

SENATE BILL NO. 280

INTRODUCED BY GROSFIELD, FAGG, HALLIGAN, HARPER, GILBERT,  
BROOKE, BECK, YELLOWTAIL  
BY REQUEST OF THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION

IN THE SENATE

JANUARY 30, 1993                      INTRODUCED AND REFERRED TO COMMITTEE  
ON NATURAL RESOURCES.

FIRST READING.

FEBRUARY 19, 1993                      COMMITTEE RECOMMEND BILL  
DO PASS. REPORT ADOPTED.

PRINTING REPORT.

FEBRUARY 20, 1993                      SECOND READING, DO PASS.

FEBRUARY 22, 1993                      ENGROSSING REPORT.

THIRD READING, PASSED.  
AYES, 36; NOES, 12.

TRANSMITTED TO HOUSE.

IN THE HOUSE

FEBRUARY 23, 1993                      INTRODUCED AND REFERRED TO COMMITTEE  
ON NATURAL RESOURCES.

FIRST READING.

MARCH 29, 1993                      COMMITTEE RECOMMEND BILL BE  
CONCURRED IN AS AMENDED. REPORT  
ADOPTED.

MARCH 30, 1993                      SECOND READING, CONCURRED IN.

APRIL 1, 1993                      THIRD READING, CONCURRED IN.  
AYES, 78; NOES, 21.

RETURNED TO SENATE WITH AMENDMENTS.

IN THE SENATE

APRIL 5, 1993                      SECOND READING, AMENDMENTS  
CONCURRED IN.

APRIL 6, 1993

THIRD READING, AMENDMENTS  
CONCURRED IN.

SENT TO ENROLLING.

REPORTED CORRECTLY ENROLLED.

1 **SENATE** BILL NO. **280**  
 2 INTRODUCED BY *Griffith*  
 3 *Billiet* BY REQUEST OF THE DEPARTMENT OF *Hallgren*  
 4 NATURAL RESOURCES AND CONSERVATION *Brasche*  
*Hilton*

6 A BILL FOR AN ACT ENTITLED: "AN ACT IMPLEMENTING THE 1992  
 7 STATE WATER PLAN; INCLUDING WATER QUALITY AS A CRITERION FOR  
 8 WATER PERMIT, CHANGE AUTHORIZATION, CONTROLLED GROUND WATER  
 9 AREA, AND BASIN CLOSURE DETERMINATIONS; AMENDING SECTIONS  
 10 85-2-311, 85-2-319, 85-2-402, AND 85-2-506, MCA; AND  
 11 PROVIDING A RETROACTIVE APPLICABILITY DATE AND AN IMMEDIATE  
 12 EFFECTIVE DATE."

13  
 14 STATEMENT OF INTENT

15 A statement of intent is required for this bill because  
 16 the bill gives the department of natural resources and  
 17 conservation authority to adopt administrative rules. The  
 18 bill adds statutory criteria for the department to consider  
 19 in the processing of an application for a permit, change  
 20 authorization, controlled ground water area, or basin  
 21 closure. In adopting rules implementing this bill and in  
 22 interpreting the new statutory language, it is the intent of  
 23 the legislature that the department and board of natural  
 24 resources and conservation should assess the magnitude,  
 25 character, duration, and geographical extent of the

1 projected effects and utilize this assessment in a practical  
 2 manner.

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

5 **Section 1.** Section 85-2-311, MCA, is amended to read:

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

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

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

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

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

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

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

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

24 (e) the proposed use will not interfere unreasonably  
 25 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;

(g) the water quality of an appropriator will not be adversely affected;

(h) the proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1); and

(i) the ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.

(2) The applicant is required to prove that the criteria in subsections (1)(g) through (1)(i) have been met only if a valid objection is filed. A valid objection is one supported by substantive evidence establishing to the satisfaction of the department that the criteria in subsection (1)(g), (1)(h), or (1)(i), as applicable, may not be met.

(3) 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 must 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.

(4) (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

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

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

15 (i) depending on the volume of water diverted or  
 16 consumed, the applicable criteria and procedures of  
 17 subsection (1) or {2} (3) are met;

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

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

23 (c) In determining whether the applicant has proved by  
 24 clear and convincing evidence that the requirements of  
 25 subsections {3}{b}{iii} (4)(b)(ii) and {3}{b}{iii}

1 (4)(b)(iii) are met, the department shall consider the  
 2 following factors:

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

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

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

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

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

18 {4}{5} To meet the ~~substantial~~--credible preponderance  
 19 of evidence standard in this section, the applicant shall  
 20 submit independent hydrologic or other evidence, including  
 21 water supply data, field reports, and other information  
 22 developed by the department, the U.S. geological survey, or  
 23 the U.S. soil conservation service and other specific field  
 24 studies, demonstrating that the criteria are met.

25 {5}{6} An appropriation, diversion, impoundment, use,

1 restraint, or attempted appropriation, diversion,  
 2 impoundment, use, or restraint contrary to the provisions of  
 3 this section is invalid. An officer, agent, agency, or  
 4 employee of the state may not knowingly permit, aid, or  
 5 assist in any manner an unauthorized appropriation,  
 6 diversion, impoundment, use, or other restraint. A person or  
 7 corporation may not, directly or indirectly, personally or  
 8 through an agent, officer, or employee, attempt to  
 9 appropriate, divert, impound, use, or otherwise restrain or  
 10 control waters within the boundaries of this state except in  
 11 accordance with this section."

12 **Section 2.** Section 85-2-319, MCA, is amended to read:

13 "85-2-319. Permit action in highly appropriated basins  
 14 or subbasins. (1) The legislature may by law preclude permit  
 15 applications, or the department may by rule reject permit  
 16 applications or modify or condition permits issued in a  
 17 highly appropriated basin or subbasin.

18 (2) A rule may be adopted under this section only upon  
 19 a petition signed by at least 25% or 10, whichever is less,  
 20 of the users of water in the source of supply within a basin  
 21 or subbasin or upon petition of the department of health and  
 22 environmental sciences alleging facts under subsection  
 23 (2)(d). The petition must be in a form as prescribed by the  
 24 department and must allege facts showing that throughout or  
 25 at certain times of the year or for certain beneficial uses:

1 (a) there are no unappropriated waters in the source of  
 2 supply;

3 (b) the rights of prior appropriators will be adversely  
 4 affected; or

5 (c) further uses will interfere unreasonably with other  
 6 planned uses or developments for which a permit has been  
 7 issued or for which water has been reserved; or

8 (d) in the case of a petition filed by the department  
 9 of health and environmental sciences:

10 (i) the water quality of an appropriator will be  
 11 adversely affected by the issuance of permits;

12 (ii) further use will not be substantially in accordance  
 13 with the classification of water set for the source of  
 14 supply pursuant to 75-5-301(1); or

15 (iii) the ability of a discharge permit holder to satisfy  
 16 effluent limitations of a permit issued in accordance with  
 17 Title 75, chapter 5, part 4, will be adversely affected by  
 18 the issuance of permits.

19 (3) Within 60 days after submission of a petition, the  
 20 department shall:

21 (a) deny the petition in writing, stating its reasons  
 22 for denial;

23 (b) inform the petitioners that the department must  
 24 study the allegations further before denying or proceeding  
 25 further with the petition; or

(c) initiate rulemaking proceedings in accordance with 2-4-302 through 2-4-305.

(4) Title 2, chapter 4, parts 1 through 4, govern rulemaking proceedings conducted under this section, except that in addition to the notice requirements of those parts, the department notice of the rulemaking hearing must be published at least once in each week for 3 successive weeks, not less than 30 days before the date of the hearing, in a newspaper of general circulation in the county or counties in which the source is located. The department shall serve by mail a copy of the notice, not less than 30 days before the hearing, upon each person or public agency known from the examination of the records of the department to be a claimant, appropriator, or permitholder of water in the source."

**Section 3.** 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 the approval of the department or, if applicable, of the legislature.

(2) Except as provided in subsections (3) (4) through (5) (6), 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.

(f) The water quality of an appropriator will not be adversely affected.

(g) The proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1).

(h) The ability of a discharge permitholder to satisfy effluent limitations of a permit issued in accordance with

1 Title 75, chapter 5, part 4, will not be adversely affected.

2 (3) The applicant is required to prove that the  
 3 criteria in subsections (2)(f) through (2)(h) have been met  
 4 only if a valid objection is filed. A valid objection is one  
 5 supported by substantive evidence establishing to the  
 6 satisfaction of the department that the criteria in  
 7 subsection (2)(f), (2)(g), or (2)(h), as applicable, may not  
 8 be met.

