

SENATE BILL NO. 231

INTRODUCED BY YELLOWTAIL  
BY REQUEST OF THE DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION

IN THE SENATE

JANUARY 21, 1993	INTRODUCED AND REFERRED TO COMMITTEE ON NATURAL RESOURCES.
	FIRST READING.
FEBRUARY 15, 1993	COMMITTEE RECOMMEND BILL DO PASS. REPORT ADOPTED.
FEBRUARY 16, 1993	PRINTING REPORT.
FEBRUARY 17, 1993	SECOND READING, DO PASS.
FEBRUARY 18, 1993	ENGROSSING REPORT.
	THIRD READING, PASSED. AYES, 42; NOES, 6.
	TRANSMITTED TO HOUSE.

IN THE HOUSE

FEBRUARY 23, 1993	INTRODUCED AND REFERRED TO COMMITTEE ON NATURAL RESOURCES.
	FIRST READING.
MARCH 15, 1993	COMMITTEE RECOMMEND BILL BE CONCURRED IN. REPORT ADOPTED.
MARCH 29, 1993	SECOND READING, CONCURRED IN.
MARCH 31, 1993	THIRD READING, CONCURRED IN. AYES, 79; NOES, 20.
APRIL 1, 1993	RETURNED TO SENATE.

IN THE SENATE

APRIL 2, 1993	RECEIVED FROM HOUSE.
	SENT TO ENROLLING.
	REPORTED CORRECTLY ENROLLED.

1 Senate BILL NO. 231  
2 INTRODUCED BY Yellowtail  
3 BY REQUEST OF THE DEPARTMENT OF NATURAL RESOURCES  
4 AND CONSERVATION

5  
6 A BILL FOR AN ACT ENTITLED: "AN ACT REVISING AND CLARIFYING  
7 THE BURDENS OF PROOF AND STANDARDS OF PROOF UNDER WHICH  
8 APPLICATIONS FOR BENEFICIAL WATER USE PERMITS, CHANGE  
9 AUTHORIZATIONS, AND RESERVATIONS ARE PROCESSED PURSUANT TO  
10 MONTANA WATER USE LAWS; CLARIFYING THE PROCESS FOR EXTENSION  
11 OF TIME FOR A WATER USE PERMITTEE TO COMPLETE PERMIT  
12 CONDITIONS; CLARIFYING THE VERIFICATION PROCESS FOR ISSUANCE  
13 OF A PERMIT; AMENDING SECTIONS 85-2-102, 85-2-302, 85-2-307,  
14 85-2-308, 85-2-311, 85-2-312, 85-2-315, 85-2-316, 85-2-402,  
15 AND 85-2-436, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE  
16 AND A RETROACTIVE APPLICABILITY DATE."

17  
18 STATEMENT OF INTENT

19 A statement of intent is required for this bill because  
20 85-2-312 grants the department of natural resources and  
21 conservation rulemaking authority to establish a procedure  
22 for extending time limits for completing work under a water  
23 use permit. The legislature intends that the department  
24 provide necessary procedural and substantive safeguards to  
25 protect existing water users and permit holders from adverse

1 impacts that may be caused by extending time limits for  
2 perfecting new water uses.

3  
4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

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

6 **"85-2-102. (Temporary) Definitions.** Unless the context  
7 requires otherwise, in this chapter the following  
8 definitions apply:

9 (1) "Appropriate" means to:

10 (a) divert, impound, or withdraw (including by stock  
11 for stock water) a quantity of water;

12 (b) in the case of a public agency, to reserve water in  
13 accordance with 85-2-316; or

14 (c) in the case of the department of fish, wildlife,  
15 and parks, to lease water in accordance with 85-2-436.

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

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

22 (b) a use of water appropriated by the department for  
23 the state water leasing program under 85-2-141 and of water  
24 leased under a valid lease issued by the department under  
25 85-2-141; and

(c) a use of water by the department of fish, wildlife, and parks pursuant to a lease authorized under 85-2-436.

(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) "Commission" means the fish, wildlife, and parks commission provided for in 2-15-3402.

(7) "Correct and complete" means that the information required to be submitted conforms to the standard of substantial credible information and that all of the necessary parts of the form requiring the information have been filled in with the required information.

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

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

(10) "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.

(11) "Ground water" means any water that is beneath the ground surface.

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

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

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

(15) "Salvage" means to make water available for beneficial use from an existing valid appropriation through application of water-saving methods.

(16) "Substantial credible information" means probable believable facts sufficient to support a reasonable legal theory upon which the department should proceed with the action requested by the person providing the information.

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

1       ~~†16†~~(18) "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       ~~†17†~~(19) "Watercourse" means any naturally occurring  
6 stream or river from which water is diverted for beneficial  
7 uses. It does not include ditches, culverts, or other  
8 manmade waterways.

9       ~~†18†~~(20) "Water division" means a drainage basin as  
10 defined in 3-7-102.

11       ~~†18†~~(21) "Water judge" means a judge as provided for in  
12 Title 3, chapter 7.

13       ~~†20†~~(22) "Water master" means a master as provided for  
14 in Title 3, chapter 7.

15       ~~†21†~~(23) "Well" means any artificial opening or  
16 excavation in the ground, however made, by which ground  
17 water is sought or can be obtained or through which it flows  
18 under natural pressures or is artificially withdrawn.  
19 (Terminates June 30, 1999--sec. 4, Ch. 740, L. 1991.)

20       85-2-102. (Effective July 1, 1999) Definitions. Unless  
21 the context requires otherwise, in this chapter the  
22 following definitions apply:

23       (1) "Appropriate" means to divert, impound, or withdraw  
24 (including by stock for stock water) a quantity of water or,  
25 in the case of a public agency, to reserve water in

1 accordance with 85-2-316.

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

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

8       (b) a use of water appropriated by the department for  
9 the state water leasing program under 85-2-141 and of water  
10 leased under a valid lease issued by the department under  
11 85-2-141.

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

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

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

19       (6) "Correct and complete" means that the information  
20 required to be submitted conforms to the standard of  
21 substantial credible information and that all of the  
22 necessary parts of the form requiring the information have  
23 been filled in with the required information.

24       ~~†6†~~(7) "Declaration" means the declaration of an  
25 existing right filed with the department under section 8,

1 Chapter 452, Laws of 1973.

2 {7}(8) "Department" means the department of natural  
3 resources and conservation provided for in Title 2, chapter  
4 15, part 33.

5 {8}(9) "Existing right" means a right to the use of  
6 water which would be protected under the law as it existed  
7 prior to July 1, 1973.

8 {9}(10) "Ground water" means any water that is beneath  
9 the ground surface.

10 {10}(11) "Permit" means the permit to appropriate issued  
11 by the department under 85-2-301 through 85-2-303 and  
12 85-2-306 through 85-2-314.

13 {11}(12) "Person" means an individual, association,  
14 partnership, corporation, state agency, political  
15 subdivision, the United States or any agency thereof, or any  
16 other entity.

17 {12}(13) "Political subdivision" means any county,  
18 incorporated city or town, public corporation, or district  
19 created pursuant to state law or other public body of the  
20 state empowered to appropriate water but not a private  
21 corporation, association, or group.

22 {13}(14) "Salvage" means to make water available for  
23 beneficial use from an existing valid appropriation through  
24 application of water-saving methods.

25 {15} "Substantial credible information" means probable

1 believable facts sufficient to support a reasonable legal  
2 theory upon which the department should proceed with the  
3 action requested by the person providing the information.

4 {14}(16) "Waste" means the unreasonable loss of water  
5 through the design or negligent operation of an  
6 appropriation or water distribution facility or the  
7 application of water to anything but a beneficial use.

8 {15}(17) "Water" means all water of the state, surface  
9 and subsurface, regardless of its character or manner of  
10 occurrence, including but not limited to geothermal water,  
11 diffuse surface water, and sewage effluent.

12 {16}(18) "Watercourse" means any naturally occurring  
13 stream or river from which water is diverted for beneficial  
14 uses. It does not include ditches, culverts, or other  
15 manmade waterways.

16 {17}(19) "Water division" means a drainage basin as  
17 defined in 3-7-102.

18 {18}(20) "Water judge" means a judge as provided for in  
19 Title 3, chapter 7.

20 {19}(21) "Water master" means a master as provided for  
21 in Title 3, chapter 7.

22 {20}(22) "Well" means any artificial opening or  
23 excavation in the ground, however made, by which ground  
24 water is sought or can be obtained or through which it flows  
25 under natural pressures or is artificially withdrawn."

**Section 2.** Section 85-2-302, MCA, is amended to read:

**"85-2-302. (Temporary) Application for permit -- fee.**

(1) Except as otherwise provided in (1) through (3) of 85-2-306, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department. The application shall be made on a form prescribed by the department. The department shall make the forms available through its offices and the offices of the county clerk and recorders. The applicant shall submit a correct and complete application. The department shall return a defective application for correction or completion, together with the reasons for returning it. An application does not lose priority of filing because of defects if the application is corrected, completed, and refiled with the department within 30 days after its return to the applicant or within a further time as the department may allow. If an application is not corrected and completed within 30 days or within a further time as the department allows, up to 3 months, the priority date of the application shall be the date of refiling the application with the corrections with the department. An application not corrected within 3 months shall be terminated.

(2) In addition to the application filing fee

prescribed by the board by rule pursuant to 85-2-113, a person applying for a permit under subsection (1) shall pay a fee of \$1 per acre-foot of ground water appropriated. The fees collected by the department under this subsection must be deposited in the ground water assessment account, established in 85-2-905, within the state special revenue fund. (Terminates July 1, 1993--sec. 22, Ch. 769, L. 1991.)

