

SENATE BILL 346

Introduced by Yellowtail, et al.

2/09 Introduced
2/09 Referred to Judiciary
2/09 First Reading
2/09 Fiscal Note Requested
2/10 Rereferred to Natural Resources
2/12 Hearing
2/15 Fiscal Note Received
2/16 Fiscal Note Printed
2/16 Committee Report--Bill Passed as Amended
2/20 2nd Reading Passed
2/22 3rd Reading Passed

Transmitted to House
2/23 Referred to Natural Resources
2/23 First Reading
3/24 Hearing
3/26 Tabled in Committee
4/19 Motion Failed to Take from Committee and
Place on 2nd Reading

1 *Senate* BILL NO. *346*
 2 INTRODUCED BY *Yellowtail*
 3 *Sen. J. J. Swenson Senate House Branch Office*
 4 A BILL FOR AN ACT ENTITLED: "AN ACT ALLOWING THE CHANGE OF
 5 PREVIOUSLY APPROPRIATED WATER TO AND FROM INSTREAM USES;
 6 INTEGRATING INSTREAM USE WATER RIGHTS INTO MONTANA'S PRIOR
 7 APPROPRIATION SYSTEM; AMENDING SECTIONS 85-2-102, 85-2-301,
 8 AND 85-2-402, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE
 9 DATE."

10
 11 WHEREAS, Article IX, section 3, of The Constitution of
 12 the State of Montana provides that it is the policy of this
 13 state that all waters within the State of Montana are the
 14 property of the state, subject to appropriation for
 15 beneficial use; and

16 WHEREAS, the Legislature finds that it is in the
 17 interest of the people of Montana to provide the same
 18 protection of law to reasonable instream uses of water for
 19 fish, wildlife, and recreational purposes that is now
 20 accorded to other uses of water; and

21 WHEREAS, the Legislature further finds that water rights
 22 for instream use may be integrated into Montana's prior
 23 appropriation system; and

24 WHEREAS, the Legislature finds that this integration of
 25 instream use into Montana's prior appropriation system is an

1 effective and efficient method of satisfying the public's
 2 interest in water resources.

3 THEREFORE, the Legislature of the State of Montana finds
 4 that it is proper to extend to all persons the right to
 5 change previously appropriated water to or from instream
 6 use.

7 STATEMENT OF INTENT

9 A statement of intent is required for this bill in order
 10 to provide guidance to the department of natural resources
 11 and conservation concerning the adoption of rules to allow
 12 the change of appropriation rights to appropriation rights
 13 for instream flow uses. It is not the intent of the
 14 legislature to allow the department to approve new
 15 appropriations for instream uses. It is the intent of the
 16 legislature to authorize change of previously appropriated
 17 water to instream uses. The changes must be voluntary. In
 18 order to fully protect prior appropriators, instream flow
 19 changes must follow the existing change in appropriation
 20 rights process. Further, it is the intent of the legislature
 21 to discourage water resource speculation and the
 22 unauthorized out-of-state transport of Montana's water. The
 23 legislature directs the department to adopt rules that
 24 effectively and efficiently implement the provisions of this
 25 bill. Additionally, the legislature recognizes that

enforcement of instream flow water rights will be crucial to realizing the goals of this bill and further directs the department to assist in the development of streamflow measuring plans that will allow enforcement of instream flow water rights. This does not mean, however, that instream flow water rights cannot be enforced without streamflow measuring plans.

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

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

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

(1) "Appropriate" means to:

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

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

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

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

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

and recreational uses;

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

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

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

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

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

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

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

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

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

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

(11) "Instream use" means a water use, with or without a diversion, to provide, maintain, or enhance values related to fish, wildlife, or recreation.

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

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

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

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

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

~~(17)~~(17) "Water" means all water of the state, surface

and subsurface, regardless of its character or manner of occurrence, including but not limited to geothermal water, diffuse surface water, and sewage effluent.

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

~~(19)~~(19) "Water division" means a drainage basin as defined in 3-7-102.

~~(20)~~(20) "Water judge" means a judge as provided for in Title 3, chapter 7.

~~(21)~~(21) "Water master" means a master as provided for in Title 3, chapter 7.

~~(22)~~(22) "Well" means any an artificial opening or excavation in the ground, however made, by which ground water is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn. (Terminates June 30, 1999--sec. 4, Ch. 740, L. 1991.)

