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Report of the
Water Policy
Committee to the
50th Legislature

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**REPORT OF
THE WATER POLICY COMMITTEE
TO THE 50TH LEGISLATURE
OF THE STATE
OF MONTANA**

December 1986

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**REPORT OF
THE WATER POLICY COMMITTEE
TO THE 50TH LEGISLATURE
OF THE STATE
OF MONTANA**

December 1986

Senator Jack Galt, Chairman
Representative Dorothy Bradley, Vice-Chairman

Representative Hubert Abrams
Representative Dennis Iverson
Representative Robert Marks

Senator Dorothy Eck
Senator James Shaw
Senator Lawrence Stimatz

Staffed by the Environmental Quality Council
Capitol Station
Helena, MT 59620
(406) 444-3742



WATER POLICY COMMITTEE

Montana State Legislature

SENATE MEMBERS

Jack L. Galt, Chairman
Dorothy Eck
Jim Shaw
Larry Stimatz

HOUSE MEMBERS

Dorothy Bradley, Vice Chairman
Hubert J. Abrams
Dennis Iverson
Bob Marks

January 2, 1987

Committee Staff
Environmental Quality Council
Capitol Station
Helena, Montana 59620
(406) 444-3742

President of the Senate
Speaker of the House
Montana Legislature

Gentlemen:

As chairman of the Water Policy Committee, I am pleased to transmit the committee's final report to the Fiftieth Legislature, as required by section 85-2-105, MCA.

The Water Policy Committee considered a broad range of topics during the first interim since its creation by House Bill 680 during the 1985 session. This report summarizes the cross-section of water issues discussed and identifies background information considered, committee activities, and recommendations to the legislature.

The basis for all the committee's recommendations became apparent as the interim neared its end: Montana needs comprehensive and coordinated water management. This management must be based on scientific study, sound policy-making, and informed public participation. Based on these principles, Montana's water resources will be used more effectively for the benefit of our citizens.

On behalf of the Water Policy Committee, I urge your consideration of this report.

Sincerely,

A handwritten signature in cursive script that reads "Jack L. Galt".

Senator Jack Galt
Chairman

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SUMMARY OF COMMITTEE RECOMMENDATIONS

The committee carefully considered each of the recommendations stated in this summary section. Readers are encouraged to refer to the body of the report for explanation concerning the recommendations.

Water Use Efficiency

1. The committee requests that, if the DNRC water use efficiency study is funded, the DNRC present results of its study to the committee by the summer or early fall of 1988.
2. The DNRC should solicit public input or participation as a major component of its irrigation efficiency study.
3. Water use efficiency should be considered an integral element of the state water plan and should be given priority.

Drought Management

1. The committee recommends that the Department of Military Affairs, as the lead agency, coordinate and work with other agencies to determine the best way to use advisory groups in developing a drought mitigation response.
2. The Disaster Advisory Council and the Drought Task Force (if established) should meet at least once before May of each year to assess the potential for drought along with possible responses.

State Water Plan

1. Public input is an important part of the state water planning process, and should be solicited early and throughout the development of each plan element.
2. The committee offers its assistance and requests coordination with the State Water Plan Advisory Council in the state water planning process.
3. The committee directs staff to make appropriate requests for grant money to assist the Water Policy Committee and the State Water Plan Advisory Council in providing public hearings concerning the state water planning process.
4. The committee requests that the State Water Plan Advisory Council include members of the Water Policy Committee.
5. The committee requests that the State Water Plan Advisory Committee develop a budget and a recommended funding source for submission to the committee and the 1987 legislature.

6. The committee recommends that the State Water Plan Advisory Council consider the public trust doctrine in its state water planning efforts.

Water Data Management

1. The NRIS should continue to work affirmatively to develop a water resources data management system while coordinating its efforts with the DNRC and other state agencies and institutions.

2. The NRIS should encourage a water data quality control system to ensure that data collected in the future are reliable.

3. State, federal, local and private entities should meet periodically to discuss water data problems and possible solutions.

4. The NRIS water data management proposal should be used to develop the water data management element of the state water plan.

5. The committee endorses the efforts of the Natural Resource Information System and Ground Water Information Center and recommends funding to ensure their purposes are achieved.