**85-2-302. (Effective July 1, 1993) Application for permit.** Except as otherwise provided in (1) through (3) of 85-2-306, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department. The application shall be made on a form prescribed by the department. The department shall make the forms available through its offices and the offices of the county clerk and recorders. The applicant shall submit a correct and complete application. The department shall return a defective application for correction or completion, together with the reasons for returning it. An application does not lose priority of filing because of defects if the application is corrected, completed, and refiled with the department within 30 days after its return to the applicant or within a further time as the department may allow. If an application is not corrected and completed within 30 days or within a

further time as the department allows, up to 3 months, the priority date of the application shall be the date of refiling the application with the corrections with the department. An application not corrected within 3 months shall be terminated."

**Section 3.** Section 85-2-307, MCA, is amended to read:

"85-2-307. Notice of application. (1) (a) Upon receipt of a proper correct and complete application for a permit, the department shall prepare a notice containing the facts pertinent to the application and shall publish the notice once in a newspaper of general circulation in the area of the source.

(b) Before the date of publication, the department shall also serve the notice by first-class mail upon:

(i) an appropriator of water or applicant for or holder of a permit who, according to the records of the department, may be affected by the proposed appropriation;

(ii) any purchaser under contract for deed, as defined in 70-20-115, of property that, according to the records of the department, may be affected by the proposed appropriation; and

(iii) any public agency that has reserved waters in the source under 85-2-316.

(c) The department may, in its discretion, also serve notice upon any state agency or other person the department

feels may be interested in or affected by the proposed appropriation.

(d) The department shall file in its records proof of service by affidavit of the publisher in the case of notice by publication and by its own affidavit in the case of service by mail.

(2) The notice shall state that by a date set by the department (not less than 15 days or more than 60 days after the date of publication) persons may file with the department written objections to the application.

(3) The requirements of subsections (1) and (2) of this section do not apply if the department finds, on the basis of information reasonably available to it, that the appropriation as proposed in the application will not adversely affect the rights of other persons."

**Section 4.** Section 85-2-308, MCA, is amended to read:

"85-2-308. Objections. (1) (a) An objection to an application for a permit must be filed by the date specified by the department under 85-2-307(2).

(b) The objection to an application for a permit must state the name and address of the objector and facts tending to show that one or more of the criteria in 85-2-311 are not met.

(2) For an application for a change in appropriation rights, the objection must state the name and address of the

objector and facts tending to show that one or more of the criteria in 85-2-402 are not met.

(3) A person has standing to file an objection under this section if the property, water rights, or interests of the objector would be adversely affected by the proposed appropriation.

(4) For an application for a reservation of water, the objection must state the name and address of the objector and facts tending to show that one or more of the criteria in 85-2-316 are not met.

(5) An objector to an application under this chapter shall timely file a correct and complete objection on a form prescribed by the department."

**Section 5.** Section 85-2-311, MCA, is amended to read:

"85-2-311. Criteria for issuance of permit. (1) Except as provided in subsections (2) and (3), the department shall issue a permit if the applicant proves by substantial and credible a preponderance of 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) during the period 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) To meet the ~~substantial-credible~~ preponderance of evidence standard in this section, the applicant, in addition to other evidence demonstrating that the criteria of subsection (1) have been met, shall submit independent hydrologic or other evidence, including but not limited to water supply data, field reports, and other information developed by the applicant, the department, the U.S. geological survey, or the U.S. soil conservation service and other specific field studies, ~~---demonstrating---that---the criteria-are-met.~~

(5) An appropriation, diversion, impoundment, use, restraint, or attempted appropriation, diversion, impoundment, use, or restraint contrary to the provisions of this section is invalid. An officer, agent, agency, or employee of the state may not knowingly permit, aid, or

assist in any manner an unauthorized appropriation, diversion, impoundment, use, or other restraint. A person or corporation may not, directly or indirectly, personally or through an agent, officer, or employee, attempt to appropriate, divert, impound, use, or otherwise restrain or control waters within the boundaries of this state except in accordance with this section."

**Section 6.** Section 85-2-316, MCA, is amended to read:

"85-2-316. **Reservation of waters.** (1) The state or any political subdivision or agency thereof or the United States or any agency thereof may apply to the board to reserve waters for existing or future beneficial uses or to maintain a minimum flow, level, or quality of water throughout the year or at periods or for a length of time as the board designates.

(2) (a) Water may be reserved for existing or future beneficial uses in the basin where it is reserved, as described by the following basins:

(i) the Clark Fork River and its tributaries to its confluence with Lake Pend Oreille in Idaho;

(ii) the Kootenai River and its tributaries to its confluence with Kootenay Lake in British Columbia;

(iii) the St. Mary River and its tributaries to its confluence with the Oldman River in Alberta;

(iv) the Little Missouri River and its tributaries to

1 its confluence with Lake Sakakawea in North Dakota;

2 (v) the Missouri River and its tributaries to its  
3 confluence with the Yellowstone River in North Dakota; and

4 (vi) the Yellowstone River and its tributaries to its  
5 confluence with the Missouri River in North Dakota.

6 (b) A water reservation may be made for an existing or  
7 future beneficial use outside the basin where the diversion  
8 occurs only if stored water is not reasonably available for  
9 water leasing under 85-2-141 and the proposed use would  
10 occur in a basin designated in subsection (2)(a).

11 (3) Upon receiving an a correct and complete  
12 application, the department shall proceed in accordance with  
13 85-2-307 through 85-2-309. After the hearing provided in  
14 85-2-309, the board shall decide whether to reserve the  
15 water for the applicant. The department's costs of giving  
16 notice, holding the hearing, conducting investigations, and  
17 making records incurred in acting upon the application to  
18 reserve water, except the cost of salaries of the  
19 department's personnel, must be paid by the applicant. In  
20 addition, a reasonable proportion of the department's cost  
21 of preparing an environmental impact statement must be paid  
22 by the applicant unless waived by the department upon a  
23 showing of good cause by the applicant.

24 (4) (a) The board may not adopt an order reserving  
25 water unless the applicant establishes to the satisfaction

1 of the board by a preponderance of evidence:

2 (i) the purpose of the reservation;

3 (ii) the need for the reservation;

4 (iii) the amount of water necessary for the purpose of  
5 the reservation;

6 (iv) that the reservation is in the public interest.

7 (b) In determining the public interest under subsection  
8 (4)(a)(iv), the board may not adopt an order reserving water  
9 for withdrawal and transport for use outside the state  
10 unless the applicant proves by clear and convincing evidence  
11 that:

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

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

17 (c) In determining whether the applicant has proved by  
18 clear and convincing evidence that the requirements of  
19 subsections (4)(b)(i) and (4)(b)(ii) are met, the board  
20 shall consider the following factors:

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

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

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

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

6 (d) When applying for a reservation to withdraw and  
7 transport water for use outside the state, the applicant  
8 shall submit to and comply with the laws of the state of  
9 Montana governing the appropriation, lease, use, and  
10 reservation of water.

11 (5) If the purpose of the reservation requires  
12 construction of a storage or diversion facility, the  
13 applicant shall establish to the satisfaction of the board  
14 by a preponderance of evidence that there will be progress  
15 toward completion of the facility and accomplishment of the  
16 purpose with reasonable diligence in accordance with an  
17 established plan.

18 (6) The board shall limit any reservations after May 9,  
19 1979, for maintenance of minimum flow, level, or quality of  
20 water that it awards at any point on a stream or river to a  
21 maximum of 50% of the average annual flow of record on  
22 gauged streams. Ungauged streams can be allocated at the  
23 discretion of the board.

24 (7) After the adoption of an order reserving waters,  
25 the department may reject an application and refuse a permit

1 for the appropriation of reserved waters or may, with the  
2 approval of the board, issue the permit subject to terms and  
3 conditions it considers necessary for the protection of the  
4 objectives of the reservation.

5 (8) (a) Any person desiring to use water reserved to a  
6 conservation district for agricultural purposes shall make  
7 application for the use with the district, and the district,  
8 upon approval of the application, shall inform the  
9 department of the approved use and issue the applicant an  
10 authorization for the use. The department shall maintain  
11 records of all uses of water reserved to conservation  
12 districts and be responsible, when requested by the  
13 districts, for rendering technical and administrative  
14 assistance within the department's staffing and budgeting  
15 limitations in the preparation and processing of such  
16 applications for the conservation districts. The department  
17 shall, within its staffing and budgeting limitations,  
18 complete any feasibility study requested by the districts  
19 within 12 months of the time the request was made. The board  
20 shall extend the time allowed to develop a plan identifying  
21 projects for utilizing a district's reservation so long as  
22 the conservation district makes a good faith effort, within  
23 its staffing and budget limitations, to develop a plan.

24 (b) Upon actual application of water to the proposed  
25 beneficial use the authorized user shall notify the

conservation district. The notification must contain a certified statement by a person with experience in the design, construction, or operation of project works for agricultural purposes ~~that describing how the reserved water has--been~~ was put to use ~~in-substantial-accordance-with-the terms-and-conditions-of-the-authorization--to--use--reserved~~ water. The department or the district may then inspect the appropriation to determine if it has been completed in substantial accordance with the authorization.

(9) Except as provided in 85-2-331, the priority of appropriation of a water reservation and the relative priority of the reservation to permits with a later priority of appropriation must be determined according to this subsection (9).

(a) A reservation under this section has a priority of appropriation dating from the filing with the department of a notice of intention to apply for a water reservation in a basin in which no other notice of intention to apply is currently pending. The notice of intention to apply must specify the basin in which the applicant is seeking a reservation.