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

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

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

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

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

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

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

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

18 (6) "Declaration" means the declaration of an existing
19 right filed with the department under section 8, Chapter
20 452, Laws of 1973.

21 (7) "Department" means the department of natural
22 resources and conservation provided for in Title 2, chapter
23 15, part 33.

24 (8) "Existing right" means a right to the use of water
25 which would be protected under the law as it existed prior

1 to July 1, 1973.

2 (9) "Ground water" means any water that is beneath the
3 ground surface.

4 (10) "Instream use" means a water use, with or without a
5 diversion, to provide, maintain, or enhance values related
6 to fish, wildlife, or recreation.

7 ~~(10)~~(11) "Permit" means the permit to appropriate issued
8 by the department under 85-2-301 through 85-2-303 and
9 85-2-306 through 85-2-314.

10 ~~(11)~~(12) "Person" means an individual, association,
11 partnership, corporation, state agency, political
12 subdivision, the United States or any an agency thereof of
13 the United States, or any other entity.

14 ~~(12)~~(13) "Political subdivision" means any a county,
15 incorporated city or town, public corporation, or district
16 created pursuant to state law or other public body of the
17 state empowered to appropriate water but not a private
18 corporation, association, or group.

19 ~~(13)~~(14) "Salvage" means to make water available for
20 beneficial use from an existing valid appropriation through
21 application of water-saving methods.

22 ~~(14)~~(15) "Waste" means the unreasonable loss of water
23 through the design or negligent operation of an
24 appropriation or water distribution facility or the
25 application of water to anything but a beneficial use.

1 ~~15~~(16) "Water" means all water of the state, surface
2 and subsurface, regardless of its character or manner of
3 occurrence, including but not limited to geothermal water,
4 diffuse surface water, and sewage effluent.

5 ~~16~~(17) "Watercourse" means any a naturally occurring
6 stream or river from which water is diverted for beneficial
7 uses. It does not include ditches, culverts, or other
8 manmade waterways.

9 ~~17~~(18) "Water division" means a drainage basin as
10 defined in 3-7-102.

11 ~~18~~(19) "Water judge" means a judge as provided for in
12 Title 3, chapter 7.

13 ~~19~~(20) "Water master" means a master as provided for
14 in Title 3, chapter 7.

15 ~~20~~(21) "Well" means any an artificial opening or
16 excavation in the ground, however made, by which ground
17 water is sought or can be obtained or through which it flows
18 under natural pressures or is artificially withdrawn."

19 **Section 2.** Section 85-2-301, MCA, is amended to read:

20 "85-2-301. Right to appropriate. (1) After July 1,
21 1973, a person may not appropriate water except as provided
22 in this chapter. A person may only appropriate water for a
23 beneficial use.

24 (2) (a) Only the department may appropriate water by
25 permit in either of the following instances:

1 (i) for transport outside the following river basins:

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

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

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

8 (D) the Little Missouri River and its tributaries to
9 its confluence with Lake Sakakawea in North Dakota;

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

12 (F) the Yellowstone River and its tributaries to its
13 confluence with the Missouri River in North Dakota; or

14 (ii) whenever water in excess of 4,000 acre-feet a year
15 and 5.5 cubic feet per second, for any use, is to be
16 consumed.

17 (b) Water for these purposes or in these amounts may be
18 leased from the department by any a person under the
19 provisions of 85-2-141.

20 (3) A right to appropriate water may not be acquired by
21 any other method, including by adverse use, adverse
22 possession, prescription, or estoppel. The method prescribed
23 by this chapter is exclusive.

24 (4) A right to use water for an instream use may only
25 be acquired by a change in appropriation right pursuant to

part 4 or by a reservation pursuant to 85-2-316."

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 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~~ when appropriation works are not required, 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 Except in the case of an instream use, the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property

where the water is to be put to beneficial use.

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

(3) (a) The application for a change in an appropriation right to an instream use must state the amount of water to be changed to instream use and the point of measurement.

(b) The department may not approve a change in an appropriation right to an instream use that would result in an out-of-state transport of water that does not comply with the provisions of subsection (6).