Ground Water Management

1. The Ground Water Information Center and the NRIS should work together to ensure that ground water data are inventoried and easily accessible.

2. Ground water management should be studied by the Water Policy Committee during the next interim.

3. The Board of Natural Resources and Conservation should consider increasing the fees on notices of completions for wells to enable the board of water well contractors and DNRC support staff achieve water well program objectives.

Water Development

1. The Legislature should adopt a preference for agricultural projects submitted for water development program funding for the biennium ending June 30, 1989.

2. Water development program funding should be used solely for water projects and programs.

3. The committee endorses the statutory inclusion of an ability-to-pay criterion in establishing what water users should pay toward the cost of water projects funded by the water development program.

Water Research

1. Current level funding (\$15,000 per year) for the Montana Water Resources Center should be continued.

2. The EQC Resource Indemnity Trust proposal for an independent feasibility and marketing study should be funded.

Missouri Basin Water Issues

1. In the event the executive-branch negotiators conclude an agreement by the end of the year that requests legislative endorsement, the Water Policy Committee would meet early in the session.

2. If an agreement is reached that calls for continued discussions on selected issues, the legislature should support such discussions.

3. Continued efforts to improve communications among the legislators and citizens of the basin states should be undertaken.

Hydropower Issues

1. Because of the complexity of hydro and other interests in the Clark Fork and Flathead basins, efforts should be undertaken to develop a comprehensive water management policy for the region.

Water Rights Adjudication

1. The committee recommends implementing a system for setting priority basins for adjudication; the system should include a petition process to enable claimants to request priority status for a basin.

2. The appointment process for the chief water judge and water judge should be modified to require that candidates fulfill the constitutional requirements for district court judges and supreme court justices and be appointed by the Chief Justice of the Supreme Court with confirmation by the Senate.

3. The DNRC's role in the water adjudication process should focus on verifying existing water rights.

4. Section 85-2-243, MCA, should be amended to delineate clearly the role of the DNRC in the adjudication process.

Federal and Indian Reserved Water Rights

1. Authority for continued negotiations by the Reserved Water Rights Compact Commission should be extended until July 1, 1993.

2. The Reserved Water Rights Compact Commission's biennial budget request for \$472,000 from the general fund should be granted.

Water Reservations

1. The reservation process should focus on priority basins, such as the Missouri, where adjudications and reserved rights negotiations are also being expedited.
2. The Legislature should appropriate the money requested in the DNRC budget proposal to undertake water reservations in the lower Missouri.
3. The basin designation in 85-2-316 should be amended to clarify that water may be reserved for future beneficial use only in the designated basin in which it is reserved. However, if water is not reasonably available for an interbasin transfer through the DNRC water leasing program, water may be reserved for an out-of-basin use provided the use is in one of the six designated basins.
4. The Water Policy Committee should consider investigating other specific statutory questions concerning the water reservation system during the next interim period.

INTRODUCTION

The 1985 Montana Legislature, in adopting House Bill 680 (the major water policy legislation of the session), established a permanent Water Policy Committee to review the state's water policy.

The bill assigned to the Water Policy Committee both general and specific responsibilities. The committee's general responsibilities are to oversee the policies and activities of state agencies concerning water resources, and to advise the legislature on matters relating to water policy. Its specific duties include analyzing and commenting on the state water plan, the state's water development program, water-related research in the state, and the water resources data management system coordinated by the Department of Natural Resources and Conservation.

This report summarizes the cross-section of water issues the Water Policy Committee discussed during the 1985-1986 interim. It identifies background information considered, committee activities, and recommendations to the legislature.

During its first legislative interim, the committee elected to review a broad spectrum of issues in the water policy arena. The members felt that this background information would assist the committee in the future in selecting specific water resource issues for in-depth study.

This report contains four chapters. The first chapter addresses water conservation, an important topic that will become more important as more Montana basins become fully appropriated and as occasional drought spawns conflict among municipal, industrial, agricultural and instream water users. Chapter Two concerns water planning, water data, ground water management, water development and water research. All five topics emphasize the need for coordinated water management. Chapter Three involves interstate and intergovernmental issues. The two examples -- hydropower and Missouri Basin issues -- show the complexity of policy decisions in a regional arena. Finally, Chapter Four examines Montana's processes for determining present and future rights to water in Montana. A principle underlying this chapter is that if Montana is to guarantee a fair share of water for itself, it must first determine the present and future needs of its citizens.