(b) Upon receiving a notice of intention to apply for a water reservation, the department shall identify all potential water reservation applicants in the basin specified in the notice and notify each potential applicant

of the opportunity to submit an application and to receive a reservation with the priority of appropriation as described in subsection (9)(a).

(c) To receive the priority of appropriation described in subsection (9)(a), the applicant shall submit a correct and complete water reservation application within 1 year after the filing of the notice of intention to apply. Upon a showing of good cause, the board may extend the time for preparing the application.

(d) The board may by order subordinate a water reservation to a permit issued pursuant to this part if:

(i) the permit application was accepted by the department before the date of the board order granting the reservation; and

(ii) the effect of subordinating the reservation to one or more permits does not interfere substantially with the purpose of the reservation.

(e) The board shall by order establish the relative priority of reservations approved under this section that have the same day of priority. A reservation may not adversely affect any rights in existence at that time.

(10) The board shall, periodically but at least once every 10 years, review existing reservations to ensure that the objectives of the reservation are being met. Where the objectives of the reservation are not being met, the board

may extend, revoke, or modify the reservation. Any undeveloped water made available as a result of a revocation or modification under this subsection is available for appropriation by others pursuant to this part.

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

(12) A reservant may not make a change in a reservation under this section except as permitted under 85-2-402 and this subsection. If the department approves a change, the board, upon notification by the department of its approval,

shall give notice and require the reservant to establish that the criteria in subsection (4) will be met under the approved change.

(13) A reservation may be transferred to another entity qualified to hold a reservation under subsection (1). Only the entity holding the reservation may initiate a transfer. The transfer occurs upon the filing of a water right transfer certificate with the board together with an affidavit from the entity receiving the reservation establishing that the entity is a qualified reservant under subsection (1), that the entity agrees to comply with the requirements of this section and the conditions of the reservation, and that the entity can meet the objectives of the reservation as granted. If the transfer of a reservation involves a change in an appropriation right, the necessary approvals must be acquired pursuant to subsection (12).

(14) Nothing in this section vests the board with the authority to alter a water right that is not a reservation.

(15) The department shall undertake a program to educate the public, other state agencies, and political subdivisions of the state as to the benefits of the reservation process and the procedures to be followed to secure the reservation of water. The department shall provide technical assistance to other state agencies and political subdivisions in applying for reservations under this section.

(16) Water reserved under this section is not subject to the state water leasing program established under 85-2-141."

**Section 7.** Section 85-2-402, MCA, is amended to read:

**"85-2-402. (Temporary) Changes in appropriation rights.**

(1) An appropriator may not make a change in an appropriation right except, as permitted under this section, and with by applying for and receiving the approval of the department or, if applicable, of the legislature. An applicant shall submit a correct and complete application.

(2) Except as provided in subsections (3) through (5), the department shall approve a change in appropriation right if the appropriator proves by substantial--credible a preponderance of 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) Except for a lease authorization pursuant to 85-2-436 that does not require appropriation works, 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.

(e) If the change in appropriation right involves salvaged water, the proposed water-saving methods will salvage at least the amount of water asserted by the applicant.

(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 a preponderance of 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 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) 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

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 subsection (2) or (3) 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 appropriator has proved by clear and convincing evidence that the requirements of subsections (5)(b)(ii) and (5)(b)(iii) will be met, the department and, if applicable, the legislature 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



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 the  
8 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 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 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 may  
4 extend time limits specified in the change approval under  
5 the applicable criteria and procedures of 85-2-312(3).

6 (8) Upon actual application of water to the proposed  
7 beneficial use within the time allowed, the appropriator  
8 shall notify the department that the appropriation has been  
9 properly completed. The notification must contain a  
10 certified statement by a person with experience in the  
11 design, construction, or operation of appropriation works  
12 that describing how the appropriation has-been-properly was  
13 ~~completed in---substantial---accordance---with---the---terms---and~~  
14 ~~conditions-of-the-change-approval.~~

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

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

(11) 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.

(12) A change in appropriation right contrary to the provisions of this section is invalid. An officer, agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized change in appropriation right. A person or corporation may not, directly or indirectly, personally or through an agent, officer, or employee, attempt to change an appropriation right except in accordance with this section. (Terminates June 30, 1999--sec. 4, Ch. 740, L. 1991.)

85-2-402. (Effective July 1, 1999) Changes in appropriation rights. (1) An appropriator may not make a change in an appropriation right except, as permitted under this section, and with by applying for and receiving the approval of the department or, if applicable, of the legislature. An applicant shall submit a correct and complete application.

(2) Except as provided in subsections (3) through (5), the department shall approve a change in appropriation right if the appropriator proves by substantial--credible a preponderance of 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.

(e) If the change in appropriation right involves salvaged water, the proposed water-saving methods will salvage at least the amount of water asserted by the applicant.

(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 a preponderance of 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

1 well as projected demands for water for future beneficial  
2 purposes, including municipal water supplies, irrigation  
3 systems, and minimum streamflows for the protection of  
4 existing water rights and aquatic life;

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

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

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

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

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

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

21 (a) the applicant proves by clear and convincing  
22 evidence and the department finds that the criteria in  
23 subsections (2) and (3) are met; and

24 (b) the department then petitions the legislature and  
25 the legislature affirms the decision of the department after

1 one or more public hearings.

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

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

20 (i) depending on the volume of water diverted or  
21 consumed, the applicable criteria and procedures of  
22 subsection (2) or (3) are met;

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

25 (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 appropriator has proved by clear and convincing evidence that the requirements of subsections (5)(b)(ii) and (5)(b)(iii) will be met, the department and, if applicable, the legislature 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 proposed change in appropriation might 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 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) 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) 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).

(8) Upon actual application of water to the proposed beneficial use within the time allowed, the appropriator shall notify the department that the appropriation has been properly completed. The notification must contain a certified statement by a person with experience in the design, construction, or operation of appropriation works that describing how the appropriation has been properly was completed in--substantial--accordance--with--the--terms--and conditions-of-the-change-approval.

(9) 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.

(10) 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.

(11) 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.

(12) 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 8.** Section 85-2-436, MCA, is amended to read:

**"85-2-436. (Temporary) Water leasing study.** (1) The

department of fish, wildlife, and parks and the department, in consultation with the water policy committee, shall conduct and coordinate a study that, at a minimum:

(a) provides the following data for each designated stream reach and each pilot lease entered into under subsection (2):

(i) the length of the stream reach and how it is determined;

(ii) technical methods and data used to determine critical streamflow or volume needed to preserve fisheries;

(iii) legal standards and technical data used to determine and substantiate the amount of water available for instream flows through leasing of existing rights;

(iv) contractual parameters, conditions, and other steps taken to ensure that each lease in no way harms other appropriators, particularly if the stream is one that experiences natural dewatering; and

(v) methods and technical means used to monitor use of water under each lease;

(b) based on the data provided under subsection (1)(a), develops a complete model of a water lease and lease authorization that includes a step-by-step explanation of the process from initiation to completion.

(2) For purposes of undertaking the study described in subsection (1) and as authorized by law, the department of

1 fish, wildlife, and parks and the department may engage in  
2 the activities described in this subsection. For purposes of  
3 this study, this section is the exclusive means by which the  
4 department of fish, wildlife, and parks may seek to change  
5 an appropriation right to an instream flow purpose.

6 (a) The department of fish, wildlife, and parks, with  
7 the consent of the commission, may lease existing rights for  
8 the purpose of maintaining or enhancing streamflows for the  
9 benefit of fisheries in stream reaches determined eligible  
10 by the board pursuant to 85-2-437.

11 (b) Upon receipt of an a correct and complete  
12 application for a lease from the department of fish,  
13 wildlife, and parks, the department shall publish notice of  
14 the application as provided in 85-2-307. Parties who believe  
15 they may be adversely affected by the proposed lease may  
16 file an objection as provided in 85-2-308. A lease may not  
17 be approved until all objections are resolved. After  
18 resolving all objections filed under 85-2-308, the  
19 department shall authorize a lease of an existing right for  
20 the purpose of maintaining or enhancing streamflows for the  
21 benefit of fisheries if the applicant submits a correct and  
22 complete application and meets the requirements of 85-2-402.

23 (c) The application for a lease authorization must  
24 include specific information on the length and location of  
25 the stream reach in which the streamflow must be maintained

1 or enhanced and must provide a detailed streamflow measuring  
2 plan that describes the points where and the manner in which  
3 the streamflow must be measured.

4 (d) The maximum quantity of water that may be leased is  
5 the amount historically diverted by the lessor. However,  
6 only the amount historically consumed, or a smaller amount  
7 if specified by the department in the lease authorization,  
8 may be used to maintain or enhance streamflows below the  
9 lessor's point of diversion.

10 (e) The lease may not be issued for a term of more than  
11 10 years, but it may be renewed once for up to 10 years,  
12 except that a lease of water made available from the  
13 development of a water conservation or storage project is  
14 restricted to a term of not more than 20 years. Upon  
15 receiving notice of a lease renewal, the department shall  
16 notify other appropriators potentially affected by the lease  
17 and shall allow 30 days for submission of new evidence of  
18 adverse effects to other water rights. A lease authorization  
19 is not required for a renewal unless an appropriator other  
20 than an appropriator described in subsection (2)(i) submits  
21 evidence of adverse effects to his the appropriator's rights  
22 that has not been considered previously. If new evidence is  
23 submitted, a lease authorization must be obtained according  
24 to the requirements of 85-2-402.