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

14 (a) the criteria in subsection (2) are met;  
 15 (b) the proposed change is a reasonable use. A finding  
 16 of reasonable use must be based on a consideration of:

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

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

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

25 (iv) the availability and feasibility of using

1 low-quality water for the purpose for which application has  
 2 been made;

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

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

9 {4}{5} The department may not approve a change in  
 10 purpose of use or place of use for a diversion that results  
 11 in 4,000 or more acre-feet of water a year and 5.5 or more  
 12 cubic feet per second of water being consumed unless:

13 (a) the applicant proves by clear and convincing  
 14 evidence and the department finds that the criteria in  
 15 subsections (2) and {3}{4} are met; and

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

19 {5}{6} (a) The state of Montana has long recognized the  
 20 importance of conserving its public waters and the necessity  
 21 to maintain adequate water supplies for the state's water  
 22 requirements, including requirements for reserved water  
 23 rights held by the United States for federal reserved lands  
 24 and in trust for the various Indian tribes within the  
 25 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)~~ (4) 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)(i)(ii)~~ (6)(b)(ii) and ~~(5)(b)(i)(iii)~~ (6)(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)(7)~~ 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 a change might adversely affect the rights of other persons.

1       {7}(8) The department or the legislature, if  
2 applicable, may approve a change subject to terms,  
3 conditions, restrictions, and limitations as it considers  
4 necessary to satisfy the criteria of this section, including  
5 limitations on the time for completion of the change. The  
6 department may extend time limits specified in the change  
7 approval under the applicable criteria and procedures of  
8 85-2-312(3).

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

18       {9}(10) If a change is not completed as approved by the  
19 department or legislature or if the terms, conditions,  
20 restrictions, and limitations of the change approval are not  
21 complied with, the department may, after notice and  
22 opportunity for hearing, require the appropriator to show  
23 cause why the change approval should not be modified or  
24 revoked. If the appropriator fails to show sufficient cause,  
25 the department may modify or revoke the change approval.

1       {10}(11) The original of a change approval issued by the  
2 department must be sent to the applicant, and a duplicate  
3 must be kept in the office of the department in Helena.

4       {11}(12) A person holding an issued permit or change  
5 approval that has not been perfected may change the place of  
6 diversion, place of use, purpose of use, or place of storage  
7 by filing an application for change pursuant to this  
8 section.

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

18       85-2-402. (Effective July 1, 1999) Changes in  
19 appropriation rights. (1) An appropriator may not make a  
20 change in an appropriation right except as permitted under  
21 this section and with the approval of the department or, if  
22 applicable, of the legislature.

23       (2) Except as provided in subsections {3} (4) through  
24 {5} (6), the department shall approve a change in  
25 appropriation right if the appropriator proves by

1 ~~substantial--credible~~ a preponderance of evidence that the  
2 following criteria are met:

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

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

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

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

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

18 (f) The water quality of an appropriator will not be  
19 adversely affected.

20 (g) The proposed use will be substantially in  
21 accordance with the classification of water set for the  
22 source of supply pursuant to 75-5-301(1).

23 (h) The ability of a discharge permitholder to satisfy  
24 effluent limitations of a permit issued in accordance with  
25 Title 75, chapter 5, part 4, will not be adversely affected.

1 (3) The applicant is required to prove that the  
2 criteria in subsections (2)(f) through (2)(h) have been met  
3 only if a valid objection is filed. A valid objection is one  
4 supported by substantive evidence establishing to the  
5 satisfaction of the department that the criteria in  
6 subsection (2)(f), (2)(g), or (2)(h), as applicable, may not  
7 be met.

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

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

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

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

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

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

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

1 been made;

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

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

8 ~~{4}~~(5) The department may not approve a change in  
9 purpose of use or place of use for a diversion that results  
10 in 4,000 or more acre-feet of water a year and 5.5 or more  
11 cubic feet per second of water being consumed unless:

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

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

18 ~~{5}~~(6) (a) The state of Montana has long recognized the  
19 importance of conserving its public waters and the necessity  
20 to maintain adequate water supplies for the state's water  
21 requirements, including requirements for reserved water  
22 rights held by the United States for federal reserved lands  
23 and in trust for the various Indian tribes within the  
24 state's boundaries. Although the state of Montana also  
25 recognizes that, under appropriate conditions, the

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

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

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

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

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

19 (c) In determining whether the appropriator has proved  
20 by clear and convincing evidence that the requirements of  
21 subsections ~~{5}~~(6)~~(b)(i)~~ (6)(b)(ii) and ~~{5}~~(6)~~(b)(iii)~~  
22 (6)(b)(iii) will be met, the department and, if applicable,  
23 the legislature shall consider the following factors:

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

~~(7)~~(8) 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)~~(9) 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 the appropriation has been properly completed in substantial accordance with the terms and conditions of the change approval.

~~(9)~~(10) 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)~~(11) 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.

~~†††~~(12) 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.

~~†††~~(13) A change in appropriation right contrary to the provisions of this section is invalid. No An officer, agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner ~~such an~~ unauthorized change in appropriation right. No 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."

**Section 4.** Section 85-2-506, MCA, is amended to read:

"85-2-506. Controlled ground water areas -- designation or ~~modification~~. (1) The board may designate or modify controlled ground water areas as provided in this part.

(2) Designation or modification of an area of controlled ground water use may be proposed to the board by the department on its own motion, by petition of a state or local public health agency for identified public health risks, or by petition signed by at least 20 or one-fourth of the users (whichever is the lesser number) of ground water

in a ground water area wherein in which there are alleged to be facts showing:

(a) that ground water withdrawals are in excess of recharge to the aquifer or aquifers within such the ground water area;

(b) that excessive ground water withdrawals are very likely to occur in the near future because of consistent and significant increases in withdrawals from within the ground water area;

(c) that significant disputes regarding priority of rights, amounts of ground water in use by appropriators, or priority of type of use are in progress within the ground water area;

(d) that ground water levels or pressures in the area in question are declining or have declined excessively; or

(e) that excessive ground water withdrawals would cause contaminant migration ~~and--a--degradation--of-ground-water quality-within-the-ground-water-area; or~~

(f) that ground water withdrawals adversely affecting ground water quality within the ground water area are occurring or are likely to occur.

(3) When such a proposal is thus made, the board shall fix a time and place for a hearing, which time ~~shall~~ may not be less than 90 days from the making of the proposal. The place for the hearing ~~shall~~ must be within or as close as

1 practical to the controlled ground water area.

2 (4) The department shall publish a notice of the  
3 hearing, setting forth therein:

4 (a) the names of the petitioners;

5 (b) the description by legal subdivisions (section,  
6 township, range) of all lands included in or proposed to be  
7 included in the ground water area or subarea;

8 (c) the purpose of the hearing; and

9 (d) the time and place of the hearing where any  
10 interested person may appear, either in person or by  
11 attorney, file written objections to the granting of the  
12 proposal, and be fully heard.

13 (5) ~~Such~~ The notice of hearing ~~shall~~ must be published  
14 at least once in each week for 3 successive weeks not less  
15 than 30 days before the date of the hearing in a newspaper  
16 of general circulation in the county or counties in which  
17 the ground water area or subarea is located. The department  
18 shall also cause a copy of the notice, together with a copy  
19 of the petition, to be served by mail, not less than 30 days  
20 before the hearing, upon each well driller licensed in  
21 Montana whose address is within any county in which any part  
22 of the area in question is located; upon each person or  
23 public agency known from an examination of the records in  
24 the department's office to be a claimant or appropriator of  
25 ground water in the area in question (claimant or

1 appropriator meaning one who diverts, impounds, or withdraws  
2 ground water and not merely one who uses or obtains ground  
3 water from another who diverts, impounds, or withdraws  
4 ground water); upon the bureau; and upon the mayor or  
5 chairman of the governing body of each incorporated  
6 municipality located in whole or in part within the proposed  
7 ground water area. The department may also serve notice upon  
8 any other person or state or federal agency that the  
9 department feels may be interested in or affected by the  
10 proposed designation or modification of a controlled ground  
11 water area. The petition need not be served on any  
12 petitioner. A copy of the notice, together with a copy of  
13 the proposal, ~~shall~~ must be mailed to each person at his the  
14 person's last-known address, and such service ~~shall--be~~ is  
15 complete upon depositing it in the post office, postage  
16 prepaid, addressed to each person on whom it is to be  
17 served. Publication and mailing of such the notice as  
18 prescribed ~~herein in this section~~, when completed, ~~shall--be~~  
19 deemed is considered to be sufficient notice of such the  
20 hearing to all interested persons."