A central theme to this report emerges: Montana needs comprehensive and coordinated water management. This management must be based on scientific study, sound policy-making, and informed public participation. Based on these principles of water management, Montana's water resources will be used more effectively for the benefit of the citizens of this headwaters state.

CHAPTER ONE: WATER CONSERVATION

Water conservation is a theme often associated with water scarcity. When water is scarce, the public generally hears about the need for water conservation. Thus, the 1985 drought resulted in pleas for water conservation to ensure adequate water for irrigators with junior rights, instream flows for fish populations and water supplies for cities and towns.

Water conservation may also be a long-term concern, particularly in basins where water is fully appropriated. In these instances, improved water conservation may help provide water for all users and minimize future conflicts.

The challenge in the water conservation arena, however, is to find ways to make more efficient water use an economically sound decision for the water user. It is difficult in today's stressed economy for water users to undertake water conservation innovations without an economic incentive.

I. Water Use Efficiency

A. Background. Water use efficiency is a popular discussion topic among water resource managers in the West. States such as Colorado and California, where water scarcity is an ongoing concern, are beginning to evaluate the ability of existing prior appropriation laws to allocate water to help their citizens. In recognition of these concerns, the Western Governors' Association (WGA) commissioned a study of western state water law systems to examine ways to improve water use efficiency. The final report, entitled Western Water: Tuning the System (1986), focuses on inexpensive ways (e.g., transfers, salvage and conservation of water) to enhance available water for the West. In encouraging western states to examine and promote these means, the report stresses that a comprehensive change in western water management is unnecessary, and that fine-tuning existing laws could facilitate efficient water use.

The report also notes that states can protect themselves from water exports, at least to some extent, by providing state government with authority to appropriate and lease water and by conducting cooperative interstate efforts.

The recommendations include several policy innovations that suggest modifications of Montana's water management laws. Some water management experts urge caution, however, because the report's recommendations are general for the western states and not tailored to Montana. In addition, the report employs an economic efficiency analysis and may not give sufficient attention to environmental and social concerns.

The WGA study, Water Policy Committee deliberations, and general concerns about water conservation resulted in a Department of Natural Resources and Conservation (DNRC) proposal to study irrigation efficiency. The project proposal, which was submitted in May 1986 for a grant under the water development program, calls for \$63,000 to inventory water use efficiency in Montana; identify problem areas and ways to improve water use efficiency; and develop a comprehensive strategy for improving irrigation efficiency. A major component of the proposal is a study of Montana's existing laws to determine whether any legal impediments to water use efficiency could be removed.

The study would receive direction from an ad hoc technical advisory committee of professionals with experience in water use efficiency, including representatives of the U.S. Soil Conservation Service and Cooperative Extension Service, the University system, the Montana Department of Agriculture, the DNRC Conservation Districts and Water Resources divisions, and the Department of Health and Environmental Sciences' Water Quality Bureau.

The DNRC would forward study results to the Water Policy Committee and also incorporate them into a State Water Plan element.

B. Committee Activities. The Water Policy Committee addressed technical, economic and legal implications of water use efficiency at its November 15-16, 1985 meeting. The committee heard presentations on water use efficiency from the DNRC, Montana State University, the Greenfield Irrigation District, the Western States Water Council and the Western Governors' Association. In addition, Bozeman Representative Dorothy Bradley represented Montana on the Water Efficiency Task Force that provided oversight for the Western Governors' Association report discussed above.

Discussions before the committee indicated that potential exists for improved water use efficiency, as exemplified by the ditch lining project undertaken by the Greenfield Irrigation District. Moreover, recent U.S. Supreme Court decisions (e.g., Colorado v. New Mexico (1985)) stress the responsibility of states to implement water conservation measures into state water policy. On the negative side, adopting specific water use efficiency measures was noted to be a difficult undertaking because of the complexity of water rights law, the impact on private water rights and the impact on other features of Montana's water policy (including the emphasis on "putting water to work"). In addition, changes to more efficient water uses are often not economically attractive to the holder of the water right. Thus, incentives may be needed to encourage improved water use efficiency.