~~(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 substantial credible evidence that:

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

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

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

existing water rights and aquatic life;

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

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

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

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

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

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

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

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

~~(5)~~(6) (a) The state of Montana has long recognized the importance of conserving its public waters and the necessity

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

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

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

1 by clear and convincing evidence that the requirements of
 2 subsections ~~(5)(b)(i)~~ (6)(b)(ii) and ~~(5)(b)(iii)~~
 3 (6)(b)(iii) will be met, the department and, if applicable,
 4 the legislature shall consider the following factors:

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

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

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

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

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

21 ~~(6)(7)~~ For any an application for a change in
 22 appropriation right involving 4,000 or more acre-feet of
 23 water a year and 5.5 or more cubic feet per second of water,
 24 the department shall give notice of the proposed change in
 25 accordance with 85-2-307 and shall hold one or more hearings

1 in accordance with 85-2-309 prior to its approval or denial
 2 of the proposed change. The department shall provide notice
 3 and may hold one or more hearings upon any other proposed
 4 change if it determines that a change might adversely affect
 5 the rights of other persons.

6 ~~(7)(8)~~ The department or the legislature, if
 7 applicable, may approve a change subject to terms,
 8 conditions, restrictions, and limitations as it considers
 9 necessary to satisfy the criteria of this section, including
 10 limitations on the time for completion of the change. The
 11 department may extend time limits specified in the change
 12 approval under the applicable criteria and procedures of
 13 85-2-312(3).

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

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

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

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

9 ~~†11†~~(12) A person holding an issued permit or change
10 approval that has not been perfected may change the place of
11 diversion, place of use, purpose of use, or place of storage
12 by filing an application for change pursuant to this
13 section.

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

23 85-2-402. (Effective July 1, 1999) Changes in
24 appropriation rights. (1) An appropriator may not make a
25 change in an appropriation right except as permitted under

1 this section and with the approval of the department or, if
2 applicable, of the legislature.

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

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

12 (b) The Except when appropriation works are not
13 required, the proposed means of diversion, construction, and
14 operation of the appropriation works are adequate.

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

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

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

24 (3) (a) The application for a change in an
25 appropriation right to an instream use must state the amount

1 of water to be changed to instream use and the point of
2 measurement.

3 (b) The department may not approve a change in an
4 appropriation right to an instream use that would result in
5 an out-of-state transport of water that does not comply with
6 the provisions of subsection (6).

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

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

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

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

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

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

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

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

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

7 ~~{4}~~{5} The department may not approve a change in
8 purpose of use or place of use for a diversion that results
9 in 4,000 or more acre-feet of water a year and 5.5 or more
10 cubic feet per second of water being consumed unless:

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

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

17 ~~{5}~~{6} (a) The state of Montana has long recognized the
18 importance of conserving its public waters and the necessity
19 to maintain adequate water supplies for the state's water
20 requirements, including requirements for reserved water
21 rights held by the United States for federal reserved lands
22 and in trust for the various Indian tribes within the
23 state's boundaries. Although the state of Montana also
24 recognizes that, under appropriate conditions, the
25 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)(iii)~~ (6)(b)(ii) and ~~(5)(b)(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 ~~such--a~~ the 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 that 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).

†9†(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.

†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 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."

NEW SECTION. **Section 4.** Effective date. [This act] is 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 SB0346, as introduced.

DESCRIPTION OF PROPOSED LEGISLATION: The bill would allow previously appropriated water to be changed to and from instream uses, and would integrate instream use water rights into Montana's prior appropriation system.

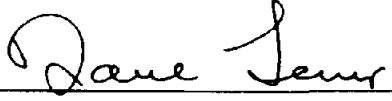
ASSUMPTIONS:

1. The number of change applications pertinent to instream flow uses is not expected to materially increase the amount of routine processing activities currently incurred by the Department of Natural Resources and Conservation (DNRC).
2. DNRC costs associated with processing and determining whether to authorize a change application for instream flow purposes would be absorbed within the current-level budget.
3. DNRC would incur a one-time cost to adopt and publish administrative rules and prepare and print new forms. This one-time cost is estimated to be \$1,000 in FY94.

FISCAL IMPACT: \$1,000 one-time expenditure in FY94 incurred by the DNRC to adopt and publish administrative rules and to print new forms.