21 NEW SECTION. Section 5. Rulemaking authority. The  
22 department may adopt rules to implement the provisions of  
23 85-2-311, 85-2-319, and 85-2-402.

24 NEW SECTION. Section 6. Codification instruction.  
25 [Section 5] is intended to be codified as an integral part

1 of Title 85, chapter 2, and the provisions of Title 85,  
2 chapter 2, apply to [section 5].

3 NEW SECTION. **Section 7. 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 8. Retroactive applicability.**  
10 [Sections 1 and 3] apply retroactively, within the meaning  
11 of 1-2-109, to all applications for a permit or change in  
12 appropriation right that the department has not noticed out  
13 for objection as of [the effective date of this act].

14 NEW SECTION. **Section 9. 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 SB0280, as introduced.


**DESCRIPTION OF PROPOSED LEGISLATION:** The bill proposes to implement a portion of the 1992 State Water Plan by amending four separate water law sections, 85-2-311, -319, -402, and -506, MCA. Water quality criterion would be added for the Department of Natural Resources and Conservation (DNRC) issuance of beneficial water use permits and change authorizations, for petitions to the DNRC for basin rule closures, and for petitions to the Board of Natural Resources and Conservation for controlled groundwater areas. It also would provide authority for the Department of Health and Environmental Sciences (DHES) to be a petitioner for a basin rule closure and for DHES or a local public health agency to be a petitioner for a controlled groundwater area.

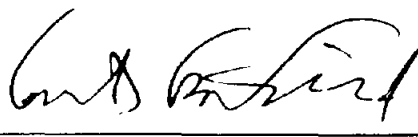
**ASSUMPTIONS:**

**Department of Natural Resources and Conservation (DNRC):**

1. For DNRC to implement the requirements of the proposed amendments, 1.00 FTE grade 14 would be required.
2. Major responsibilities to process permit and change applications concerning the water quality criteria would include:
  - Providing technical expertise in evaluating objections to approximately 70 permit applications and 45 change applications each calendar year to determine their validity.
  - Coordinating correspondence with applicants to inform them of any valid water quality objection and their burden to prove the water quality criteria set forth in Sections 85-2-311 and 85-2-402, MCA.
  - Reviewing any factual water quality evidence submitted by applicants and recommend the conditioning, granting, or denial of the application.
  - Presenting the DNRC decision concerning the conditioning or denial of an application at approximately 8 contested-case hearings per calendar year.
3. Major responsibilities in processing water quality type petitions to the DNRC for basin rule closures:
  - Providing technical review of approximately 2 petitions per calendar year filed by the DHES alleging water quality problems in a specified drainage basin area.
  - Coordinating with DHES any additional factual data necessary to validate their petition.
  - Assisting DNRC in drafting applicable administrative rules for closure of the petitioned basin.
  - Presenting as requested, an explanation of any proposed water quality rules at public hearings.
  - Assisting DNRC Water Resources Regional Office staff in administering and enforcing the closure rules at local level.

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 2-5-93  
DAVID LEWIS, BUDGET DIRECTOR      DATE  
Office of Budget and Program Planning

 2/6/93  
LORENTS GROSFIELD, PRIMARY SPONSOR      DATE  
Fiscal Note for SB0280, as introduced  
SB280

(continued)

4. Major responsibilities to process water quality type petitions for controlled groundwater areas:
  - Providing technical review of 1 petition in FY94 and 2 petitions in FY95 filed by the DHES or any local public health agency alleging that groundwater withdrawals adversely affecting groundwater quality are occurring or are likely to occur.
  - Coordinating with DHES or local public health agency any additional factual data necessary to validate the petition.
  - Assisting DNRC in presenting the petition to the Board of Natural Resources and Conservation and coordinating the individual and hearing notices.
  - Presenting any explanation or factual data on behalf of DNRC as necessary at the public hearing on the petition and assist the Board and DNRC in drafting and finalizing a final Board order.
  - Assisting Water Resources regional staff in administering and enforcing the Board order at the local level.
5. Miscellaneous duties would include:
  - Preparing or obtaining maps containing all classified surface water quality source standards in Montana and the location of all DHES issued discharge permits.
  - Assisting the DNRC in drafting administrative rules to implement the proposed new criteria.
  - Training DNRC Regional Office staff and others as requested concerning water quality standards, discharge permits, and water quality criteria.
  - Preparing water quality standards informational pamphlet for potential applicants, objectors and petitioners.
6. Three petitions are anticipated to be received per calendar year from DHES with a \$100 fee each. Also it is expected that DNRC would collect \$400 per petition for notification costs as provided under current law.

**Department of Health and Environmental Sciences (DHES):**

7. The criteria in section 1 subsection (h) of the bill means: the proposed use will not substantially affect the uses designated for the classification of water set forth for the source of supply pursuant to 75-5-301(1), MCA.
8. The number of new applications and applications for a change in rights will continue at the rate for 1992 which was 272 new applications and 176 applications for a change.
9. It is necessary for DHES to review each of these applications to determine if an objection should be filed.
10. Screening and the filing of the resulting objections takes an average of 0.50 days for each application, for a total of 224 days (448 x .50).
11. DHES files 2 petitions for basin closure each year and that each petition requires 2 months for a total of 4 months.
12. Carrying through on each objection would take 112 days or one day each, including hearings. That 10 of the objections will result in contested case hearings each of which will take 3 days or 30 days total.
13. DHES will make 3 applications for formation of a controlled ground water area (1 in FY94 and 2 in FY95) and for each application will: research data on public health threats; prepare a water budget; review groundwater monitoring data; prepare maps; and use computer models to compare groundwater flow under normal conditions with flow alterations due to excessive groundwater withdrawals, to determine the impact on contaminant migration and possible degradation of groundwater quality. Total time per application is estimated at 2 months for a total 6 months or a total of 626 days equaling 2.4 FTE at grade 14 personnel costs.
14. DHES pays the objection fee of \$50 for each of the 112 objections (50 x 112 = \$5,600) and the \$100 fee for each of the 5 petitions (5 x 100 = \$500) for a total cost in fees of \$6,100.

(continued on next page)

SB 280

FISCAL IMPACT:

Department of Natural Resources and Conservation:

	FY '94			FY '95		
<u>Expenditures:</u>	<u>Current Law</u>	<u>Proposed Law</u>	<u>Difference</u>	<u>Current Law</u>	<u>Proposed Law</u>	<u>Difference</u>
FTE	0	1.00	1.00	0	1.00	1.00
Personal Services	0	30,467	30,467	0	30,467	30,467
Operating Expenses	0	5,000	5,000	0	4,300	4,300
Total	0	35,467	35,467	0	34,767	34,767
<u>Funding:</u>						
General Fund	0	35,467	35,467	0	34,767	34,767

Department of Health and Environmental Sciences:

	FY '94			FY '95		
<u>Expenditures:</u>	<u>Current Law</u>	<u>Proposed Law</u>	<u>Difference</u>	<u>Current Law</u>	<u>Proposed Law</u>	<u>Difference</u>
FTE	0	2.40	2.40	0	2.40	2.40
Personal Services	0	87,369	87,369	0	87,369	87,369
Operating Expenses	0	26,100	26,100	0	26,100	26,100
Equipment	0	5,000	5,000	0	2,000	2,000
Total	0	118,469	118,469	0	115,469	115,469
<u>Funding:</u>						
General Fund	0	118,469	118,469	0	115,469	115,469
<u>Net Impact:</u>						
General Fund Costs			153,936			150,236

EFFECT ON COUNTY OR OTHER LOCAL REVENUES OR EXPENDITURES: Local water quality agencies will be required to pay objection and petition fees. It may be necessary to hire consultants to provide factual data for petitions filed.

SB280

STATE OF MONTANA - FISCAL NOTE

Form BD-15

In compliance with a written request, there is hereby submitted a Revised Fiscal Note for SB0280, as introduced.