25 (f) During the term of the lease, the department may

1 modify or revoke the lease authorization if an appropriator  
2 other than an appropriator described in subsection (2)(i)  
3 proves by ~~substantial-credible~~ a preponderance of evidence  
4 that his the appropriator's water right is adversely  
5 affected.

6 (g) The priority of appropriation for a lease under  
7 this section is the same as the priority of appropriation of  
8 the right that is leased.

9 (h) Neither a change in appropriation right nor any  
10 other authorization is required for the reversion of the  
11 appropriation right to the lessor's previous use.

12 (i) A person issued a water use permit with a priority  
13 of appropriation after the date of filing of an application  
14 for a lease authorization under this section may not object  
15 to the exercise of the lease according to its terms or the  
16 reversion of the appropriation right to the lessor according  
17 to the lessor's previous use.

18 (j) The department of fish, wildlife, and parks shall  
19 pay all costs associated with installing devices or  
20 providing personnel to measure streamflows according to the  
21 measuring plan submitted under this section.

22 (3) (a) The department of fish, wildlife, and parks  
23 shall complete and submit to the board, commission, and  
24 water policy committee an annual study progress report by  
25 December 1 of each year. This report must include the

1 applicable information listed in subsection (1) for each  
2 lease. If the department of fish, wildlife, and parks has  
3 not leased water rights under this section by December 1 of  
4 any year, the department of fish, wildlife, and parks shall  
5 provide compelling justification for that fact in the study  
6 progress report.

7 (b) A final study report must be adopted by the board  
8 and commission and submitted to the water policy committee,  
9 which shall complete the final report by December 1, 1998.

10 (4) This section does not create the right for a person  
11 to bring suit to compel the renewal of a lease that has  
12 expired. (Terminates June 30, 1999--sec. 4, Ch. 740, L.  
13 1991.)"

14 **Section 9.** Section 85-2-312, MCA, is amended to read:

15 **"85-2-312. Terms of permit.** (1) The department may  
16 issue a permit for less than the amount of water requested,  
17 but in no case may it issue a permit for more water than is  
18 requested or than can be beneficially used without waste for  
19 the purpose stated in the application. The department may  
20 require modification of plans and specifications for the  
21 appropriation or related diversion or construction. The  
22 department may issue a permit subject to terms, conditions,  
23 restrictions, and limitations it considers necessary to  
24 satisfy the criteria listed in 85-2-311, and it may issue  
25 temporary or seasonal permits. A permit shall be issued

subject to existing rights and any final determination of those rights made under this chapter.

(2) The department shall specify in the permit or in any authorized extension of time provided in subsection (3), the time limits for commencement of the appropriation works, completion of construction, and actual application of the water to the proposed beneficial use. In fixing those time limits, the department shall consider the cost and magnitude of the project, the engineering and physical features to be encountered, and, on projects designed for gradual development and gradually increased use of water, the time reasonably necessary for that gradual development and increased use. The department shall issue the permit or authorized extension of time subject to the terms, conditions, restrictions, and limitations it considers necessary to ensure that the work on the appropriation is commenced, conducted, and completed and that the water is actually applied in a timely manner to the beneficial use specified in the permit.

(3) ~~The department may upon a showing of good cause, extend time limits specified in the permit for commencement of the appropriation works, completion of construction, and actual application of the water to the proposed beneficial use. All requests for extensions of time must be by affidavit and must be filed with the department prior to the~~

~~expiration of the time limit specified in the permit or any previously authorized extension of time. The department may issue an order temporarily extending the time limit specified in the permit for 120 days or until the department has completed its action under this section, whichever is greater. Upon receipt of a proper request for extension of time, the department shall prepare a notice containing the facts pertinent to the request for extension of time and shall publish the notice in a newspaper of general circulation in the area of the source. The department may serve notice by first class mail upon any public agency or other person the department determines may be interested in or affected by the request for extension of time. The department shall hold a hearing on the request for extension of time on its own motion or if requested by an interested party. The department may grant the extension of time in the absence of a hearing if no requests for a hearing are received and the extension of time is granted as requested, or the department may grant the extension of time in a modified form by following the process established in 85-2-310(2). Subsequent extensions of time may be made in the same manner. The department shall by rule or by condition to a permit establish a process allowing for the extension of the time limits specified in the permit for commencement of the appropriation works, completion of~~



1 construction, and actual application of water to the  
 2 proposed beneficial use. The department may not accept a  
 3 request for extension of time that is filed less than 30  
 4 days prior to the time limit specified in the permit. If a  
 5 permit is not completed within the time limit specified or  
 6 within an extension of that time limit the permit is void  
 7 upon lapse of the time limit.

8 (4) The original of the permit shall be sent to the  
 9 permittee, and a copy shall be kept in the office of the  
 10 department in Helena."

11 **Section 10.** Section 85-2-315, MCA, is amended to read:

12 "85-2-315. Certificate of water right. Upon actual  
 13 application of water to the proposed beneficial use within  
 14 the time allowed, the permittee shall notify the department  
 15 that the appropriation has been properly completed. The  
 16 notification must contain a certified statement by a person  
 17 with experience in the design, construction, or operation of  
 18 appropriation works that describing how the appropriation  
 19 ~~has--been~~ was properly completed ~~in-substantial-accordance~~  
 20 ~~with-the-terms-and-conditions-of-the-permit.~~ The department  
 21 shall review the certified statement and may then inspect  
 22 the appropriation, and if it determines that the  
 23 appropriation has been completed in substantial accordance  
 24 with the permit, it shall issue the permittee a certificate  
 25 of water right. The original of the certificate shall be

1 sent to the permittee, and a duplicate shall be kept in the  
 2 office of the department in Helena."

3 **NEW SECTION. Section 11. Severability.** If a part of  
 4 [this act] is invalid, all valid parts that are severable  
 5 from the invalid part remain in effect. If a part of [this  
 6 act] is invalid in one or more of its applications, the part  
 7 remains in effect in all valid applications that are  
 8 severable from the invalid applications.

9 **NEW SECTION. Section 12. Retroactive applicability.**  
 10 [Sections 1 through 8] apply retroactively, within the  
 11 meaning of 1-2-109, to all applications and objections  
 12 pending on [the effective date of this act] that are subject  
 13 to the provisions of Title 85, chapter 2.

14 **NEW SECTION. Section 13. Effective date.** [This act] is  
 15 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 SB0231, as introduced.

DESCRIPTION OF PROPOSED LEGISLATION: The bill proposes to revise and clarify portions of ten separate water law sections concerning the burdens of proof under which applications for beneficial water use permits, change authorizations, and reservations are processed pursuant to Montana water use laws. It also clarifies the process for extension of time for a water use permittee to complete permit and change authorization conditions, and the verification process for issued permit and change authorizations.

ASSUMPTIONS:

1. The present filing fee for an Application for Extension of Time (Form No. 607) is \$70. Board Rule 36.12.103(1)(f) states \$20 is specifically for publication costs.
2. During 1990, 1991, and 1992 the Department of Natural Resources and Conservation (DNRC) received 226 Applications for Extension of Time, for a three-year average of 75 per year.
3. This proposed bill would eliminate the requirement that Applications for Extension of Time be public noticed. Therefore on the average per year DNRC would realize a reduction in Form No. 607 fees of \$1,500. (75 applications x \$20 = \$1,500)
4. During 1990, 1991, and 1992 DNRC spent a total of \$3,882 to public notice the 226 Applications for Extension of Time for a three-year average of \$17 per application. Therefore, on the average per year, DNRC spent \$1,275 to public notice 75 applications. (75 applications x \$17 = \$1,275)
5. The difference between publication fees received and actual costs on an average per year equals \$225. (\$1,500 - \$1,275 = \$225).
6. DNRC would be required to revise Board Rule 36.12.103(1)(f), to eliminate the \$20 fee specifically required to public notice Applications for Extension of Time. However, the \$50 fee for processing the application would remain.
7. DNRC would also be required to revise and republish five separate forms if the above proposed amendment should pass.
8. The costs of amending board rules and revising and republishing rules would be absorbed.

FISCAL IMPACT:

On an average year DNRC would lose \$1,500 in (Form No. 607) fees for public noticing. However, DNRC would not be required to spend an average \$1,275 per year to public notice the Applications for Extension of Time, for a net revenue loss of \$225 per year.

David Lewis 1-25-93  
DAVID LEWIS, BUDGET DIRECTOR DATE  
Office of Budget and Program Planning

Bill Yellowtail 1/26/93  
BILL YELLOWTAIL, PRIMARY SPONSOR DATE

Fiscal Note for SB0231, as introduced

SB 231

APPROVED BY COMM. ON  
NATURAL RESOURCES

1

~~Sends~~ BILL NO. 231

2

INTRODUCED BY Yellowtail

3

BY REQUEST OF THE DEPARTMENT OF NATURAL RESOURCES

4

AND CONSERVATION

5

6 A BILL FOR AN ACT ENTITLED: "AN ACT REVISING AND CLARIFYING  
7 THE BURDENS OF PROOF AND STANDARDS OF PROOF UNDER WHICH  
8 APPLICATIONS FOR BENEFICIAL WATER USE PERMITS, CHANGE  
9 AUTHORIZATIONS, AND RESERVATIONS ARE PROCESSED PURSUANT TO  
10 MONTANA WATER USE LAWS; CLARIFYING THE PROCESS FOR EXTENSION  
11 OF TIME FOR A WATER USE PERMITTEE TO COMPLETE PERMIT  
12 CONDITIONS; CLARIFYING THE VERIFICATION PROCESS FOR ISSUANCE  
13 OF A PERMIT; AMENDING SECTIONS 85-2-102, 85-2-302, 85-2-307,  
14 85-2-308, 85-2-311, 85-2-312, 85-2-315, 85-2-316, 85-2-402,  
15 AND 85-2-436, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE  
16 AND A RETROACTIVE APPLICABILITY DATE."