LONG-RANGE EFFECTS OF PROPOSED LEGISLATION: This legislation puts instream flows for fish, wildlife, and recreation on an equal footing with traditional beneficial uses of water by allowing non-agency entities to acquire through purchase, lease or gift existing water rights to augment low flows. The current law allows the Department of Fish, Wildlife and Parks only to lease (not purchase) existing rights for augmenting instream flows. The fisheries resource should benefit in the long run from this legislation because with these new options, stream flows in many of Montana's chronically dewatered streams have increased chance for improvement.

TECHNICAL NOTES: If large applications requiring reasonable use determination are received, an EIS would likely be required. Because an instream flow use would probably not require constructing, repairing or changing the appropriation or diversion facilities, EIS fees could not be collected from the applicant. Therefore, EIS costs would have to be paid from the general fund or other funding sources.

 2-13-93
DAVID LEWIS, BUDGET DIRECTOR DATE
Office of Budget and Program Planning

 2-16-93
BILL YELLOWTAIL, PRIMARY SPONSOR DATE

Fiscal Note for SB0346, as introduced

SB 346

APPROVED BY COMM. ON
NATURAL RESOURCES

SENATE BILL NO. 346

INTRODUCED BY YELLOWTAIL, RYE, CRIPPEN, SIMON, FAGG,
SWANSON, BROOKE, HARPER, BIANCHI, DOHERTY

A BILL FOR AN ACT ENTITLED: "AN ACT ALLOWING THE CHANGE OF
PREVIOUSLY APPROPRIATED WATER TO AND FROM INSTREAM USES;
INTEGRATING INSTREAM USE WATER RIGHTS INTO MONTANA'S PRIOR
APPROPRIATION SYSTEM; AMENDING SECTIONS 85-2-102, 85-2-301,
AND 85-2-402, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE
DATE."

WHEREAS, Article IX, section 3, of The Constitution of
the State of Montana provides that it is the policy of this
state that all waters within the State of Montana are the
property of the state, subject to appropriation for
beneficial use; and

WHEREAS, the Legislature finds that it is in the
interest of the people of Montana to provide the same
protection of law to reasonable instream uses of water for
fish, wildlife, and recreational purposes that is now
accorded to other uses of water; and

WHEREAS, the Legislature further finds that water rights
for instream use may be integrated into Montana's prior
appropriation system; and

WHEREAS, the Legislature finds that this integration of

instream use into Montana's prior appropriation system is an
effective and efficient method of satisfying the public's
interest in water resources.

THEREFORE, the Legislature of the State of Montana finds
that it is proper to extend to all persons the right to
change previously appropriated water to or from instream
use.

STATEMENT OF INTENT

A statement of intent is required for this bill in order
to provide guidance to the department of natural resources
and conservation concerning the adoption of rules to allow
the change of appropriation rights to appropriation rights
for instream flow uses. It is not the intent of the
legislature to allow the department to approve new
appropriations for instream uses. It is the intent of the
legislature to authorize change of previously appropriated
water to instream uses. The changes must be voluntary. In
order to fully protect prior appropriators, instream flow
changes must follow the existing change in appropriation
rights process. Further, it is the intent of the legislature
to discourage water resource speculation and the
unauthorized out-of-state transport of Montana's water. The
legislature directs the department to adopt rules that
effectively and efficiently implement the provisions of this

bill. Additionally, the legislature recognizes that enforcement of instream flow water rights will be crucial to realizing the goals of this bill and further directs the department to assist in the development of streamflow measuring plans that will allow enforcement of instream flow water rights BY THE DEPARTMENT, SUBJECT TO THE PROVISIONS OF 85-2-114. This does not mean, however, that instream flow water rights cannot be enforced without streamflow measuring plans.

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

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

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

(1) "Appropriate" means to:

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

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

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

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

(a) a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to

agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses;

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

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

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

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

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

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

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

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

(9) "Existing right" means a right to the use of water

1 which would be protected under the law as it existed prior
2 to July 1, 1973.

3 (10) "Ground water" means any water that is beneath the
4 ground surface.

5 (11) "Instream use" means a water use, with or without a
6 diversion, to provide, maintain, or enhance values related
7 to fish, wildlife, or recreation.

8 ~~(11)~~(12) "Permit" means the permit to appropriate issued
9 by the department under 85-2-301 through 85-2-303 and
10 85-2-306 through 85-2-314.