**DESCRIPTION OF PROPOSED LEGISLATION:** The bill proposes to implement a portion of the 1992 State Water Plan by amending four separate water law sections, 85-2-311, -319, -402, and -506, MCA. Water quality criterion would be added for the Department of Natural Resources and Conservation (DNRC) issuance of beneficial water use permits and change authorizations, for petitions to the DNRC for basin rule closures, and for petitions to the Board of Natural Resources and Conservation for controlled groundwater areas. It also would provide authority for the Department of Health and Environmental Sciences (DHES) to be a petitioner for a basin rule closure and for DHES or a local public health agency to be a petitioner for a controlled groundwater area.

**ASSUMPTIONS:**

**Department of Natural Resources and Conservation (DNRC):**

1. For DNRC to implement the requirements of the proposed amendments, 1.00 FTE grade 14 would be required.
2. Major responsibilities to process permit and change applications concerning the water quality criteria would include:
  - Providing technical expertise in evaluating objections to approximately 70 permit applications and 45 change applications each calendar year to determine their validity.
  - Coordinating correspondence with applicants to inform them of any valid water quality objection and their burden to prove the water quality criteria set forth in Sections 85-2-311 and 85-2-402, MCA.
  - Reviewing any factual water quality evidence submitted by applicants and recommend the conditioning, granting, or denial of the application.
  - Presenting the DNRC decision concerning the conditioning or denial of an application at approximately 8 contested-case hearings per calendar year.
3. Major responsibilities in processing water quality type petitions to the DNRC for basin rule closures:
  - Providing technical review of approximately 2 petitions per calendar year filed by the DHES alleging water quality problems in a specified drainage basin area.
  - Coordinating with DHES any additional factual data necessary to validate their petition.
  - Assisting DNRC in drafting applicable administrative rules for closure of the petitioned basin.
  - Presenting as requested, an explanation of any proposed water quality rules at public hearings.
  - Assisting DNRC Water Resources Regional Office staff in administering and enforcing the closure rules at local level.

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*David Lewis* 2-20-93

DAVID LEWIS, BUDGET DIRECTOR DATE  
Office of Budget and Program Planning

*Lorent's Grosfield* 2/22/93  
LORENTS GROSFIELD, PRIMARY SPONSOR DATE

Revised Fiscal Note for SB0280, as introduced

SB 280 - #2

(continued)

4. Major responsibilities to process water quality type petitions for controlled groundwater areas:
  - Providing technical review of 1 petition in FY94 and 2 petitions in FY95 filed by the DHES or any local public health agency alleging that groundwater withdrawals adversely affecting groundwater quality are occurring or are likely to occur.
  - Coordinating with DHES or local public health agency any additional factual data necessary to validate the petition.
  - Assisting DNRC in presenting the petition to the Board of Natural Resources and Conservation and coordinating the individual and hearing notices.
  - Presenting any explanation or factual data on behalf of DNRC as necessary at the public hearing on the petition and assist the Board and DNRC in drafting and finalizing a final Board order.
  - Assisting Water Resources regional staff in administering and enforcing the Board order at the local level.
5. Miscellaneous duties would include:
  - Preparing or obtaining maps containing all classified surface water quality source standards in Montana and the location of all DHES issued discharge permits.
  - Assisting the DNRC in drafting administrative rules to implement the proposed new criteria.
  - Training DNRC Regional Office staff and others as requested concerning water quality standards, discharge permits, and water quality criteria.
  - Preparing water quality standards informational pamphlet for potential applicants, objectors and petitioners.
6. Three petitions are anticipated to be received per calendar year from DHES with a \$100 fee each. Also it is expected that DNRC would collect \$400 per petition for notification costs as provided under current law.

**Department of Health and Environmental Sciences (DHES):**

7. Subsection (h) which says " the proposed use will substantially in accordance with the classification of water set forth for the source of supply pursuant to 75-5-301(1);" means that the proposed use will not substantially affect the uses designated for the classification of water set forth for the source of supply pursuant to 75-5-301(1), MCA.
8. DHES would object only to major or controversial projects.
9. The costs of such objections would be covered by the required EIS which would be paid by the applicant.
10. DHES files a petition for one basin closure in the biennium and that this cost would be absorbed by current programs.
11. DHES makes one application for formation of a controlled ground water area in the biennium and that for each, it researchers data on public health threats, prepares a water budget, reviews groundwater monitoring data, prepares maps, and uses computer models to compare groundwater flow under normal conditions to flow alterations due to excessive groundwater withdrawals to determine the impact on contaminant migration and possible degradation of groundwater quality. The cost of these activities would be covered by current programs.

**FISCAL IMPACT:**

**Department of Health and Environmental Sciences:**

None.

(continued on next page)

SB 280-#2

(continued)

Department of Natural Resources and Conservation:

	FY '94			FY '95		
<u>Expenditures:</u>	<u>Current Law</u>	<u>Proposed Law</u>	<u>Difference</u>	<u>Current Law</u>	<u>Proposed Law</u>	<u>Difference</u>
FTE	0	1.00	1.00	0	1.00	1.00
Personal Services	0	30,467	30,467	0	30,467	30,467
Operating Expenses	<u>0</u>	<u>5,000</u>	<u>5,000</u>	<u>0</u>	<u>4,300</u>	<u>4,300</u>
Total	0	35,467	35,467	0	34,767	34,767
<u>Funding:</u>						
Water Development Account	0	35,467	35,467	0	34,767	34,767

SB 280-#2

APPROVED BY COMM. ON  
NATURAL RESOURCES

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INTRODUCED BY *Sen. Sena* *Gratchell* *Billant* *Hallgren* *Thompson* *Braden* *Yellowtail*

BILL NO. 280

BY REQUEST OF THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION

A BILL FOR AN ACT ENTITLED: "AN ACT IMPLEMENTING THE 1992  
STATE WATER PLAN; INCLUDING WATER QUALITY AS A CRITERION FOR  
WATER PERMIT, CHANGE AUTHORIZATION, CONTROLLED GROUND WATER  
AREA, AND BASIN CLOSURE DETERMINATIONS; AMENDING SECTIONS  
85-2-311, 85-2-319, 85-2-402, AND 85-2-506, MCA; AND  
PROVIDING A RETROACTIVE APPLICABILITY DATE AND AN IMMEDIATE  
EFFECTIVE DATE."

STATEMENT OF INTENT

A statement of intent is required for this bill because  
the bill gives the department of natural resources and  
conservation authority to adopt administrative rules. The  
bill adds statutory criteria for the department to consider  
in the processing of an application for a permit, change  
authorization, controlled ground water area, or basin  
closure. In adopting rules implementing this bill and in  
interpreting the new statutory language, it is the intent of  
the legislature that the department and board of natural  
resources and conservation should assess the magnitude,  
character, duration, and geographical extent of the

projected effects and utilize this assessment in a practical  
manner.

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

**Section 1.** Section 85-2-311, MCA, is amended to read:

"85-2-311. Criteria for issuance of permit. (1) Except  
as provided in subsections (2) (3) and (3) (4), the  
department shall issue a permit if the applicant proves by  
substantial--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;

(g) the water quality of an appropriator will not be adversely affected;

(h) the proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1); and

(i) the ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.

(2) The applicant is required to prove that the criteria in subsections (1)(g) through (1)(i) have been met only if a valid objection is filed. A valid objection is one supported by substantive evidence establishing to the satisfaction of the department that the criteria in subsection (1)(g), (1)(h), or (1)(i), as applicable, may not be met.

~~(2)~~(3) 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~~ A finding shall must 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)~~(4) (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

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

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

15 (i) depending on the volume of water diverted or  
 16 consumed, the applicable criteria and procedures of  
 17 subsection (1) or ~~(2)~~ (3) are met;

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

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

23 (c) In determining whether the applicant has proved by  
 24 clear and convincing evidence that the requirements of  
 25 subsections ~~(3)(b)(iii)~~ (4)(b)(ii) and ~~(3)(b)(iii)~~

1 ~~(4)(b)(iii)~~ are met, the department shall consider the  
 2 following factors:

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

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

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

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

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

18 ~~(4)(5)~~ To meet the ~~substantial~~--credible preponderance  
 19 of evidence standard in this section, the applicant shall  
 20 submit independent hydrologic or other evidence, including  
 21 water supply data, field reports, and other information  
 22 developed by the department, the U.S. geological survey, or  
 23 the U.S. soil conservation service and other specific field  
 24 studies, demonstrating that the criteria are met.

