation right, department"

3. Page 11.

Following: line 1

Insert: "(6) Salvaged water may be transferred to an instream purpose, or leased for an instream purpose if the lease is authorized by law, upon approval by the department as provided in subsection (4)."

SB 450

HOUSE

COMMITTEE OF THE WHOLE AMENDMENT
Senate Bill 450
Representative Giacometto

March 21, 1989 3:18 pm
Page 1 of 1

Mr. Chairman: I move to amend Senate Bill 450 (reference copy -- salmon).

Signed:


Representative Giacometto

And, that such amendments to Senate Bill 450 read as follows:

1. Page 3, line 21.

Following: "SUPPLY"

Insert: "BY ANOTHER APPROPRIATOR FROM THE SOURCE OF SUPPLY"

2. Page 11, lines 3 and 4.

Following: "BE" on line 3

Strike: "TRANSFERRED" through "PURPOSE, OR" on line 4

ADOPT

REJECT

HOUSE
SB 450

RT

SENATE BILL NO. 450

INTRODUCED BY YELLOWTAIL

A BILL FOR AN ACT ENTITLED: "AN ACT CLARIFYING THE RIGHT TO BENEFICIALLY USE SALVAGED WATER BY DEFINING "SALVAGE" AND ALLOWING FOR THE BENEFICIAL USE OF SALVAGED WATER UNDER THE PROCESS FOR A CHANGE IN APPROPRIATION RIGHTS; AMENDING SECTIONS 85-2-102 AND 85-2-402, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(10) "Permit" means the permit to appropriate issued by

1 the department under 85-2-301 through 85-2-303 and 85-2-306
2 through 85-2-314.

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

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

12 (13) "Salvage" means to make available for beneficial
13 use water that would otherwise be:

14 (A) irretrievably lost to the source of supply,
15 including loss through percolation to groundwater that is
16 not physically or economically retrievable,
17 evapotranspiration, evaporation, or the deterioration of
18 water quality that renders water unusable; OR

19 (B) LOST TO THE USE OF THE APPROPRIATOR AND NOT
20 BENEFICIALLY USED BY ANOTHER APPROPRIATOR FROM THE SOURCE OF
21 SUPPLY AFTER THE WATER RETURNS TO THE SOURCE OF SUPPLY.

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

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

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

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

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

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

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

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

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

24 (a) The proposed use will not adversely affect the
25 water rights of other persons or other planned uses of

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) If the change in appropriation right involves salvaged water, the amount of water salvaged through the use of water-saving practices or technology will meet the demand of the proposed use.

(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) 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 water for future beneficial purposes, including municipal water supplies, irrigation systems, and minimum stream flows 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) 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) and (3) 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) (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

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

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

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

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

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

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

1 consider the following factors:

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

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

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

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

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

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

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

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

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

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

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

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

9 NEW SECTION. Section 3. Right to salvaged water --
10 approval required. (1) It is the declared policy of the
11 state of Montana in 85-1-101 to encourage the conservation
12 and full utilization of water. Allowing the salvage of water
13 through the application of water-saving practices and
14 technology is consistent with this policy.

15 (2) The right to beneficially use salvaged water
16 belongs to the person holding the appropriation right under
17 which the salvage occurs. Water salvage may be accomplished
18 only from a valid appropriation right.

19 (3) The priority of appropriation of the right to
20 salvaged water is the same as the priority of appropriation
21 of the right under which the salvage occurs.

22 (4) Department IF THE SALVAGE OF WATER INVOLVES A
23 CHANGE IN APPROPRIATION RIGHT, DEPARTMENT approval of a
24 change in appropriation right pursuant to 85-2-402 is
25 required before salvaged water may be put to beneficial use.

1 (5) The right to salvaged water may be transferred
2 subject to the requirements of 85-2-403.

3 (6) SALVAGED WATER MAY BE TRANSFERRED TO AN INSTREAM
4 PURPOSE, OR LEASED FOR AN INSTREAM PURPOSE IF THE LEASE IS
5 AUTHORIZED BY LAW, UPON APPROVAL BY THE DEPARTMENT AS
6 PROVIDED IN SUBSECTION (4).

7 NEW SECTION. Section 4. Extension of authority. Any
8 existing authority to make rules on the subject of the
9 provisions of [this act] is extended to the provisions of
10 [this act].

11 NEW SECTION. Section 5. Codification instruction.
12 [Section 3] is intended to be codified as an integral part
13 of Title 85, chapter 2, part 4, and the provisions of Title
14 85, chapter 2, part 4, apply to [section 3].

15 NEW SECTION. Section 6. Saving clause. [This act]
16 does not affect rights and duties that matured, penalties
17 that were incurred, or proceedings that were begun before
18 [the effective date of this act].