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

15 ~~(13)~~(14) "Political subdivision" means any a county,
16 incorporated city or town, public corporation, or district
17 created pursuant to state law or other public body of the
18 state empowered to appropriate water but not a private
19 corporation, association, or group.

20 ~~(14)~~(15) "Salvage" means to make water available for
21 beneficial use from an existing valid appropriation through
22 application of water-saving methods.

23 ~~(15)~~(16) "Waste" means the unreasonable loss of water
24 through the design or negligent operation of an
25 appropriation or water distribution facility or the

1 application of water to anything but a beneficial use.

2 ~~(16)~~(17) "Water" means all water of the state, surface
3 and subsurface, regardless of its character or manner of
4 occurrence, including but not limited to geothermal water,
5 diffuse surface water, and sewage effluent.

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

10 ~~(18)~~(19) "Water division" means a drainage basin as
11 defined in 3-7-102.

12 ~~(19)~~(20) "Water judge" means a judge as provided for in
13 Title 3, chapter 7.

14 ~~(20)~~(21) "Water master" means a master as provided for
15 in Title 3, chapter 7.

16 ~~(21)~~(22) "Well" means any an artificial opening or
17 excavation in the ground, however made, by which ground
18 water is sought or can be obtained or through which it flows
19 under natural pressures or is artificially withdrawn.
20 (Terminates June 30, 1999--sec. 4, Ch. 740, L. 1991.)

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

24 (1) "Appropriate" means to divert, impound, or withdraw
25 (including by stock for stock water) a quantity of water or,

1 in the case of a public agency, to reserve water in
2 accordance with 85-2-316.

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

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

9 (b) a use of water appropriated by the department for
10 the state water leasing program under 85-2-141 and of water
11 leased under a valid lease issued by the department under
12 85-2-141.

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

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

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

20 (6) "Declaration" means the declaration of an existing
21 right filed with the department under section 8, Chapter
22 452, Laws of 1973.

23 (7) "Department" means the department of natural
24 resources and conservation provided for in Title 2, chapter
25 15, part 33.

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

4 (9) "Ground water" means any water that is beneath the
5 ground surface.

6 (10) "Instream use" means a water use, with or without a
7 diversion, to provide, maintain, or enhance values related
8 to fish, wildlife, or recreation.

9 ~~(11)~~ (11) "Permit" means the permit to appropriate issued
10 by the department under 85-2-301 through 85-2-303 and
11 85-2-306 through 85-2-314.

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

16 ~~(13)~~ (13) "Political subdivision" means any a county,
17 incorporated city or town, public corporation, or district
18 created pursuant to state law or other public body of the
19 state empowered to appropriate water but not a private
20 corporation, association, or group.

21 ~~(14)~~ (14) "Salvage" means to make water available for
22 beneficial use from an existing valid appropriation through
23 application of water-saving methods.

24 ~~(15)~~ (15) "Waste" means the unreasonable loss of water
25 through the design or negligent operation of an

appropriation or water distribution facility or the application of water to anything but a beneficial use.

~~15~~16 "Water" means all water of the state, surface and subsurface, regardless of its character or manner of occurrence, including but not limited to geothermal water, diffuse surface water, and sewage effluent.

~~16~~17 "Watercourse" means any a naturally occurring stream or river from which water is diverted for beneficial uses. It does not include ditches, culverts, or other manmade waterways.

~~17~~18 "Water division" means a drainage basin as defined in 3-7-102.

~~18~~19 "Water judge" means a judge as provided for in Title 3, chapter 7.

~~19~~20 "Water master" means a master as provided for in Title 3, chapter 7.

~~20~~21 "Well" means any an artificial opening or excavation in the ground, however made, by which ground water is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn."

Section 2. Section 85-2-301, MCA, is amended to read:

"85-2-301. Right to appropriate. (1) After July 1, 1973, a person may not appropriate water except as provided in this chapter. A person may only appropriate water for a beneficial use.

(2) (a) Only the department may appropriate water by permit in either of the following instances:

(i) for transport outside the following river basins:

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

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

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

(D) the Little Missouri River and its tributaries to its confluence with Lake Sakakawea in North Dakota;

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

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

(ii) whenever water in excess of 4,000 acre-feet a year and 5.5 cubic feet per second, for any use, is to be consumed.

(b) Water for these purposes or in these amounts may be leased from the department by any a person under the provisions of 85-2-141.