25 ~~(5)(6)~~ An appropriation, diversion, impoundment, use,

1 restraint, or attempted appropriation, diversion,  
 2 impoundment, use, or restraint contrary to the provisions of  
 3 this section is invalid. An officer, agent, agency, or  
 4 employee of the state may not knowingly permit, aid, or  
 5 assist in any manner an unauthorized appropriation,  
 6 diversion, impoundment, use, or other restraint. A person or  
 7 corporation may not, directly or indirectly, personally or  
 8 through an agent, officer, or employee, attempt to  
 9 appropriate, divert, impound, use, or otherwise restrain or  
 10 control waters within the boundaries of this state except in  
 11 accordance with this section."

12 **Section 2.** Section 85-2-319, MCA, is amended to read:

13 "85-2-319. Permit action in highly appropriated basins  
 14 or subbasins. (1) The legislature may by law preclude permit  
 15 applications, or the department may by rule reject permit  
 16 applications or modify or condition permits issued in a  
 17 highly appropriated basin or subbasin.

18 (2) A rule may be adopted under this section only upon  
 19 a petition signed by at least 25% or 10, whichever is less,  
 20 of the users of water in the source of supply within a basin  
 21 or subbasin or upon petition of the department of health and  
 22 environmental sciences alleging facts under subsection  
 23 (2)(d). The petition must be in a form as prescribed by the  
 24 department and must allege facts showing that throughout or  
 25 at certain times of the year or for certain beneficial uses:

1 (a) there are no unappropriated waters in the source of  
 2 supply;

3 (b) the rights of prior appropriators will be adversely  
 4 affected; or

5 (c) further uses will interfere unreasonably with other  
 6 planned uses or developments for which a permit has been  
 7 issued or for which water has been reserved; or

8 (d) in the case of a petition filed by the department  
 9 of health and environmental sciences:

10 (i) the water quality of an appropriator will be  
 11 adversely affected by the issuance of permits;

12 (ii) further use will not be substantially in accordance  
 13 with the classification of water set for the source of  
 14 supply pursuant to 75-5-301(1); or

15 (iii) the ability of a discharge permit holder to satisfy  
 16 effluent limitations of a permit issued in accordance with  
 17 Title 75, chapter 5, part 4, will be adversely affected by  
 18 the issuance of permits.

19 (3) Within 60 days after submission of a petition, the  
 20 department shall:

21 (a) deny the petition in writing, stating its reasons  
 22 for denial;

23 (b) inform the petitioners that the department must  
 24 study the allegations further before denying or proceeding  
 25 further with the petition; or

(c) initiate rulemaking proceedings in accordance with 2-4-302 through 2-4-305.

(4) Title 2, chapter 4, parts 1 through 4, govern rulemaking proceedings conducted under this section, except that in addition to the notice requirements of those parts, the department notice of the rulemaking hearing must be published at least once in each week for 3 successive weeks, not less than 30 days before the date of the hearing, in a newspaper of general circulation in the county or counties in which the source is located. The department shall serve by mail a copy of the notice, not less than 30 days before the hearing, upon each person or public agency known from the examination of the records of the department to be a claimant, appropriator, or permitholder of water in the source."

**Section 3.** 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 the approval of the department or, if applicable, of the legislature.

(2) Except as provided in subsections (3) (4) through (5) (6), 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.

(f) The water quality of an appropriator will not be adversely affected.

(g) The proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1).

(h) The ability of a discharge permitholder to satisfy effluent limitations of a permit issued in accordance with

1 Title 75, chapter 5, part 4, will not be adversely affected.

2 (3) The applicant is required to prove that the  
 3 criteria in subsections (2)(f) through (2)(h) have been met  
 4 only if a valid objection is filed. A valid objection is one  
 5 supported by substantive evidence establishing to the  
 6 satisfaction of the department that the criteria in  
 7 subsection (2)(f), (2)(g), or (2)(h), as applicable, may not  
 8 be met.

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

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

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

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

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

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

25 (iv) the availability and feasibility of using

1 low-quality water for the purpose for which application has  
 2 been made;

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

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

9 {4}{5} The department may not approve a change in  
 10 purpose of use or place of use for a diversion that results  
 11 in 4,000 or more acre-feet of water a year and 5.5 or more  
 12 cubic feet per second of water being consumed unless:

13 (a) the applicant proves by clear and convincing  
 14 evidence and the department finds that the criteria in  
 15 subsections (2) and {3}{4} are met; and

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

19 {5}{6} (a) The state of Montana has long recognized the  
 20 importance of conserving its public waters and the necessity  
 21 to maintain adequate water supplies for the state's water  
 22 requirements, including requirements for reserved water  
 23 rights held by the United States for federal reserved lands  
 24 and in trust for the various Indian tribes within the  
 25 state's boundaries. Although the state of Montana also

1 recognizes that, under appropriate conditions, the  
2 out-of-state transportation and use of its public waters are  
3 not in conflict with the public welfare of its citizens or  
4 the conservation of its waters, the following criteria must  
5 be met before out-of-state use may occur:

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

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

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

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

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

25 (i) whether there are present or projected water

1 shortages within the state of Montana;

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

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

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

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

16 ~~(6)(7)~~ For any application for a change in  
17 appropriation right involving 4,000 or more acre-feet of  
18 water a year and 5.5 or more cubic feet per second of water,  
19 the department shall give notice of the proposed change in  
20 accordance with 85-2-307 and shall hold one or more hearings  
21 in accordance with 85-2-309 prior to its approval or denial  
22 of the proposed change. The department shall provide notice  
23 and may hold one or more hearings upon any other proposed  
24 change if it determines that a change might adversely affect  
25 the rights of other persons.

1       †7†(8) The department or the legislature, if  
 2 applicable, may approve a change subject to terms,  
 3 conditions, restrictions, and limitations as it considers  
 4 necessary to satisfy the criteria of this section, including  
 5 limitations on the time for completion of the change. The  
 6 department may extend time limits specified in the change  
 7 approval under the applicable criteria and procedures of  
 8 85-2-312(3).

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

18       †9†(10) If a change is not completed as approved by the  
 19 department or legislature or if the terms, conditions,  
 20 restrictions, and limitations of the change approval are not  
 21 complied with, the department may, after notice and  
 22 opportunity for hearing, require the appropriator to show  
 23 cause why the change approval should not be modified or  
 24 revoked. If the appropriator fails to show sufficient cause,  
 25 the department may modify or revoke the change approval.

1       †10†(11) The original of a change approval issued by the  
 2 department must be sent to the applicant, and a duplicate  
 3 must be kept in the office of the department in Helena.

4       †11†(12) A person holding an issued permit or change  
 5 approval that has not been perfected may change the place of  
 6 diversion, place of use, purpose of use, or place of storage  
 7 by filing an application for change pursuant to this  
 8 section.

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

18       85-2-402. (Effective July 1, 1999) Changes in  
 19 appropriation rights. (1) An appropriator may not make a  
 20 change in an appropriation right except as permitted under  
 21 this section and with the approval of the department or, if  
 22 applicable, of the legislature.

23       (2) Except as provided in subsections †3† (4) through  
 24 †5† (6), the department shall approve a change in  
 25 appropriation right if the appropriator proves by

1 substantial--credible a preponderance of evidence that the  
2 following criteria are met:

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

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

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

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

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

18 (f) The water quality of an appropriator will not be  
19 adversely affected.

20 (g) The proposed use will be substantially in  
21 accordance with the classification of water set for the  
22 source of supply pursuant to 75-5-301(1).

23 (h) The ability of a discharge permit holder to satisfy  
24 effluent limitations of a permit issued in accordance with  
25 Title 75, chapter 5, part 4, will not be adversely affected.

1 (3) The applicant is required to prove that the  
2 criteria in subsections (2)(f) through (2)(h) have been met  
3 only if a valid objection is filed. A valid objection is one  
4 supported by substantive evidence establishing to the  
5 satisfaction of the department that the criteria in  
6 subsection (2)(f), (2)(g), or (2)(h), as applicable, may not  
7 be met.