17

18

## STATEMENT OF INTENT

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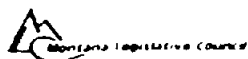
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A statement of intent is required for this bill because  
85-2-312 grants the department of natural resources and  
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provide necessary procedural and substantive safeguards to  
protect existing water users and permit holders from adverse

THERE ARE NO CHANGES ON THIS BILL  
AND WILL NOT BE REPRINTED. PLEASE  
REFER TO INTRODUCED (WHITE) BILL  
FOR COMPLETE TEXT.



*Sends* BILL NO. *231*

INTRODUCED BY *Yellowtail*  
BY REQUEST OF THE DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING AND CLARIFYING THE BURDENS OF PROOF AND STANDARDS OF PROOF UNDER WHICH APPLICATIONS FOR BENEFICIAL WATER USE PERMITS, CHANGE AUTHORIZATIONS, AND RESERVATIONS ARE PROCESSED PURSUANT TO MONTANA WATER USE LAWS; CLARIFYING THE PROCESS FOR EXTENSION OF TIME FOR A WATER USE PERMITTEE TO COMPLETE PERMIT CONDITIONS; CLARIFYING THE VERIFICATION PROCESS FOR ISSUANCE OF A PERMIT; AMENDING SECTIONS 85-2-102, 85-2-302, 85-2-307, 85-2-308, 85-2-311, 85-2-312, 85-2-315, 85-2-316, 85-2-402, AND 85-2-436, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND A RETROACTIVE APPLICABILITY DATE."

#### STATEMENT OF INTENT

A statement of intent is required for this bill because 85-2-312 grants the department of natural resources and conservation rulemaking authority to establish a procedure for extending time limits for completing work under a water use permit. The legislature intends that the department provide necessary procedural and substantive safeguards to protect existing water users and permit holders from adverse

impacts that may be caused by extending time limits for perfecting new water uses.

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. (Temporary) Definitions.** Unless the context requires otherwise, in this chapter the following definitions apply:

(1) "Appropriate" means to:

(a) divert, impound, or withdraw (including by stock for stock water) a quantity of water;

(b) in the case of a public agency, to reserve water in accordance with 85-2-316; or

(c) in the case of the department of fish, wildlife, and parks, to lease water in accordance with 85-2-436.

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

(a) a use of water for the benefit of the appropriator,

other -----

THERE ARE NO CHANGES IN THIS BILL  
AND WILL NOT BE REPRINTED. PLEASE  
REFER TO YELLOW COPY FOR COMPLETE TEXT.

*SB 231*  
THIRD READING

## 1 SENATE BILL NO. 231

2 INTRODUCED BY YELLOWTAIL

3 BY REQUEST OF THE DEPARTMENT OF NATURAL RESOURCES

4 AND CONSERVATION

5  
6 A BILL FOR AN ACT ENTITLED: "AN ACT REVISING AND CLARIFYING  
7 THE BURDENS OF PROOF AND STANDARDS OF PROOF UNDER WHICH  
8 APPLICATIONS FOR BENEFICIAL WATER USE PERMITS, CHANGE  
9 AUTHORIZATIONS, AND RESERVATIONS ARE PROCESSED PURSUANT TO  
10 MONTANA WATER USE LAWS; CLARIFYING THE PROCESS FOR EXTENSION  
11 OF TIME FOR A WATER USE PERMITTEE TO COMPLETE PERMIT  
12 CONDITIONS; CLARIFYING THE VERIFICATION PROCESS FOR ISSUANCE  
13 OF A PERMIT; AMENDING SECTIONS 85-2-102, 85-2-302, 85-2-307,  
14 85-2-308, 85-2-311, 85-2-312, 85-2-315, 85-2-316, 85-2-402,  
15 AND 85-2-436, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE  
16 AND A RETROACTIVE APPLICABILITY DATE."  
17

## 18 STATEMENT OF INTENT

19 A statement of intent is required for this bill because  
20 85-2-312 grants the department of natural resources and  
21 conservation rulemaking authority to establish a procedure  
22 for extending time limits for completing work under a water  
23 use permit. The legislature intends that the department  
24 provide necessary procedural and substantive safeguards to  
25 protect existing water users and permitholders from adverse

1 impacts that may be caused by extending time limits for  
2 perfecting new water uses.  
3

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

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

6 "85-2-102. (Temporary) Definitions. Unless the context  
7 requires otherwise, in this chapter the following  
8 definitions apply:

9 (1) "Appropriate" means to:

10 (a) divert, impound, or withdraw (including by stock  
11 for stock water) a quantity of water;

12 (b) in the case of a public agency, to reserve water in  
13 accordance with 85-2-316; or

14 (c) in the case of the department of fish, wildlife,  
15 and parks, to lease water in accordance with 85-2-436.

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

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

22 (b) a use of water appropriated by the department for  
23 the state water leasing program under 85-2-141 and of water  
24 leased under a valid lease issued by the department under  
25 85-2-141; and

(c) a use of water by the department of fish, wildlife, and parks pursuant to a lease authorized under 85-2-436.

(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) "Commission" means the fish, wildlife, and parks commission provided for in 2-15-3402.

(7) "Correct and complete" means that the information required to be submitted conforms to the standard of substantial credible information and that all of the necessary parts of the form requiring the information have been filled in with the required information.

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

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

(10) "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.

(11) "Ground water" means any water that is beneath the ground surface.

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

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

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

(15) "Salvage" means to make water available for beneficial use from an existing valid appropriation through application of water-saving methods.

(16) "Substantial credible information" means probable believable facts sufficient to support a reasonable legal theory upon which the department should proceed with the action requested by the person providing the information.

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

1       ~~(16)~~(18) "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       ~~(17)~~(19) "Watercourse" means any naturally occurring  
6 stream or river from which water is diverted for beneficial  
7 uses. It does not include ditches, culverts, or other  
8 manmade waterways.

9       ~~(18)~~(20) "Water division" means a drainage basin as  
10 defined in 3-7-102.

11       ~~(19)~~(21) "Water judge" means a judge as provided for in  
12 Title 3, chapter 7.

13       ~~(20)~~(22) "Water master" means a master as provided for  
14 in Title 3, chapter 7.

15       ~~(21)~~(23) "Well" means any artificial opening or  
16 excavation in the ground, however made, by which ground  
17 water is sought or can be obtained or through which it flows  
18 under natural pressures or is artificially withdrawn.  
19 (Terminates June 30, 1999--sec. 4, Ch. 740, L. 1991.)

20       85-2-102. (Effective July 1, 1999) Definitions. Unless  
21 the context requires otherwise, in this chapter the  
22 following definitions apply:

23       (1) "Appropriate" means to divert, impound, or withdraw  
24 (including by stock for stock water) a quantity of water or,  
25 in the case of a public agency, to reserve water in

1 accordance with 85-2-316.

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

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

8       (b) a use of water appropriated by the department for  
9 the state water leasing program under 85-2-141 and of water  
10 leased under a valid lease issued by the department under  
11 85-2-141.

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

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

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

19       (6) "Correct and complete" means that the information  
20 required to be submitted conforms to the standard of  
21 substantial credible information and that all of the  
22 necessary parts of the form requiring the information have  
23 been filled in with the required information.

24       ~~(6)~~(7) "Declaration" means the declaration of an  
25 existing right filed with the department under section 8,

1 Chapter 452, Laws of 1973.

2 {7}(8) "Department" means the department of natural  
3 resources and conservation provided for in Title 2, chapter  
4 15, part 33.

5 {8}(9) "Existing right" means a right to the use of  
6 water which would be protected under the law as it existed  
7 prior to July 1, 1973.

8 {9}(10) "Ground water" means any water that is beneath  
9 the ground surface.

10 {10}(11) "Permit" means the permit to appropriate issued  
11 by the department under 85-2-301 through 85-2-303 and  
12 85-2-306 through 85-2-314.

13 {11}(12) "Person" means an individual, association,  
14 partnership, corporation, state agency, political  
15 subdivision, the United States or any agency thereof, or any  
16 other entity.

17 {12}(13) "Political subdivision" means any county,  
18 incorporated city or town, public corporation, or district  
19 created pursuant to state law or other public body of the  
20 state empowered to appropriate water but not a private  
21 corporation, association, or group.

22 {13}(14) "Salvage" means to make water available for  
23 beneficial use from an existing valid appropriation through  
24 application of water-saving methods.

25 (15) "Substantial credible information" means probable

1 believable facts sufficient to support a reasonable legal  
2 theory upon which the department should proceed with the  
3 action requested by the person providing the information.

4 {14}(16) "Waste" means the unreasonable loss of water  
5 through the design or negligent operation of an  
6 appropriation or water distribution facility or the  
7 application of water to anything but a beneficial use.

8 {15}(17) "Water" means all water of the state, surface  
9 and subsurface, regardless of its character or manner of  
10 occurrence, including but not limited to geothermal water,  
11 diffuse surface water, and sewage effluent.

12 {16}(18) "Watercourse" means any naturally occurring  
13 stream or river from which water is diverted for beneficial  
14 uses. It does not include ditches, culverts, or other  
15 manmade waterways.

16 {17}(19) "Water division" means a drainage basin as  
17 defined in 3-7-102.

18 {18}(20) "Water judge" means a judge as provided for in  
19 Title 3, chapter 7.

20 {19}(21) "Water master" means a master as provided for  
21 in Title 3, chapter 7.