The committee addressed briefly several specific efficiency alternatives. Of particular interest were the retention of salvaged water rights by the person who conserves water and the establishment of freely transferrable water rights. These options pose policy

considerations requiring detailed evaluation by the committee, the DNRC and the public.

C. Committee Recommendations.

1. The committee requests that, if the DNRC water use efficiency study is funded, the DNRC present results of its study to the committee by the summer or early fall of 1988. The committee recognizes that water use efficiency is a water management issue of regional and local importance and that continued study of water use efficiency in Montana would be timely. The study should include consideration of economics, especially the valuation of instream flow rights, in examining water use efficiency alternatives. An early reporting is requested because the committee desires to review the DNRC study carefully before making recommendations to the 1989 Legislature.

2. The DNRC should solicit public input or participation as a major component of its irrigation efficiency study. Because irrigation efficiency could significantly affect the agricultural community, the committee recommends that DNRC staff and the ad hoc technical advisory committee solicit public input throughout the study. This recommendation is contingent on actual funding of the study under the water development program.

3. Water use efficiency should be considered an integral element of the state water plan and should be given priority. The DNRC study should assist in developing a water use efficiency element to the state water plan. Making water use efficiency a priority is justified because of the role conservation can play in adjusting to water shortages.

II. Drought Management

A. Background. The record drought conditions in 1985, along with the droughts in previous years, created severe economic difficulties for Montana citizens. These droughts helped focus public attention on government role in alleviating the effects of drought. While the ability of government to mitigate drought effects is often very limited, some states have developed comprehensive strategies to improve their assistance efforts.

Montana state government's drought response in 1985 was heavily criticized, largely because efforts were undertaken only as that drought became severe. A draft drought plan that had received little attention since 1977 was brought out in mid-summer to guide the Disaster Advisory Council in recommending agency assessment and mitigation measures. Perhaps as a result of this late start, council meetings tended to focus on assessing drought conditions. While some state efforts were helpful, many citizens felt that a more organized response for both short-term and long-term droughts could maximize state assistance. This response would

require advance analysis of available state resources and the manner in which they are made available to local governments and the public.

1. The Disaster Advisory Council

The Disaster Advisory Council guides state executive agencies in drought mitigation efforts. Chaired by Lieutenant Governor George Turman, it is composed primarily of state agency directors. During the summer of 1985 the council met several times to discuss drought conditions. However, some citizens questioned its effectiveness because it did not include representatives of local government or the public.

The concerns about public participation prompted the council in May 1986 to consider creating a special Drought Task Force. The task force, as proposed by the Department of Military Affairs Disaster and Emergency Affairs Division, would consist of representatives of state and local government and the private sector. It would assess drought conditions and recommend drought response measures to the Disaster Advisory Council. While the concept received favorable comments at the May meeting, the council has not met subsequently to consider implementing the task force.

2. The Drought Plan

An updated (September 1985) drought plan is now available from the Department of Military Affairs. A particularly valuable part of the updated plan is a detailed index of agency contacts for various drought-related problems. The plan also provides general guidance concerning state government responsibilities and the role of the Disaster Advisory Council during drought conditions.

In May 1986, the DNRC and the Department of Military Affairs submitted a joint proposal for water development program funding to study Montana's drought response/mitigation strategy. If they receive funding, the agencies will develop a phased government drought response plan keyed to variations in the Palmer Drought Index; and they will examine Montana's statutes for possible changes needed to address drought conditions.

B. Committee Activities. The 1985 drought resulted in considerable interest in the state's drought response system. A panel of interest group representatives testified before the water policy committee in November 1985 that, while state government did provide some drought assistance, more effective assistance could be offered if local government and private sector involvement were solicited and stronger state leadership provided.

Also advocated were stronger public information efforts on how to conserve water and an early drought-warning system. In regard to the Montana drought plan, some panel members indicated that an effective drought plan must detail a phased response system and describe how

governmental responses will be coordinated. They also encouraged the examination of drought planning in other states.

In April 1986, the water policy committee recommended: (1) the addition of local government and private sector representatives to the Disaster Advisory Council (referred to in 1985 as the Drought Task Force); (2) written notice to local governments of council meetings; and (3) an emphasis on drought response, rather than drought assessment, at council meetings.