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

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

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

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

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

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

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

1 been made;

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

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

8 ~~†4†~~(5) The department may not approve a change in  
9 purpose of use or place of use for a diversion that results  
10 in 4,000 or more acre-feet of water a year and 5.5 or more  
11 cubic feet per second of water being consumed unless:

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

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

18 ~~†5†~~(6) (a) The state of Montana has long recognized the  
19 importance of conserving its public waters and the necessity  
20 to maintain adequate water supplies for the state's water  
21 requirements, including requirements for reserved water  
22 rights held by the United States for federal reserved lands  
23 and in trust for the various Indian tribes within the  
24 state's boundaries. Although the state of Montana also  
25 recognizes that, under appropriate conditions, the

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

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

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

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

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

19 (c) In determining whether the appropriator has proved  
20 by clear and convincing evidence that the requirements of  
21 subsections ~~†5††b†††~~ (6)(b)(ii) and ~~†5††b†††~~  
22 (6)(b)(iii) will be met, the department and, if applicable,  
23 the legislature shall consider the following factors:

24 (i) whether there are present or projected water  
25 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}~~{7} For any application for a change in appropriation right involving 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water, the department shall give notice of the proposed change in accordance with 85-2-307 and shall hold one or more hearings in accordance with 85-2-309 prior to its approval or denial of the proposed change. The department shall provide notice and may hold one or more hearings upon any other proposed change if it determines that such a change might adversely affect the rights of other persons.

~~{7}~~{8} 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}~~{9} 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 the appropriation has been properly completed in substantial accordance with the terms and conditions of the change approval.

~~{9}~~{10} 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}~~{11} 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.

~~†††~~(12) 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.

~~†††~~(13) A change in appropriation right contrary to the provisions of this section is invalid. No An officer, agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner such an unauthorized change in appropriation right. No 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."

**Section 4.** Section 85-2-506, MCA, is amended to read:

"85-2-506. Controlled ground water areas -- designation or modification. (1) The board may designate or modify controlled ground water areas as provided in this part.

(2) Designation or modification of an area of controlled ground water use may be proposed to the board by the department on its own motion, by petition of a state or local public health agency for identified public health risks, or by petition signed by at least 20 or one-fourth of the users (whichever is the lesser number) of ground water

in a ground water area wherein in which there are alleged to be facts showing:

(a) that ground water withdrawals are in excess of recharge to the aquifer or aquifers within such the ground water area;

(b) that excessive ground water withdrawals are very likely to occur in the near future because of consistent and significant increases in withdrawals from within the ground water area;

(c) that significant disputes regarding priority of rights, amounts of ground water in use by appropriators, or priority of type of use are in progress within the ground water area;

(d) that ground water levels or pressures in the area in question are declining or have declined excessively; or

(e) that excessive ground water withdrawals would cause contaminant migration ~~and--a--degradation--of-ground-water quality-within-the-ground-water-area; or~~

(f) that ground water withdrawals adversely affecting ground water quality within the ground water area are occurring or are likely to occur.

(3) When such a proposal is thus made, the board shall fix a time and place for a hearing, which time ~~shall~~ may not be less than 90 days from the making of the proposal. The place for the hearing ~~shall~~ must be within or as close as

practical to the controlled ground water area.

(4) The department shall publish a notice of the hearing, setting forth therein:

(a) the names of the petitioners;

(b) the description by legal subdivisions (section, township, range) of all lands included in or proposed to be included in the ground water area or subarea;

(c) the purpose of the hearing; and

(d) the time and place of the hearing where any interested person may appear, either in person or by attorney, file written objections to the granting of the proposal, and be fully heard.

(5) ~~Such~~ The notice of hearing ~~shall~~ must be published at least once in each week for 3 successive weeks not less than 30 days before the date of the hearing in a newspaper of general circulation in the county or counties in which the ground water area or subarea is located. The department shall also cause a copy of the notice, together with a copy of the petition, to be served by mail, not less than 30 days before the hearing, upon each well driller licensed in Montana whose address is within any county in which any part of the area in question is located; upon each person or public agency known from an examination of the records in the department's office to be a claimant or appropriator of ground water in the area in question (claimant or

appropriator meaning one who diverts, impounds, or withdraws ground water and not merely one who uses or obtains ground water from another who diverts, impounds, or withdraws ground water); upon the bureau; and upon the mayor or chairman of the governing body of each incorporated municipality located in whole or in part within the proposed ground water area. The department may also serve notice upon any other person or state or federal agency that the department feels may be interested in or affected by the proposed designation or modification of a controlled ground water area. The petition need not be served on any petitioner. A copy of the notice, together with a copy of the proposal, ~~shall~~ must be mailed to each person at ~~his~~ the ~~person's~~ last-known address, and ~~such~~ service ~~shall--be~~ is complete upon depositing it in the post office, postage prepaid, addressed to each person on whom it is to be served. Publication and mailing of ~~such~~ the notice as prescribed ~~herein~~ in this section, when completed, ~~shall--be~~ deemed is considered to be sufficient notice of ~~such~~ the hearing to all interested persons."

NEW SECTION. Section 5. Rulemaking authority. The department may adopt rules to implement the provisions of 85-2-311, 85-2-319, and 85-2-402.

NEW SECTION. Section 6. Codification instruction. [Section 5] is intended to be codified as an integral part

1 of Title 85, chapter 2, and the provisions of Title 85,  
2 chapter 2, apply to [section 5].

3 NEW SECTION. **Section 7. 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 8. Retroactive applicability.**  
10 [Sections 1 and 3] apply retroactively, within the meaning  
11 of 1-2-109, to all applications for a permit or change in  
12 appropriation right that the department has not noticed out  
13 for objection as of [the effective date of this act].

14 NEW SECTION. **Section 9. Effective date.** [This act] is  
15 effective on passage and approval.

-End-

1 *Senora* BILL NO. *280*  
 2 INTRODUCED BY *Griffith*  
 3 *Billert* BY REQUEST OF THE DEPARTMENT OF *Hallgren*  
 4 NATURAL RESOURCES AND CONSERVATION *Braske*  
*Holtzman*

5  
 6 A BILL FOR AN ACT ENTITLED: "AN ACT IMPLEMENTING THE 1992  
 7 STATE WATER PLAN; INCLUDING WATER QUALITY AS A CRITERION FOR  
 8 WATER PERMIT, CHANGE AUTHORIZATION, CONTROLLED GROUND WATER  
 9 AREA, AND BASIN CLOSURE DETERMINATIONS; AMENDING SECTIONS  
 10 85-2-311, 85-2-319, 85-2-402, AND 85-2-506, MCA; AND  
 11 PROVIDING A RETROACTIVE APPLICABILITY DATE AND AN IMMEDIATE  
 12 EFFECTIVE DATE."

13  
 14 STATEMENT OF INTENT

15 A statement of intent is required for this bill because  
 16 the bill gives the department of natural resources and  
 17 conservation authority to adopt administrative rules. The  
 18 bill adds statutory criteria for the department to consider  
 19 in the processing of an application for a permit, change  
 20 authorization, controlled ground water area, or basin  
 21 closure. In adopting rules implementing this bill and in  
 22 interpreting the new statutory language, it is the intent of  
 23 the legislature that the department and board of natural  
 24 resources and conservation should assess the magnitude,  
 25 character, duration, and geographical extent of the

1 projected effects and utilize this assessment in a practical  
 2 manner.

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

5 Section 1. Section 85-2-311, MCA, is amended to read:

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

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

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

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

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

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

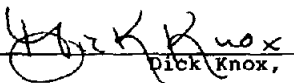


HOUSE STANDING COMMITTEE REPORT

March 29, 1993

Page 1 of 2

Mr. Speaker: We, the committee on Natural Resources report that Senate Bill 280 (third reading copy -- blue) be concurred in as amended.

Signed:  Dick Knox, Chair

And, that such amendments read:

Carried by: Rep. Gilbert

1. Page 2, line 1.

Following: "effects"

Insert: "on the uses of water as classified"

2. Page 3, line 6.

Following: "of"

Strike: "an"

Insert: "a prior"

3. Page 3, lines 16 through 20.

Strike: the second "is" on line 16 through "met" on line 20

Insert: "must contain substantial credible information establishing to the satisfaction of the department that the criteria in subsection (1)(g), (1)(h), or (1)(i), as applicable, may not be met. For the criteria set forth in subsection (1)(h), only the department of health and environmental sciences or a local water quality district established under Title 7, chapter 13, part 45, may file a valid objection"

4. Page 10, lines 21 through 23.

Strike: subsection (g) in its entirety

Renumber: subsequent subsection

5. Page 11, line 3.

Strike: "through (2)(h)"

Insert: "and (2)(g)"

6. Page 11, lines 4 through 8.

Strike: the second "is" on line 4 through "(2)(h)" on line 8

Insert: "must contain substantial credible information establishing to the satisfaction of the department that the criteria in subsection (2)(f) or (2)(g)"

7. Page 17, lines 20 through 22.

Strike: subsection (g) in its entirety

Renumber: subsequent subsection

8. Page 18, line 2.

Strike: "through (2)(h)"

Insert: "and (2)(g)"

9. Page 18, lines 3 through 6.

Strike: the second "is" on line 3 through "(2)(h)" on line 6

Insert: "must contain substantial credible information establishing to the satisfaction of the department that the criteria in subsection (2)(f) or (2)(g)"

10. Page 24, line 18.

Strike: "or"

11. Page 24, line 21.

Strike: "."