22 {20}(22) "Well" means any artificial opening or  
23 excavation in the ground, however made, by which ground  
24 water is sought or can be obtained or through which it flows  
25 under natural pressures or is artificially withdrawn."



**Section 2.** Section 85-2-302, MCA, is amended to read:

**"85-2-302. (Temporary) Application for permit -- fee.**

(1) Except as otherwise provided in (1) through (3) of 85-2-306, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department. The application shall be made on a form prescribed by the department. The department shall make the forms available through its offices and the offices of the county clerk and recorders. The applicant shall submit a correct and complete application. The department shall return a defective application for correction or completion, together with the reasons for returning it. An application does not lose priority of filing because of defects if the application is corrected, completed, and refiled with the department within 30 days after its return to the applicant or within a further time as the department may allow. If an application is not corrected and completed within 30 days or within a further time as the department allows, up to 3 months, the priority date of the application shall be the date of refiled the application with the corrections with the department. An application not corrected within 3 months shall be terminated.

(2) In addition to the application filing fee

prescribed by the board by rule pursuant to 85-2-113, a person applying for a permit under subsection (1) shall pay a fee of \$1 per acre-foot of ground water appropriated. The fees collected by the department under this subsection must be deposited in the ground water assessment account, established in 85-2-905, within the state special revenue fund. (Terminates July 1, 1993--sec. 22, Ch. 769, L. 1991.)

**85-2-302. (Effective July 1, 1993) Application for permit.** Except as otherwise provided in (1) through (3) of 85-2-306, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department. The application shall be made on a form prescribed by the department. The department shall make the forms available through its offices and the offices of the county clerk and recorders. The applicant shall submit a correct and complete application. The department shall return a defective application for correction or completion, together with the reasons for returning it. An application does not lose priority of filing because of defects if the application is corrected, completed, and refiled with the department within 30 days after its return to the applicant or within a further time as the department may allow. If an application is not corrected and completed within 30 days or within a

further time as the department allows, up to 3 months, the priority date of the application shall be the date of refiling the application with the corrections with the department. An application not corrected within 3 months shall be terminated."

**Section 3.** Section 85-2-307, MCA, is amended to read:

"85-2-307. Notice of application. (1) (a) Upon receipt of a proper correct and complete application for a permit, the department shall prepare a notice containing the facts pertinent to the application and shall publish the notice once in a newspaper of general circulation in the area of the source.

(b) Before the date of publication, the department shall also serve the notice by first-class mail upon:

(i) an appropriator of water or applicant for or holder of a permit who, according to the records of the department, may be affected by the proposed appropriation;

(ii) any purchaser under contract for deed, as defined in 70-20-115, of property that, according to the records of the department, may be affected by the proposed appropriation; and

(iii) any public agency that has reserved waters in the source under 85-2-316.

(c) The department may, in its discretion, also serve notice upon any state agency or other person the department

feels may be interested in or affected by the proposed appropriation.

(d) The department shall file in its records proof of service by affidavit of the publisher in the case of notice by publication and by its own affidavit in the case of service by mail.

(2) The notice shall state that by a date set by the department (not less than 15 days or more than 60 days after the date of publication) persons may file with the department written objections to the application.

(3) The requirements of subsections (1) and (2) of this section do not apply if the department finds, on the basis of information reasonably available to it, that the appropriation as proposed in the application will not adversely affect the rights of other persons."

**Section 4.** Section 85-2-308, MCA, is amended to read:

"85-2-308. Objections. (1) (a) An objection to an application for a permit must be filed by the date specified by the department under 85-2-307(2).

(b) The objection to an application for a permit must state the name and address of the objector and facts tending to show that one or more of the criteria in 85-2-311 are not met.

(2) For an application for a change in appropriation rights, the objection must state the name and address of the

1 objector and facts tending to show that one or more of the  
2 criteria in 85-2-402 are not met.

3 (3) A person has standing to file an objection under  
4 this section if the property, water rights, or interests of  
5 the objector would be adversely affected by the proposed  
6 appropriation.

7 (4) For an application for a reservation of water, the  
8 objection must state the name and address of the objector  
9 and facts tending to show that one or more of the criteria  
10 in 85-2-316 are not met.

11 (5) An objector to an application under this chapter  
12 shall timely file a correct and complete objection on a  
13 form prescribed by the department."

14 **Section 5.** Section 85-2-311, MCA, is amended to read:

15 "85-2-311. Criteria for issuance of permit. (1) Except  
16 as provided in subsections (2) and (3), the department shall  
17 issue a permit if the applicant proves by substantial  
18 credible a preponderance of evidence that the following  
19 criteria are met:

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

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

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

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

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

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

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

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

11 (f) the applicant has a possessory interest, or the  
12 written consent of the person with the possessory interest,  
13 in the property where the water is to be put to beneficial  
14 use.

15 (2) The department may not issue a permit for an  
16 appropriation of 4,000 or more acre-feet of water a year and  
17 5.5 or more cubic feet per second of water unless the  
18 applicant proves by clear and convincing evidence that:

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

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

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

25 (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) To meet the ~~substantial-credible~~ preponderance of evidence standard in this section, the applicant, in addition to other evidence demonstrating that the criteria of subsection (1) have been met, shall submit independent hydrologic or other evidence, including but not limited to water supply data, field reports, and other information developed by the applicant, the department, the U.S. geological survey, or the U.S. soil conservation service and other specific field studies,--demonstrating--that--the ~~criteria-are-met~~.

(5) An appropriation, diversion, impoundment, use, restraint, or attempted appropriation, diversion, impoundment, use, or restraint contrary to the provisions of this section is invalid. An officer, agent, agency, or employee of the state may not knowingly permit, aid, or

assist in any manner an unauthorized appropriation, diversion, impoundment, use, or other restraint. A person or corporation may not, directly or indirectly, personally or through an agent, officer, or employee, attempt to appropriate, divert, impound, use, or otherwise restrain or control waters within the boundaries of this state except in accordance with this section."

**Section 6.** Section 85-2-316, MCA, is amended to read:

"85-2-316. **Reservation of waters.** (1) The state or any political subdivision or agency thereof or the United States or any agency thereof may apply to the board to reserve waters for existing or future beneficial uses or to maintain a minimum flow, level, or quality of water throughout the year or at periods or for a length of time as the board designates.

(2) (a) Water may be reserved for existing or future beneficial uses in the basin where it is reserved, as described by the following basins:

(i) the Clark Fork River and its tributaries to its confluence with Lake Pend Oreille in Idaho;

(ii) the Kootenai River and its tributaries to its confluence with Kootenay Lake in British Columbia;

(iii) the St. Mary River and its tributaries to its confluence with the Oldman River in Alberta;

(iv) the Little Missouri River and its tributaries to

its confluence with Lake Sakakawea in North Dakota;

(v) the Missouri River and its tributaries to its confluence with the Yellowstone River in North Dakota; and

(vi) the Yellowstone River and its tributaries to its confluence with the Missouri River in North Dakota.

(b) A water reservation may be made for an existing or future beneficial use outside the basin where the diversion occurs only if stored water is not reasonably available for water leasing under 85-2-141 and the proposed use would occur in a basin designated in subsection (2)(a).

(3) Upon receiving an a correct and complete application, the department shall proceed in accordance with 85-2-307 through 85-2-309. After the hearing provided in 85-2-309, the board shall decide whether to reserve the water for the applicant. The department's costs of giving notice, holding the hearing, conducting investigations, and making records incurred in acting upon the application to reserve water, except the cost of salaries of the department's personnel, must be paid by the applicant. In addition, a reasonable proportion of the department's cost of preparing an environmental impact statement must be paid by the applicant unless waived by the department upon a showing of good cause by the applicant.

(4) (a) The board may not adopt an order reserving water unless the applicant establishes to the satisfaction

of the board by a preponderance of evidence:

(i) the purpose of the reservation;

(ii) the need for the reservation;

(iii) the amount of water necessary for the purpose of the reservation;

(iv) that the reservation is in the public interest.

(b) In determining the public interest under subsection (4)(a)(iv), the board may not adopt an order reserving water for withdrawal and transport for use outside the state unless the applicant proves by clear and convincing evidence that:

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

(ii) 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 (4)(b)(i) and (4)(b)(ii) are met, the board 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 reservation 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, use, and reservation of water.

(5) If the purpose of the reservation requires construction of a storage or diversion facility, the applicant shall establish to the satisfaction of the board by a preponderance of evidence that there will be progress toward completion of the facility and accomplishment of the purpose with reasonable diligence in accordance with an established plan.

(6) The board shall limit any reservations after May 9, 1979, for maintenance of minimum flow, level, or quality of water that it awards at any point on a stream or river to a maximum of 50% of the average annual flow of record on gauged streams. Ungauged streams can be allocated at the discretion of the board.

(7) After the adoption of an order reserving waters, the department may reject an application and refuse a permit

for the appropriation of reserved waters or may, with the approval of the board, issue the permit subject to terms and conditions it considers necessary for the protection of the objectives of the reservation.

(8) (a) Any person desiring to use water reserved to a conservation district for agricultural purposes shall make application for the use with the district, and the district, upon approval of the application, shall inform the department of the approved use and issue the applicant an authorization for the use. The department shall maintain records of all uses of water reserved to conservation districts and be responsible, when requested by the districts, for rendering technical and administrative assistance within the department's staffing and budgeting limitations in the preparation and processing of such applications for the conservation districts. The department shall, within its staffing and budgeting limitations, complete any feasibility study requested by the districts within 12 months of the time the request was made. The board shall extend the time allowed to develop a plan identifying projects for utilizing a district's reservation so long as the conservation district makes a good faith effort, within its staffing and budget limitations, to develop a plan.