C. Committee Recommendations.

1. The committee recommends that the Department of Military Affairs, as the lead agency, coordinate and work with other agencies to determine the best way to use advisory groups in developing a drought mitigation response. Several agencies, including the Department of Military Affairs, the DNRC, and the Department of Health and Environmental Sciences, have important roles in mitigating drought. These agencies should work together to develop a detailed drought mitigation plan that actively seeks public input and maximizes the assistance of governments.

2. The Disaster Advisory Council and the Drought Task Force (if established) should meet at least once before May of each year to assess the potential for drought along with possible responses. Experience from the previous droughts indicates that the state has been slow to develop drought-mitigation efforts in drought years. Early meetings could help ensure that state resources are available for immediate assistance if drought conditions develop.

CHAPTER TWO: WATER MANAGEMENT

Effective water management can significantly reduce long-term costs to both the private and public sectors. This chapter describes areas where water management efforts could be most beneficial.

The state water plan is the initial subject because an effective state water plan can guide all water management decisions. States such as Kansas have used the state planning process as a principal water management tool to guide administrative actions and to make recommendations to the legislature. A key characteristic of these innovative processes is that legislative and public involvement is obtained early and throughout the planning process.

The other subjects -- water data management, ground water management, water development and water research -- all represent specific areas where coordination and/or comprehensive management efforts can improve the return from the application of limited state resources to Montana water resource problems.

I. The State Water Plan

A. Background. The state water planning statute (85-1-203, MCA) has been in effect since 1967. Other than having a requirement added that the plan be submitted to the Water Policy Committee, the statute has remained unchanged since 1974. The principal requirements are:

- A comprehensive, multiple-use water resources plan. This requirement implicitly contemplates both water quality and water supply topics.
- Formulation according to hydrologic divisions of the state. While referenced, this language does not prohibit other approaches.
- A program for water development and conservation. The DNRC is required to plan for water development and conservation.
- Public hearings on the plan. Public hearings must be held on elements of the plan prior to Board of Natural Resources and Conservation approval and adoption.
- Regulatory board approval. The board must approve elements of or amendments to the state water plan.
- Legislative involvement. The DNRC must submit to the Water Policy Committee and to each general session of the legislature the state water plan or amendments or additions to the state water plan.

DNRC planning efforts have focused primarily on large basin management plans. With federal support during the 1970s, management

plans were developed (though generally not adopted) for all of the basins in the state except the Kootenai. These large-scale plans, referred to as Level B plans, provide only general management guidance, however. While the DNRC has prepared some more specific Level C plans, a single comprehensive water plan directed at the management of specific water problems in Montana is lacking.

The status of state water planning in Montana is described in a DNRC report to the 1985 Legislature entitled Montana's Water Planning Program. The report describes Montana's planning efforts from 1973 to 1984, and provides a reference for future water planning efforts.

1. State Water Plans in the Missouri River Basin

All ten Missouri River Basin states undertake water planning to some degree. The more active states include North Dakota, Nebraska, Kansas and Iowa. North Dakota's planning process emphasizes water development with project priorities established by regional planning groups. Nebraska and Iowa, on the other hand, undertake major studies on issues selected by their legislatures. Kansas' approach is perhaps the most interesting. Its planning emphasizes public participation and input at both regional and state levels, and promotes analyses of feasible solutions for specific problems. Its plan is also dynamic, requiring continual review and updating, and has a policy issue component and a regional component.

Table 1 compares the water planning efforts of nine states according to Montana's statutory water planning requirements. One Missouri basin state -- Colorado -- is not described because state water planning is not a major component of its water management program.

The plans adopted by these states indicate diverse approaches. Some dominant themes, however, are the need for public participation in the planning process, the key role of water development in most western water plans, and legislative review of the state water plan.

2. The DNRC State Water Plan Proposal

The DNRC developed a water plan proposal in early 1986 that draws on the Kansas water planning process. The DNRC proposal recognized that state water planning should guide water management, and that the value of a state water plan is measured by the extent to which it is used in water management decisions. In particular, the proposal emphasized: (1) a dynamic planning process leading to a timely and problem-oriented plan; (2) involvement of a state water plan advisory council composed of state agency, legislative and public members; and (3) the active solicitation of public input through regional public hearings.