Insert: "; or (g) that water quality within the ground water area is not suited for a specific beneficial use defined by 85-2-102(2)(a)."

Committee Vote:

Yes 16, No    

701119SC.Hss

March 29, 1993  
Page 2 of 2

HOUSE  
SB 280

## SENATE BILL NO. 280

INTRODUCED BY GROSFIELD, FAGG, HALLIGAN, HARPER, GILBERT,

BROOKE, BECK, YELLOWTAIL

BY REQUEST OF THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION

A BILL FOR AN ACT ENTITLED: "AN ACT IMPLEMENTING THE 1992  
STATE WATER PLAN; INCLUDING WATER QUALITY AS A CRITERION FOR  
WATER PERMIT, CHANGE AUTHORIZATION, CONTROLLED GROUND WATER  
AREA, AND BASIN CLOSURE DETERMINATIONS; AMENDING SECTIONS  
85-2-311, 85-2-319, 85-2-402, AND 85-2-506, MCA; AND  
PROVIDING A RETROACTIVE APPLICABILITY DATE AND AN IMMEDIATE  
EFFECTIVE DATE."

## STATEMENT OF INTENT

A statement of intent is required for this bill because  
the bill gives the department of natural resources and  
conservation authority to adopt administrative rules. The  
bill adds statutory criteria for the department to consider  
in the processing of an application for a permit, change  
authorization, controlled ground water area, or basin  
closure. In adopting rules implementing this bill and in  
interpreting the new statutory language, it is the intent of  
the legislature that the department and board of natural  
resources and conservation should assess the magnitude,

character, duration, and geographical extent of the  
projected effects ON THE USES OF WATER AS CLASSIFIED and  
utilize this assessment in a practical manner.

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

**Section 1.** Section 85-2-311, MCA, is amended to read:

"85-2-311. Criteria for issuance of permit. (1) Except  
as provided in subsections ~~(2)~~ (3) and ~~(3)~~ (4), the  
department shall issue a permit if the applicant proves by  
~~substantial-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;

(g) the water quality of an A PRIOR appropriator will not be adversely affected;

(h) the proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1); and

(i) the ability of a discharge permitholder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.

(2) The applicant is required to prove that the criteria in subsections (1)(g) through (1)(i) have been met only if a valid objection is filed. A valid objection ~~is one supported by substantive evidence establishing to the satisfaction of the department that the criteria in subsection (1)(g), (1)(h), or (1)(i), as applicable, may not be met~~ MUST CONTAIN SUBSTANTIAL CREDIBLE INFORMATION ESTABLISHING TO THE SATISFACTION OF THE DEPARTMENT THAT THE CRITERIA IN SUBSECTION (1)(G), (1)(H), OR (1)(I), AS APPLICABLE, MAY NOT BE MET. FOR THE CRITERIA SET FORTH IN SUBSECTION (1)(H), ONLY THE DEPARTMENT OF HEALTH AND

ENVIRONMENTAL SCIENCES OR A LOCAL WATER QUALITY DISTRICT ESTABLISHED UNDER TITLE 7, CHAPTER 13, PART 45, MAY FILE A VALID OBJECTION.

~~(2)~~(3) 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~~ A finding ~~shall~~ must 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

1 creation of or contribution to saline seep; and

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

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

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

23 (i) depending on the volume of water diverted or  
24 consumed, the applicable criteria and procedures of  
25 subsection (1) or ~~(2)~~ (3) are met;

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

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

6 (c) In determining whether the applicant has proved by  
7 clear and convincing evidence that the requirements of  
8 subsections ~~(3)(b)(i)~~ (4)(b)(ii) and ~~(3)(b)(iii)~~  
9 (4)(b)(iii) are met, the department shall consider the  
10 following factors:

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

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

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

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

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

1       ~~(4)~~(5) To meet the ~~substantial--credible~~ preponderance  
 2 of evidence standard in this section, the applicant shall  
 3 submit independent hydrologic or other evidence, including  
 4 water supply data, field reports, and other information  
 5 developed by the department, the U.S. geological survey, or  
 6 the U.S. soil conservation service and other specific field  
 7 studies, demonstrating that the criteria are met.

8       ~~(5)~~(6) An appropriation, diversion, impoundment, use,  
 9 restraint, or attempted appropriation, diversion,  
 10 impoundment, use, or restraint contrary to the provisions of  
 11 this section is invalid. An officer, agent, agency, or  
 12 employee of the state may not knowingly permit, aid, or  
 13 assist in any manner an unauthorized appropriation,  
 14 diversion, impoundment, use, or other restraint. A person or  
 15 corporation may not, directly or indirectly, personally or  
 16 through an agent, officer, or employee, attempt to  
 17 appropriate, divert, impound, use, or otherwise restrain or  
 18 control waters within the boundaries of this state except in  
 19 accordance with this section."

20       **Section 2.** Section 85-2-319, MCA, is amended to read:

21       "85-2-319. Permit action in highly appropriated basins  
 22 or subbasins. (1) The legislature may by law preclude permit  
 23 applications, or the department may by rule reject permit  
 24 applications or modify or condition permits issued in a  
 25 highly appropriated basin or subbasin.

1       (2) A rule may be adopted under this section only upon  
 2 a petition signed by at least 25% or 10, whichever is less,  
 3 of the users of water in the source of supply within a basin  
 4 or subbasin or upon petition of the department of health and  
 5 environmental sciences alleging facts under subsection  
 6 (2)(d). The petition must be in a form as prescribed by the  
 7 department and must allege facts showing that throughout or  
 8 at certain times of the year or for certain beneficial uses:

9       (a) there are no unappropriated waters in the source of  
 10 supply;

11       (b) the rights of prior appropriators will be adversely  
 12 affected; or

13       (c) further uses will interfere unreasonably with other  
 14 planned uses or developments for which a permit has been  
 15 issued or for which water has been reserved; or

16       (d) in the case of a petition filed by the department  
 17 of health and environmental sciences:

18       (i) the water quality of an appropriator will be  
 19 adversely affected by the issuance of permits;

20       (ii) further use will not be substantially in accordance  
 21 with the classification of water set for the source of  
 22 supply pursuant to 75-5-301(1); or

23       (iii) the ability of a discharge permit holder to satisfy  
 24 effluent limitations of a permit issued in accordance with  
 25 Title 75, chapter 5, part 4, will be adversely affected by

1 the issuance of permits.

2 (3) Within 60 days after submission of a petition, the  
3 department shall:

4 (a) deny the petition in writing, stating its reasons  
5 for denial;

6 (b) inform the petitioners that the department must  
7 study the allegations further before denying or proceeding  
8 further with the petition; or

9 (c) initiate rulemaking proceedings in accordance with  
10 2-4-302 through 2-4-305.

11 (4) Title 2, chapter 4, parts 1 through 4, govern  
12 rulemaking proceedings conducted under this section, except  
13 that in addition to the notice requirements of those parts,  
14 the department notice of the rulemaking hearing must be  
15 published at least once in each week for 3 successive weeks,  
16 not less than 30 days before the date of the hearing, in a  
17 newspaper of general circulation in the county or counties  
18 in which the source is located. The department shall serve  
19 by mail a copy of the notice, not less than 30 days before  
20 the hearing, upon each person or public agency known from  
21 the examination of the records of the department to be a  
22 claimant, appropriator, or permitholder of water in the  
23 source."

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

25 "85-2-402. (Temporary) Changes in appropriation rights.

1 (1) An appropriator may not make a change in an  
2 appropriation right except as permitted under this section  
3 and with the approval of the department or, if applicable,  
4 of the legislature.

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

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

14 (b) Except for a lease authorization pursuant to  
15 85-2-436 that does not require appropriation works, the  
16 proposed means of diversion, construction, and operation of  
17 the appropriation works are adequate.

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

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

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

applicant.

(f) The water quality of an appropriator will not be adversely affected.

~~(g) The proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1).~~

(h)(G) The ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.