(b) Upon actual application of water to the proposed beneficial use the authorized user shall notify the

1 conservation district. The notification must contain a  
 2 certified statement by a person with experience in the  
 3 design, construction, or operation of project works for  
 4 agricultural purposes that describing how the reserved water  
 5 ~~has--been~~ was put to use ~~in-substantial-accordance-with-the~~  
 6 ~~terms-and-conditions-of-the-authorization--to--use--reserved~~  
 7 water. The department or the district may then inspect the  
 8 appropriation to determine if it has been completed in  
 9 substantial accordance with the authorization.

10 (9) Except as provided in 85-2-331, the priority of  
 11 appropriation of a water reservation and the relative  
 12 priority of the reservation to permits with a later priority  
 13 of appropriation must be determined according to this  
 14 subsection (9).

15 (a) A reservation under this section has a priority of  
 16 appropriation dating from the filing with the department of  
 17 a notice of intention to apply for a water reservation in a  
 18 basin in which no other notice of intention to apply is  
 19 currently pending. The notice of intention to apply must  
 20 specify the basin in which the applicant is seeking a  
 21 reservation.

22 (b) Upon receiving a notice of intention to apply for a  
 23 water reservation, the department shall identify all  
 24 potential water reservation applicants in the basin  
 25 specified in the notice and notify each potential applicant

1 of the opportunity to submit an application and to receive a  
 2 reservation with the priority of appropriation as described  
 3 in subsection (9)(a).

4 (c) To receive the priority of appropriation described  
 5 in subsection (9)(a), the applicant shall submit a correct  
 6 and complete water reservation application within 1 year  
 7 after the filing of the notice of intention to apply. Upon a  
 8 showing of good cause, the board may extend the time for  
 9 preparing the application.

10 (d) The board may by order subordinate a water  
 11 reservation to a permit issued pursuant to this part if:

12 (i) the permit application was accepted by the  
 13 department before the date of the board order granting the  
 14 reservation; and

15 (ii) the effect of subordinating the reservation to one  
 16 or more permits does not interfere substantially with the  
 17 purpose of the reservation.

18 (e) The board shall by order establish the relative  
 19 priority of reservations approved under this section that  
 20 have the same day of priority. A reservation may not  
 21 adversely affect any rights in existence at that time.

22 (10) The board shall, periodically but at least once  
 23 every 10 years, review existing reservations to ensure that  
 24 the objectives of the reservation are being met. Where the  
 25 objectives of the reservation are not being met, the board



1 may extend, revoke, or modify the reservation. Any  
 2 undeveloped water made available as a result of a revocation  
 3 or modification under this subsection is available for  
 4 appropriation by others pursuant to this part.

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

22 (12) A reservant may not make a change in a reservation  
 23 under this section except as permitted under 85-2-402 and  
 24 this subsection. If the department approves a change, the  
 25 board, upon notification by the department of its approval,

1 shall give notice and require the reservant to establish  
 2 that the criteria in subsection (4) will be met under the  
 3 approved change.

4 (13) A reservation may be transferred to another entity  
 5 qualified to hold a reservation under subsection (1). Only  
 6 the entity holding the reservation may initiate a transfer.  
 7 The transfer occurs upon the filing of a water right  
 8 transfer certificate with the board together with an  
 9 affidavit from the entity receiving the reservation  
 10 establishing that the entity is a qualified reservant under  
 11 subsection (1), that the entity agrees to comply with the  
 12 requirements of this section and the conditions of the  
 13 reservation, and that the entity can meet the objectives of  
 14 the reservation as granted. If the transfer of a reservation  
 15 involves a change in an appropriation right, the necessary  
 16 approvals must be acquired pursuant to subsection (12).

17 (14) Nothing in this section vests the board with the  
 18 authority to alter a water right that is not a reservation.

19 (15) The department shall undertake a program to educate  
 20 the public, other state agencies, and political subdivisions  
 21 of the state as to the benefits of the reservation process  
 22 and the procedures to be followed to secure the reservation  
 23 of water. The department shall provide technical assistance  
 24 to other state agencies and political subdivisions in  
 25 applying for reservations under this section.

1 (16) Water reserved under this section is not subject to  
2 the state water leasing program established under 85-2-141."

3 **Section 7.** Section 85-2-402, MCA, is amended to read:

4 "85-2-402. (Temporary) Changes in appropriation rights.

5 (1) An appropriator may not make a change in an  
6 appropriation right except, as permitted under this section,  
7 and with by applying for and receiving the approval of the  
8 department or, if applicable, of the legislature. An  
9 applicant shall submit a correct and complete application.

10 (2) Except as provided in subsections (3) through (5),  
11 the department shall approve a change in appropriation right  
12 if the appropriator proves by substantial--credible a  
13 preponderance of evidence that the following criteria are  
14 met:

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

19 (b) Except for a lease authorization pursuant to  
20 85-2-436 that does not require appropriation works, the  
21 proposed means of diversion, construction, and operation of  
22 the appropriation works are adequate.

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

24 (d) 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 (e) If the change in appropriation right involves  
4 salvaged water, the proposed water-saving methods will  
5 salvage at least the amount of water asserted by the  
6 applicant.

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

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

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

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

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

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

23 (iv) the availability and feasibility of using  
24 low-quality water for the purpose for which application has  
25 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

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 subsection (2) or (3) 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 appropriator has proved by clear and convincing evidence that the requirements of subsections (5)(b)(ii) and (5)(b)(iii) will be met, the department and, if applicable, the legislature 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

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 the  
8 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 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 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 may  
4 extend time limits specified in the change approval under  
5 the applicable criteria and procedures of 85-2-312(3).

6 (8) Upon actual application of water to the proposed  
7 beneficial use within the time allowed, the appropriator  
8 shall notify the department that the appropriation has been  
9 properly completed. The notification must contain a  
10 certified statement by a person with experience in the  
11 design, construction, or operation of appropriation works  
12 that describing how the appropriation has-been-properly was  
13 ~~completed in--substantial--accordance--with--the--terms--and~~  
14 ~~conditions-of-the-change-approval.~~

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

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

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

6 (12) A change in appropriation right contrary to the  
7 provisions of this section is invalid. An officer, agent,  
8 agency, or employee of the state may not knowingly permit,  
9 aid, or assist in any manner an unauthorized change in  
10 appropriation right. A person or corporation may not,  
11 directly or indirectly, personally or through an agent,  
12 officer, or employee, attempt to change an appropriation  
13 right except in accordance with this section. (Terminates  
14 June 30, 1999--sec. 4, Ch. 740, L. 1991.)

15 85-2-402. (Effective July 1, 1999) Changes in  
16 appropriation rights. (1) An appropriator may not make a  
17 change in an appropriation right except, as permitted under  
18 this section, and with by applying for and receiving the  
19 approval of the department or, if applicable, of the  
20 legislature. An applicant shall submit a correct and  
21 complete application.

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

1 met:

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

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

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

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

13 (e) If the change in appropriation right involves  
14 salvaged water, the proposed water-saving methods will  
15 salvage at least the amount of water asserted by the  
16 applicant.

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

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

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

25 (i) the existing demands on the state water supply, as

1 well as projected demands for water for future beneficial  
2 purposes, including municipal water supplies, irrigation  
3 systems, and minimum streamflows for the protection of  
4 existing water rights and aquatic life;

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

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

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

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

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

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

21 (a) the applicant proves by clear and convincing  
22 evidence and the department finds that the criteria in  
23 subsections (2) and (3) are met; and

24 (b) the department then petitions the legislature and  
25 the legislature affirms the decision of the department after

1 one or more public hearings.

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

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

20 (i) depending on the volume of water diverted or  
21 consumed, the applicable criteria and procedures of  
22 subsection (2) or (3) are met;

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

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

1 otherwise detrimental to the public welfare of the citizens  
2 of Montana.

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

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

10 (ii) whether the water that is the subject of the  
11 proposed change in appropriation might feasibly be  
12 transported to alleviate water shortages within the state of  
13 Montana;

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

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

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

24 (6) For any application for a change in appropriation  
25 right involving 4,000 or more acre-feet of water a year and

1 5.5 or more cubic feet per second of water, the department  
2 shall give notice of the proposed change in accordance with  
3 85-2-307 and shall hold one or more hearings in accordance  
4 with 85-2-309 prior to its approval or denial of the  
5 proposed change. The department shall provide notice and may  
6 hold one or more hearings upon any other proposed change if  
7 it determines that such a change might adversely affect the  
8 rights of other persons.

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

16 (8) Upon actual application of water to the proposed  
17 beneficial use within the time allowed, the appropriator  
18 shall notify the department that the appropriation has been  
19 properly completed. The notification must contain a  
20 certified statement by a person with experience in the  
21 design, construction, or operation of appropriation works  
22 that describing how the appropriation has-been-properly was  
23 ~~completed in--substantial--accordance--with--the--terms--and~~  
24 ~~conditions-of-the-change-approval.~~

25 (9) 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.

(10) 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.

(11) 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.

(12) 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 8.** Section 85-2-436, MCA, is amended to read:

"85-2-436. (Temporary) Water leasing study. (1) The

department of fish, wildlife, and parks and the department, in consultation with the water policy committee, shall conduct and coordinate a study that, at a minimum:

(a) provides the following data for each designated stream reach and each pilot lease entered into under subsection (2):

(i) the length of the stream reach and how it is determined;

(ii) technical methods and data used to determine critical streamflow or volume needed to preserve fisheries;

(iii) legal standards and technical data used to determine and substantiate the amount of water available for instream flows through leasing of existing rights;

(iv) contractual parameters, conditions, and other steps taken to ensure that each lease in no way harms other appropriators, particularly if the stream is one that experiences natural dewatering; and

(v) methods and technical means used to monitor use of water under each lease;

(b) based on the data provided under subsection (1)(a), develops a complete model of a water lease and lease authorization that includes a step-by-step explanation of the process from initiation to completion.