(3) A right to appropriate water may not be acquired by any other method, including by adverse use, adverse possession, prescription, or estoppel. The method prescribed by this chapter is exclusive.

1 (4) A right to use water for an instream use may only
 2 be acquired by a change in appropriation right pursuant to
 3 part 4 or by a reservation pursuant to 85-2-316."

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

5 ***85-2-402. (Temporary) Changes in appropriation rights.**

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

10 (2) Except as provided in subsections ~~(3)~~(4) through
 11 ~~(5)~~(6), the department shall approve a change in
 12 appropriation right if the appropriator proves by
 13 substantial credible evidence that the following criteria
 14 are met:

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

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

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

25 (d) The Except in the case of an instream use, the

1 applicant has a possessory interest, or the written consent
 2 of the person with the possessory interest, in the property
 3 where the water is to be put to beneficial use.

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

8 (3) (a) The application for a change in an
 9 appropriation right to an instream use must state the amount
 10 of water to be changed to instream use and the point of
 11 measurement.

12 (b) The department may not approve a change in an
 13 appropriation right to an instream use:

14 (I) that would result in an out-of-state transport of
 15 water that does not comply with the provisions of subsection
 16 (6); AND

17 (II) WITHOUT A STREAMFLOW MEASURING PLAN AS DESCRIBED IN
 18 85-2-436. THE COST OF THE STREAMFLOW MEASURING PLAN AND ANY
 19 REQUIRED MEASURING DEVICE MUST BE BORNE BY THE APPLICANT FOR
 20 AN INSTREAM USE.

21 (C) ENFORCEMENT BY THE DEPARTMENT OF INSTREAM USES IS
 22 SUBJECT TO THE PROVISIONS OF 85-2-114.

23 ~~(3)~~(4) The department may not approve a change in
 24 purpose of use or place of use of an appropriation of 4,000
 25 or more acre-feet of water a year and 5.5 or more cubic feet

1 per second of water unless the appropriator proves by
2 substantial credible evidence that:

- 3 (a) the criteria in subsection (2) are met;
- 4 (b) the proposed change is a reasonable use. A finding
5 of reasonable use must be based on a consideration of:
- 6 (i) the existing demands on the state water supply, as
7 well as projected demands for water for future beneficial
8 purposes, including municipal water supplies, irrigation
9 systems, and minimum streamflows for the protection of
10 existing water rights and aquatic life;
- 11 (ii) the benefits to the applicant and the state;
- 12 (iii) the effects on the quantity and quality of water
13 for existing uses in the source of supply;
- 14 (iv) the availability and feasibility of using
15 low-quality water for the purpose for which application has
16 been made;
- 17 (v) the effects on private property rights by any
18 creation of or contribution to saline seep; and
- 19 (vi) the probable significant adverse environmental
20 impacts of the proposed use of water as determined by the
21 department pursuant to Title 75, chapter 1, or Title 75,
22 chapter 20.

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

1 cubic feet per second of water being consumed unless:

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

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

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

20 (b) The department and, if applicable, the legislature
21 may not approve a change in appropriation right for the
22 withdrawal and transportation of appropriated water for use
23 outside the state unless the appropriator proves by clear
24 and convincing evidence and, if applicable, the legislature
25 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††iii†~~ (6)(b)(ii) and ~~†5††b††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 an 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.

~~†7†~~(8) The department or the legislature, if applicable, may approve a change subject to 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.

~~(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. An officer, agent, agency, or employee of the state may not knowingly permit,

aid, or assist in any manner an unauthorized change in appropriation right. A person or corporation may not, directly or indirectly, personally or through an agent, officer, or employee, attempt to change an appropriation right except in accordance with this section. (Terminates June 30, 1999--sec. 4, Ch. 740, L. 1991.)

85-2-402. (Effective July 1, 1999) Changes in appropriation rights. (1) An appropriator may not make a change in an appropriation right except as permitted under this section and with 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 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 Except when appropriation works are not required, 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 Except in the case of a change to an instream

1 use, the applicant has a possessory interest, or the written
 2 consent of the person with the possessory interest, in the
 3 property where the water is to be put to beneficial use.

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

8 (3) (a) The application for a change in an
 9 appropriation right to an instream use must state the amount
 10 of water to be changed to instream use and the point of
 11 measurement.