(3) The applicant is required to prove that the criteria in subsections (2)(f) through (2)(h) AND (2)(G) have been met only if a valid objection is filed. A valid objection is one supported by substantive evidence establishing to the satisfaction of the department that the criteria in subsection (2)(f), (2)(g), or (2)(h) MUST CONTAIN SUBSTANTIAL CREDIBLE INFORMATION ESTABLISHING TO THE SATISFACTION OF THE DEPARTMENT THAT THE CRITERIA IN SUBSECTION (2)(F) OR (2)(G), as applicable, may not be met.

(4) 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.

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

(a) the applicant proves by clear and convincing evidence and the department finds that the criteria in

1 subsections (2) and ~~(3)~~ (4) are met; and

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

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

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

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

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

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

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

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

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

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

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

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

1 water.

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

12       ~~†7†~~(8) The department or the legislature, if  
13 applicable, may approve a change subject to terms,  
14 conditions, restrictions, and limitations as it considers  
15 necessary to satisfy the criteria of this section, including  
16 limitations on the time for completion of the change. The  
17 department may extend time limits specified in the change  
18 approval under the applicable criteria and procedures of  
19 85-2-312(3).

20       ~~†8†~~(9) Upon actual application of water to the proposed  
21 beneficial use within the time allowed, the appropriator  
22 shall notify the department that the appropriation has been  
23 properly completed. The notification must contain a  
24 certified statement by a person with experience in the  
25 design, construction, or operation of appropriation works

1 that the appropriation has been properly completed in  
2 substantial accordance with the terms and conditions of the  
3 change approval.

4       ~~†9†~~(10) If a change is not completed as approved by the  
5 department or legislature or if the terms, conditions,  
6 restrictions, and limitations of the change approval are not  
7 complied with, the department may, after notice and  
8 opportunity for hearing, require the appropriator to show  
9 cause why the change approval should not be modified or  
10 revoked. If the appropriator fails to show sufficient cause,  
11 the department may modify or revoke the change approval.

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

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

20       ~~†12†~~(13) A change in appropriation right contrary to the  
21 provisions of this section is invalid. An officer, agent,  
22 agency, or employee of the state may not knowingly permit,  
23 aid, or assist in any manner an unauthorized change in  
24 appropriation right. A person or corporation may not,  
25 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 the approval of the department or, if applicable, of the legislature.

(2) Except as provided in subsections ~~(3)~~ (4) through ~~(5)~~ (6), 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.

(f) The water quality of an appropriator will not be adversely affected.

~~(g) The proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(i).~~

~~(h)(G) The ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.~~

(3) The applicant is required to prove that the criteria in subsections (2)(f) through ~~(2)(h)~~ AND (2)(G) have been met only if a valid objection is filed. A valid objection is one supported by substantive evidence establishing to the satisfaction of the department that the criteria in subsection ~~(2)(f)~~ ~~(2)(g)~~ or ~~(2)(h)~~ MUST CONTAIN SUBSTANTIAL CREDIBLE INFORMATION ESTABLISHING TO THE SATISFACTION OF THE DEPARTMENT THAT THE CRITERIA IN SUBSECTION (2)(F) OR (2)(G), as applicable, may not be met.

~~(3)(4)~~ 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

1 ~~substantial-credible~~ a preponderance of evidence that:

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

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

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

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

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

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

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

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

22 ~~†4†~~(5) The department may not approve a change in  
23 purpose of use or place of use for a diversion that results  
24 in 4,000 or more acre-feet of water a year and 5.5 or more  
25 cubic feet per second of water being consumed unless:

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

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

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

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

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

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

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

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

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

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

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

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

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

24 (d) When applying for a change in appropriation right  
25 to withdraw and transport water for use outside the state,

1 the applicant shall submit to and comply with the laws of  
2 the state of Montana governing the appropriation and use of  
3 water.

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

14 ~~(7)(8)~~ The department or the legislature, if  
15 applicable, may approve a change subject to such terms,  
16 conditions, restrictions, and limitations as it considers  
17 necessary to satisfy the criteria of this section, including  
18 limitations on the time for completion of the change. The  
19 department may extend time limits specified in the change  
20 approval under the applicable criteria and procedures of  
21 85-2-312(3).

22 ~~(8)(9)~~ Upon actual application of water to the proposed  
23 beneficial use within the time allowed, the appropriator  
24 shall notify the department that the appropriation has been  
25 properly completed. The notification must contain a

certified statement by a person with experience in the design, construction, or operation of appropriation works that the appropriation has been properly completed in substantial accordance with the terms and conditions of the change approval.

~~(9)~~(10) 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)~~(11) 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)~~(12) 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)~~(13) A change in appropriation right contrary to the provisions of this section is invalid. No An officer, agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner such an unauthorized change in

appropriation right. No 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."

**Section 4.** Section 85-2-506, MCA, is amended to read:

**"85-2-506. Controlled ground water areas -- designation or modification.** (1) The board may designate or modify controlled ground water areas as provided in this part.

(2) Designation or modification of an area of controlled ground water use may be proposed to the board by the department on its own motion, by petition of a state or local public health agency for identified public health risks, or by petition signed by at least 20 or one-fourth of the users (whichever is the lesser number) of ground water in a ground water area wherein in which there are alleged to be facts showing:

(a) that ground water withdrawals are in excess of recharge to the aquifer or aquifers within such the ground water area;

(b) that excessive ground water withdrawals are very likely to occur in the near future because of consistent and significant increases in withdrawals from within the ground water area;

(c) that significant disputes regarding priority of rights, amounts of ground water in use by appropriators, or

priority of type of use are in progress within the ground water area;

(d) that ground water levels or pressures in the area in question are declining or have declined excessively; or

(e) that excessive ground water withdrawals would cause contaminant migration ~~and--a--degradation--of-ground-water quality-within-the-ground-water-area; or~~

(f) that ground water withdrawals adversely affecting ground water quality within the ground water area are occurring or are likely to occur; OR

(G) THAT WATER QUALITY WITHIN THE GROUND WATER AREA IS NOT SUITED FOR A SPECIFIC BENEFICIAL USE DEFINED BY 85-2-102(2)(A).

(3) When such a proposal is thus made, the board shall fix a time and place for a hearing, which time ~~shall~~ may not be less than 90 days from the making of the proposal. The place for the hearing ~~shall~~ must be within or as close as practical to the controlled ground water area.

(4) The department shall publish a notice of the hearing, setting forth therein:

(a) the names of the petitioners;

(b) the description by legal subdivisions (section, township, range) of all lands included in or proposed to be included in the ground water area or subarea;

(c) the purpose of the hearing; and

(d) the time and place of the hearing where any interested person may appear, either in person or by attorney, file written objections to the granting of the proposal, and be fully heard.

(5) Such The notice of hearing ~~shall~~ must be published at least once in each week for 3 successive weeks not less than 30 days before the date of the hearing in a newspaper of general circulation in the county or counties in which the ground water area or subarea is located. The department shall also cause a copy of the notice, together with a copy of the petition, to be served by mail, not less than 30 days before the hearing, upon each well driller licensed in Montana whose address is within any county in which any part of the area in question is located; upon each person or public agency known from an examination of the records in the department's office to be a claimant or appropriator of ground water in the area in question (claimant or appropriator meaning one who diverts, impounds, or withdraws ground water and not merely one who uses or obtains ground water from another who diverts, impounds, or withdraws ground water); upon the bureau; and upon the mayor or chairman of the governing body of each incorporated municipality located in whole or in part within the proposed ground water area. The department may also serve notice upon any other person or state or federal agency that the

department feels may be interested in or affected by the proposed designation or modification of a controlled ground water area. The petition need not be served on any petitioner. A copy of the notice, together with a copy of the proposal, ~~shall~~ must be mailed to each person at ~~his~~ the person's last-known address, and such service ~~shall--be~~ is complete upon depositing it in the post office, postage prepaid, addressed to each person on whom it is to be served. Publication and mailing of ~~such~~ the notice as prescribed ~~herein~~ in this section, when completed, ~~shall--be~~ is considered to be sufficient notice of ~~such~~ the hearing to all interested persons."

NEW SECTION. Section 5. Rulemaking authority. The department may adopt rules to implement the provisions of 85-2-311, 85-2-319, and 85-2-402.

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

NEW SECTION. Section 7. 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 8. Retroactive applicability. [Sections 1 and 3] apply retroactively, within the meaning of 1-2-109, to all applications for a permit or change in appropriation right that the department has not noticed out for objection as of [the effective date of this act].

NEW SECTION. Section 9. Effective date. [This act] is effective on passage and approval.

-End-