The approach involves two types of water plans: plans for hydrologic basins and plans for statewide water management issues. The topics covered range from water quality to water supply and would

Table 1

A COMPARISON OF STATE WATER PLANS OF THE MISSOURI BASIN STATES AND IDAHO

	Comprehensive Multiple Use Plan?	Hydrologic Divisions Used?	Water Development & Conservation Emphasized?	Public Hearing?	Board Approval Required?	Legislative Involvement?
Idaho	yes	not emphasized	no, but addressed	yes	yes	approval required
Iowa	yes	no	no, but addressed	yes	yes	approval required
Kansas	yes	yes, in part	no, but addressed	yes	yes	plan submission required
Minnesota	yes	no	no, but addressed	yes	yes	reviews plan
Missouri	no	no	no, but addressed	varies with study	yes	?
Montana	yes	yes, in part	yes	yes	yes	plan submission
Nebraska (but developing)	no	no	no, but addressed	yes	yes	designated study issues in 1978
North Dakota	yes	yes	a major component	yes	generally no	yes, for project funding
South Dakota	no	generally no	yes	yes	yes	yes, for large projects
Wyoming	no	generally no	yes	?	yes	yes, for project funding

eventually include planning for all of the state's basins. An advisory committee -- the state water plan advisory council -- has been established weigh the priority of the plan elements. The committee has ten members: four state agency representatives, four legislators and two public members. Besides DNRC staff, others who would be involved in the planning process include basin advisory committees; the Board of Natural Resources and Conservation, which has final approval authority over the plan; and the Water Policy Committee, which has statutory direction to oversee state water plan development.

Elements of the plan will be prepared according to the priorities assigned by the state water plan advisory council. The sections will be concise, generally not exceeding ten pages. The estimated timeline for addressing all of the plan elements is six years; however, this figure will vary according to available funding. In addition, because water management is dynamic (that is, new decisions must be made to address problems as they arise), the plan will be updated periodically.

B. Committee Activities. Discussions before the Water Policy Committee have indicated that a water plan which emphasizes the relationship between planning and decision-making could provide Montana with improved water management and long-term cost-savings. In addition, the plan could help direct agency resources to areas or problems that are determined most important to Montanans.

Discussions also indicated that public input is essential in creating a plan that maximizes effective agency response to water management problems. This aspect was emphasized by Joe Harkins, director of the Kansas Water Office, in his presentation to the committee concerning Kansas' water planning process. Kansas' approach stresses citizen input at three levels: the selection of water planning priorities, participation in plan creation while it is being developed, and review of plan elements upon completion (legislative review is part of this latter process). Additionally, public input is obtained from both regional advisory committees and a state advisory committee.

The committee also heard about the advantages of state water planning. In addition to providing guidance for water management decisions, a detailed plan would provide protection if an equitable apportionment suit involving Montana was heard before the U.S. Supreme Court. The court in Colorado v. New Mexico (1985) stated that planning could help justify a state's claim to water sought by other states. A plan could also help resolve in-state water issues. For instance, an effective planning process in Montana might address the public trust doctrine and its effect on the use of water by recreationists, hydropower users, present consumptive water users and future appropriators. Finally, a state water plan can help guide a state's water development program and ensure optimal use of state dollars.

Committee members stressed that public involvement is essential to an effective planning process. In particular, public involvement should

begin at the front end of the planning process and continue as each plan element is adopted.

The committee also addressed concerns about the public trust doctrine. In testifying before the committee, Lorents Grosfield, a Big Timber rancher and frequent participant in water policy discussions throughout the biennium, stressed that the public trust doctrine could be applied in a manner that adversely affects agricultural water right holders. He encouraged the committee and the legislature to consider specifying limits on how the public trust doctrine can be applied to water rights in Montana. Committee members acknowledged the concerns but expressed reservations about recommending legislation for the upcoming session because of the complexity of the issue.

C. Committee Recommendations.

1. Public input is an important part of the state water planning process, and should be solicited early and throughout the development of each plan element. The committee recommends that public participation be obtained at each stage in the development of a plan element. Possible stages include setting priorities for plan elements, the outlining of a draft for each plan element, reviewing and commenting on drafts of each element, and creating the final draft.