(2) For purposes of undertaking the study described in subsection (1) and as authorized by law, the department of



1 fish, wildlife, and parks and the department may engage in  
2 the activities described in this subsection. For purposes of  
3 this study, this section is the exclusive means by which the  
4 department of fish, wildlife, and parks may seek to change  
5 an appropriation right to an instream flow purpose.

6 (a) The department of fish, wildlife, and parks, with  
7 the consent of the commission, may lease existing rights for  
8 the purpose of maintaining or enhancing streamflows for the  
9 benefit of fisheries in stream reaches determined eligible  
10 by the board pursuant to 85-2-437.

11 (b) Upon receipt of an a correct and complete  
12 application for a lease from the department of fish,  
13 wildlife, and parks, the department shall publish notice of  
14 the application as provided in 85-2-307. Parties who believe  
15 they may be adversely affected by the proposed lease may  
16 file an objection as provided in 85-2-308. A lease may not  
17 be approved until all objections are resolved. After  
18 resolving all objections filed under 85-2-308, the  
19 department shall authorize a lease of an existing right for  
20 the purpose of maintaining or enhancing streamflows for the  
21 benefit of fisheries if the applicant submits a correct and  
22 complete application and meets the requirements of 85-2-402.

23 (c) The application for a lease authorization must  
24 include specific information on the length and location of  
25 the stream reach in which the streamflow must be maintained

1 or enhanced and must provide a detailed streamflow measuring  
2 plan that describes the points where and the manner in which  
3 the streamflow must be measured.

4 (d) The maximum quantity of water that may be leased is  
5 the amount historically diverted by the lessor. However,  
6 only the amount historically consumed, or a smaller amount  
7 if specified by the department in the lease authorization,  
8 may be used to maintain or enhance streamflows below the  
9 lessor's point of diversion.

10 (e) The lease may not be issued for a term of more than  
11 10 years, but it may be renewed once for up to 10 years,  
12 except that a lease of water made available from the  
13 development of a water conservation or storage project is  
14 restricted to a term of not more than 20 years. Upon  
15 receiving notice of a lease renewal, the department shall  
16 notify other appropriators potentially affected by the lease  
17 and shall allow 30 days for submission of new evidence of  
18 adverse effects to other water rights. A lease authorization  
19 is not required for a renewal unless an appropriator other  
20 than an appropriator described in subsection (2)(i) submits  
21 evidence of adverse effects to his the appropriator's rights  
22 that has not been considered previously. If new evidence is  
23 submitted, a lease authorization must be obtained according  
24 to the requirements of 85-2-402.

25 (f) During the term of the lease, the department may

1 modify or revoke the lease authorization if an appropriator  
 2 other than an appropriator described in subsection (2)(i)  
 3 proves by ~~substantial-credible~~ a preponderance of evidence  
 4 that ~~his~~ the appropriator's water right is adversely  
 5 affected.

6 (g) The priority of appropriation for a lease under  
 7 this section is the same as the priority of appropriation of  
 8 the right that is leased.

9 (h) Neither a change in appropriation right nor any  
 10 other authorization is required for the reversion of the  
 11 appropriation right to the lessor's previous use.

12 (i) A person issued a water use permit with a priority  
 13 of appropriation after the date of filing of an application  
 14 for a lease authorization under this section may not object  
 15 to the exercise of the lease according to its terms or the  
 16 reversion of the appropriation right to the lessor according  
 17 to the lessor's previous use.

18 (j) The department of fish, wildlife, and parks shall  
 19 pay all costs associated with installing devices or  
 20 providing personnel to measure streamflows according to the  
 21 measuring plan submitted under this section.

22 (3) (a) The department of fish, wildlife, and parks  
 23 shall complete and submit to the board, commission, and  
 24 water policy committee an annual study progress report by  
 25 December 1 of each year. This report must include the

1 applicable information listed in subsection (1) for each  
 2 lease. If the department of fish, wildlife, and parks has  
 3 not leased water rights under this section by December 1 of  
 4 any year, the department of fish, wildlife, and parks shall  
 5 provide compelling justification for that fact in the study  
 6 progress report.

7 (b) A final study report must be adopted by the board  
 8 and commission and submitted to the water policy committee,  
 9 which shall complete the final report by December 1, 1998.

10 (4) This section does not create the right for a person  
 11 to bring suit to compel the renewal of a lease that has  
 12 expired. (Terminates June 30, 1999--sec. 4, Ch. 740, L.  
 13 1991.)"

14 **Section 9.** Section 85-2-312, MCA, is amended to read:

15 "85-2-312. **Terms of permit.** (1) The department may  
 16 issue a permit for less than the amount of water requested,  
 17 but in no case may it issue a permit for more water than is  
 18 requested or than can be beneficially used without waste for  
 19 the purpose stated in the application. The department may  
 20 require modification of plans and specifications for the  
 21 appropriation or related diversion or construction. The  
 22 department may issue a permit subject to terms, conditions,  
 23 restrictions, and limitations it considers necessary to  
 24 satisfy the criteria listed in 85-2-311, and it may issue  
 25 temporary or seasonal permits. A permit shall be issued .

1 subject to existing rights and any final determination of  
2 those rights made under this chapter.

3 (2) The department shall specify in the permit or in  
4 any authorized extension of time provided in subsection (3),  
5 the time limits for commencement of the appropriation works,  
6 completion of construction, and actual application of the  
7 water to the proposed beneficial use. In fixing those time  
8 limits, the department shall consider the cost and magnitude  
9 of the project, the engineering and physical features to be  
10 encountered, and, on projects designed for gradual  
11 development and gradually increased use of water, the time  
12 reasonably necessary for that gradual development and  
13 increased use. The department shall issue the permit or  
14 authorized extension of time subject to the terms,  
15 conditions, restrictions, and limitations it considers  
16 necessary to ensure that the work on the appropriation is  
17 commenced, conducted, and completed and that the water is  
18 actually applied in a timely manner to the beneficial use  
19 specified in the permit.

20 (3) ~~The department may, upon a showing of good cause,~~  
21 ~~extend time limits specified in the permit for commencement~~  
22 ~~of the appropriation works, completion of construction, and~~  
23 ~~actual application of the water to the proposed beneficial~~  
24 ~~user. All requests for extensions of time must be by~~  
25 ~~affidavit and must be filed with the department prior to the~~

1 ~~expiration of the time limit specified in the permit or any~~  
2 ~~previously authorized extension of time. The department may~~  
3 ~~issue an order temporarily extending the time limit~~  
4 ~~specified in the permit for 120 days or until the department~~  
5 ~~has completed its action under this section, whichever is~~  
6 ~~greater. Upon receipt of a proper request for extension of~~  
7 ~~time, the department shall prepare a notice containing the~~  
8 ~~facts pertinent to the request for extension of time and~~  
9 ~~shall publish the notice in a newspaper of general~~  
10 ~~circulation in the area of the source. The department may~~  
11 ~~serve notice by first class mail upon any public agency or~~  
12 ~~other person the department determines may be interested in~~  
13 ~~or affected by the request for extension of time. The~~  
14 ~~department shall hold a hearing on the request for extension~~  
15 ~~of time on its own motion or if requested by an interested~~  
16 ~~party. The department may grant the extension of time in the~~  
17 ~~absence of a hearing if no requests for a hearing are~~  
18 ~~received and the extension of time is granted as requested,~~  
19 ~~or the department may grant the extension of time in a~~  
20 ~~modified form by following the process established in~~  
21 ~~85-2-318(2). Subsequent extensions of time may be made in~~  
22 ~~the same manner. The department shall by rule or by~~  
23 condition to a permit establish a process allowing for the  
24 extension of the time limits specified in the permit for  
25 commencement of the appropriation works, completion of

construction, and actual application of water to the proposed beneficial use. The department may not accept a request for extension of time that is filed less than 30 days prior to the time limit specified in the permit. If a permit is not completed within the time limit specified or within an extension of that time limit the permit is void upon lapse of the time limit.

(4) The original of the permit shall be sent to the permittee, and a copy shall be kept in the office of the department in Helena."

**Section 10.** Section 85-2-315, MCA, is amended to read:

"85-2-315. Certificate of water right. Upon actual application of water to the proposed beneficial use within the time allowed, the permittee shall notify the department that the appropriation has been properly completed. The notification must contain a certified statement by a person with experience in the design, construction, or operation of appropriation works that describing how the appropriation ~~has--been~~ was properly completed ~~in-substantial-accordance with-the-terms-and-conditions-of-the-permit.~~ The department shall review the certified statement and may then inspect the appropriation, and if it determines that the appropriation has been completed in substantial accordance with the permit, it shall issue the permittee a certificate of water right. The original of the certificate shall be

sent to the permittee, and a duplicate shall be kept in the office of the department in Helena."

**NEW SECTION. Section 11. Severability.** If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

**NEW SECTION. Section 12. Retroactive applicability.** [Sections 1 through 8] apply retroactively, within the meaning of 1-2-109, to all applications and objections pending on [the effective date of this act] that are subject to the provisions of Title 85, chapter 2.

**NEW SECTION. Section 13. Effective date.** [This act] is effective on passage and approval.

-End-