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

-End-

SECOND PRINTING

SENATE BILL NO. 450
INTRODUCED BY YELLOWTAIL

A BILL FOR AN ACT ENTITLED: "AN ACT CLARIFYING THE RIGHT TO BENEFICIALLY USE SALVAGED WATER BY DEFINING "SALVAGE" AND ALLOWING FOR THE BENEFICIAL USE OF SALVAGED WATER UNDER THE PROCESS FOR A CHANGE IN APPROPRIATION RIGHTS; AMENDING SECTIONS 85-2-102 AND 85-2-402, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(10) "Permit" means the permit to appropriate issued by

1 the department under 85-2-301 through 85-2-303 and 85-2-306
2 through 85-2-314.

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

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

12 (13) "Salvage" means to make available for beneficial
13 use water that would otherwise be:

14 (A) irretrievably lost to the source of supply,
15 including loss through percolation to groundwater that is
16 not physically or economically retrievable,
17 evapotranspiration, evaporation, or the deterioration of
18 water quality that renders water unusable; OR

19 (B) LOST TO THE USE OF THE APPROPRIATOR AND NOT
20 BENEFICIALLY USED BY ANOTHER APPROPRIATOR FROM THE SOURCE OF
21 SUPPLY BY ANOTHER APPROPRIATOR FROM THE SOURCE OF SUPPLY
22 AFTER THE WATER RETURNS TO THE SOURCE OF SUPPLY.

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

1 application of water to anything but a beneficial use.

2 ~~(14)~~(15) "Water" means all water of the state, surface
3 and subsurface, regardless of its character or manner of
4 occurrence, including but not limited to geothermal water,
5 diffuse surface water, and sewage effluent.

6 ~~(15)~~(16) "Water division" means a drainage basin as
7 defined in 3-7-102.

8 ~~(16)~~(17) "Water judge" means a judge as provided for in
9 Title 3, chapter 7.

10 ~~(17)~~(18) "Water master" means a master as provided for
11 in Title 3, chapter 7.

12 ~~(18)~~(19) "Well" means any artificial opening or
13 excavation in the ground, however made, by which groundwater
14 is sought or can be obtained or through which it flows under
15 natural pressures or is artificially withdrawn."

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

17 **"85-2-402. Changes in appropriation rights.** (1) An
18 appropriator may not make a change in an appropriation right
19 except as permitted under this section and with the approval
20 of the department or, if applicable, of the legislature.

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

25 (a) The proposed use will not adversely affect the

1 water rights of other persons or other planned uses or
2 developments for which a permit has been issued or for which
3 water has been reserved.

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

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

7 (d) If the change in appropriation right involves
8 salvaged water, the amount of water salvaged through the use
9 of water-saving practices or technology will meet the demand
10 of the proposed use.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 section.

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

10 NEW SECTION. Section 3. Right to salvaged water --
11 approval required. (1) It is the declared policy of the
12 state of Montana in 85-1-101 to encourage the conservation
13 and full utilization of water. Allowing the salvage of water
14 through the application of water-saving practices and
15 technology is consistent with this policy.

16 (2) The right to beneficially use salvaged water
17 belongs to the person holding the appropriation right under
18 which the salvage occurs. Water salvage may be accomplished
19 only from a valid appropriation right.

20 (3) The priority of appropriation of the right to
21 salvaged water is the same as the priority of appropriation
22 of the right under which the salvage occurs.

23 (4) Department IF THE SALVAGE OF WATER INVOLVES A
24 CHANGE IN APPROPRIATION RIGHT, DEPARTMENT approval of a
25 change in appropriation right pursuant to 85-2-402 is

1 required before salvaged water may be put to beneficial use.

2 (5) The right to salvaged water may be transferred
3 subject to the requirements of 85-2-403.

4 (6) SALVAGED WATER MAY BE TRANSFERRED TO--AN--INSTREAM
5 PURPOSE,--OR LEASED FOR AN INSTREAM PURPOSE IF THE LEASE IS
6 AUTHORIZED BY LAW, UPON APPROVAL BY THE DEPARTMENT AS
7 PROVIDED IN SUBSECTION (4).

8 NEW SECTION. Section 4. Extension of authority. Any
9 existing authority to make rules on the subject of the
10 provisions of [this act] is extended to the provisions of
11 [this act].

12 NEW SECTION. Section 5. Codification instruction.
13 [Section 3] is intended to be codified as an integral part
14 of Title 85, chapter 2, part 4, and the provisions of Title
15 85, chapter 2, part 4, apply to [section 3].

16 NEW SECTION. Section 6. Saving clause. [This act]
17 does not affect rights and duties that matured, penalties
18 that were incurred, or proceedings that were begun before
19 [the effective date of this act].

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

-End-