2. The committee offers its assistance and requests coordination with the State Water Plan Advisory Council in the state water planning process. In particular, the committee requests that the State Water Plan Advisory Council submit its priority list of water management topics for plan development as soon as it is prepared. Also, the Water Policy Committee requests an early meeting with the advisory council to discuss state water planning budget needs, and that committee staff investigate possible grant sources to facilitate public input, committee participation and the planning process generally.

3. The committee directs staff to make appropriate requests for grant money to assist the Water Policy Committee and the State Water Plan Advisory Council in providing public hearings concerning the state water planning process. This recommendation encourages active Water Policy Committee participation in ensuring public participation in the state water planning process. The recommendation also acknowledges the costs of conducting such hearings, and the need for grant money to pay these costs.

4. The committee requests that the State Water Plan Advisory Council include members of the Water Policy Committee. An overlap of members will help ensure coordination between the two committees.

5. The committee requests that the State Water Plan Advisory Council develop a budget and a recommended funding source for submission to the committee and the 1987 Legislature. Because the 1987 Legislature is facing severe financial limitations, any funding request must be carefully considered and developed. A thorough discussion of funding

needs between DNRC staff and advisory council members would help verify the minimum funding necessary to achieve positive public input and effective plan elements.

6. The committee recommends that the State Water Plan Advisory Council consider the public trust doctrine in its state water planning efforts. Following the presentation by Lorents Grosfield, the committee acknowledged that the public trust doctrine may pose policy and legal questions that could significantly and adversely affect holders of Montana water rights, especially irrigation water rights. The discussions further indicated that the legislature could help clarify the public trust doctrine as applied to Montana with an eye toward protecting established agricultural water uses. To assist in this undertaking, the state water plan advisory council could, as part of its early planning efforts, develop alternatives for clarifying the doctrine in Montana. In addition, it has been suggested that an assessment by the council of the protection already given public trust considerations in the existing statutes might be helpful.

II. Water Data Management

A. Background. Virtually everyone involved in water policy suggests that accurate water data are critical to effective state policymaking. While a lack of water data generally is a problem, perhaps an easier problem to solve is the lack of a coordinated and centralized system for obtaining existing data.

The enactment of House Bill 680 in 1985 added legal support to recommendations contained in DNRC's A Water Protection Strategy for Montana (the Trelease report). It directed the DNRC, in conjunction with other state agencies and universities, to:

"establish and maintain a centralized and efficient water resources data management system sufficient to make available and readily accessible, in a usable format, to state agencies and other interested persons, information on the state's water resources, out-of-state water resources that affect the state, existing and potential uses, and existing and potential demand."

This authority is overlapped by broad natural resource data management responsibility granted by the legislature to the Natural Resource Information System (NRIS). The NRIS, attached to the State Library, is designed to be a "comprehensive program for the acquisition, storage, and retrieval of existing data relating to the natural resources of Montana."

Based on initial surveys and recommendations of an advisory committee, the NRIS in early 1986 preliminarily ranked the organization of water resource data according as most important to state, local and

private sector decisionmaking. This priority was substantiated by a user needs assessment conducted in April 1986, in which water was by far the most critical data need category.

Because of the overlapping statutory authority and interest in water data, the NRIS and DNRC established a water data advisory committee composed of state and federal agency representatives to examine alternatives for meeting the House Bill 680 mandate. The committee developed a project proposal for water development program funding that would:

- determine the data storage and retrieval needs of Montana water data users;
- design a water resources data management system to meet user needs for water data storage and retrieval, and allow quick and efficient access to existing sources of information for any particular geographic area within the state;
- design and promote a quality control system to ensure the validity of water resources data; and
- establish a central contact capable of accessing all data and assisting users.

In short, this water data management system proposal, which is under the formal sponsorship of the NRIS, is designed to develop central access to data sources scattered across Montana. The project, if funded, will begin by inventorying existing information sources in the state. In addition, key users of water resources data will be interviewed to determine specific data needs and existing impediments to retrieval of data. Then, from surveys of other state data management systems, a data management system will be designed to address Montana's specific needs. Eventually this system will provide centralized access to the decentralized data bases in Montana.