12 (b) The department may not approve a change in an
 13 appropriation right to an instream use:

14 (I) that would result in an out-of-state transport of
 15 water that does not comply with the provisions of subsection
 16 (6); AND

17 (II) WITHOUT A STREAMFLOW MEASURING PLAN AS DESCRIBED IN
 18 85-2-436. THE COST OF THE STREAMFLOW MEASURING PLAN AND ANY
 19 REQUIRED MEASURING DEVICE MUST BE BORNE BY THE APPLICANT FOR
 20 AN INSTREAM USE.

21 (C) ENFORCEMENT BY THE DEPARTMENT OF INSTREAM USES IS
 22 SUBJECT TO THE PROVISIONS OF 85-2-114.

23 ~~(3)~~(4) The department may not approve a change in
 24 purpose of use or place of use of an appropriation of 4,000
 25 or more acre-feet of water a year and 5.5 or more cubic feet

1 per second of water unless the appropriator proves by
 2 substantial credible evidence that:

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

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

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

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

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

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

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

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

23 ~~(4)~~(5) The department may not approve a change in
 24 purpose of use or place of use for a diversion that results
 25 in 4,000 or more acre-feet of water a year and 5.5 or more

1 cubic feet per second of water being consumed unless:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

23 ~~†8†~~(9) Upon actual application of water to the proposed
24 beneficial use within the time allowed, the appropriator
25 shall notify the department that the appropriation has been

1 properly completed. The notification must contain a
2 certified statement by a person with experience in the
3 design, construction, or operation of appropriation works
4 that the appropriation has been properly completed in
5 substantial accordance with the terms and conditions of the
6 change approval.

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

15 ~~†10†~~(11) The original of a change approval issued by the
16 department must be sent to the applicant, and a duplicate
17 must be kept in the office of the department in Helena.

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

23 ~~†12†~~(13) A change in appropriation right contrary to the
24 provisions of this section is invalid. No An officer, agent,
25 agency, or employee of the state may not knowingly permit,

1 aid, or assist in any manner such unauthorized change in
2 appropriation right. No A person or corporation may not,
3 directly or indirectly, personally or through an agent,
4 officer, or employee, attempt to change an appropriation
5 right except in accordance with this section."

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

-End-

1 SENATE BILL NO. 346

2 INTRODUCED BY YELLOWTAIL, RYE, CRIPPEN, SIMON, FAGG,
3 SWANSON, BROOKE, HARPER, BIANCHI, DOHERTY

4
5 A BILL FOR AN ACT ENTITLED: "AN ACT ALLOWING THE CHANGE OF
6 PREVIOUSLY APPROPRIATED WATER TO AND FROM INSTREAM USES;
7 INTEGRATING INSTREAM USE WATER RIGHTS INTO MONTANA'S PRIOR
8 APPROPRIATION SYSTEM; AMENDING SECTIONS 85-2-102, 85-2-301,
9 AND 85-2-402, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE
10 DATE."

11
12 WHEREAS, Article IX, section 3, of The Constitution of
13 the State of Montana provides that it is the policy of this
14 state that all waters within the State of Montana are the
15 property of the state, subject to appropriation for
16 beneficial use; and

17 WHEREAS, the Legislature finds that it is in the
18 interest of the people of Montana to provide the same
19 protection of law to reasonable instream uses of water for
20 fish, wildlife, and recreational purposes that is now
21 accorded to other uses of water; and

22 WHEREAS, the Legislature further finds that water rights
23 for instream use may be integrated into Montana's prior
24 appropriation system; and

25 WHEREAS, the Legislature finds that this integration of

1 instream use into Montana's prior appropriation system is an
2 effective and efficient method of satisfying the public's
3 interest in water resources.

4 THEREFORE, the Legislature of the State of Montana finds
5 that it is proper to extend to all persons the right to
6 change previously appropriated water to or from instream
7 use.

9 STATEMENT OF INTENT

10 A statement of intent is required for this bill in order
11 to provide guidance to the department of natural resources
12 and conservation concerning the adoption of rules to allow
13 the change of appropriation rights to appropriation rights
14 for instream flow uses. It is not the intent of the
15 legislature to allow the department to approve new
16 appropriations for instream uses. It is the intent of the
17 legislature to authorize change of previously appropriated
18 water to instream uses. The changes must be voluntary. In

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