B. Committee Activities. Water data management was addressed by several presenters at the November 1985 water policy committee meeting. In addition to presentations concerning water data difficulties experienced during the Clark Fork River study and by the DNRC water management bureau, other presenters summarized five principal problem areas: insufficient communication among agencies concerning their data systems, a lack of data generally, limited access to data, varying data dependability, and incompatible data.

Committee members expressed concern about the lack of organized data and the lack of quality control in data gathering. This concern resulted in a committee recommendation to the DNRC that the NRIS proposal receive water development program funding.

C. Committee Recommendations.

1. The NRIS should continue to work affirmatively to develop a water resources data management system while coordinating its efforts

with the DNRC and other state agencies and institutions. Because the DNRC still has statutory responsibility for water resources data management and because other state agencies and institutions have strong water resources data interests, the NRIS program should carefully coordinate its efforts to ensure that these agencies and institutions have an inexpensive and effective data management system.

2. The NRIS should encourage a water data quality control system to ensure that data collected in the future are reliable. Because of limited funding, efficient and reliable water data collection is critical. A state-designed quality control system for data collection would help accomplish this purpose in the future.

3. State, federal, local and private entities should meet periodically to discuss water data problems and possible solutions. As pointed out in discussions before the committee, lack of communication is one reason for ineffective use of water data. Meetings and conferences, such as the Water Data Users Conference on October 2, 1986, help promote communication and data sharing.

4. The NRIS water data management proposal should be used to develop the water data management element of the state water plan. The NRIS proposal would help design an access system for water resource data located throughout Montana. The project results could, therefore, provide a model for a state water plan element addressing future water data management objectives.

5. The committee endorses the efforts of the Natural Resource Information System and Ground Water Information Center and recommends funding to ensure their purposes are achieved. These programs currently rely on funding for special projects submitted for RIT or water development funding. The committee recognizes the need to fund these programs generally and encourages continued adequate funding of these programs.

III. Ground Water Management

A. Background. Ground water management was the subject of a major Governor's Ground Water Advisory Council study during the 1983-85 interim. That report -- Issues in Ground Water Management -- summarized findings on a variety of ground water topics, ranging from ground water data to integrated ground water management to ground water quality.

A significant part of the study was a review of the role of the Board of Water Well Contractors in overseeing water well drilling in Montana. The council expressed three concerns about existing water well drilling regulation. First, it noted that the distinction between water well drillers and water well contractors was confusing and that licenses for both drillers and contractors should be required. Second, it said the board suffered from inadequate professional staff and poor field

office facilities. Finally, the information submitted concerning water wells was often of poor quality.

As a result of these findings, House Bill 739 was submitted to and adopted by the 1985 Legislature. Central to the bill were the transfer of the Board of Water Well Contractors from the Department of Commerce to the DNRC and a requirement that water well construction standards be adopted. These changes required substantial support from the DNRC and new rules addressing water well construction. The changes are, however, fundamental to the board's goal of protecting ground water and, as a result, public health.

Since the shift of the board to DNRC, field activity has increased and more violations have been detected. The DNRC has expressed concern about increased enforcement costs.

B. Committee Activities. The Water Policy Committee addressed ground water management at its November 1985 meeting. In addition to examining the recommendations of the Governor's Ground Water Advisory Council, the committee solicited comments from a panel of experts on Montana's ground water resources. An absence of adequate ground water data was identified as the most significant problem, particularly in areas where ground water problems are occurring. In addition, the panel recommended more public education on the value of Montana's ground water, better agency coordination concerning ground water management efforts, and expanded study on comprehensive ground water management.

The committee also looked at water well drilling legislation. Commenting on the ongoing rules preparation by the Board of Water Well Contractors, the committee emphasized the need for a coordinated effort by the Board and the Department of Health and Environmental Sciences to ensure coherence in approach and a minimum of regulatory overlap.

This concern was addressed by the Board of Water Well Contractors with the adoption of the following rule:

Public, Community, Non-Community Public, and Multi-Family Water Supply Wells. (1) All wells for public community, non-community public and multi-family water supply system use are governed by those construction standards set forth in the department of health and environmental sciences rules (Title 16, chapters 16 and 20, Administrative Rules of Montana). Copies of the rules may be obtained by contacting that department.

(2) These minimum construction standards shall apply to all wells in Montana. However, for the above-stated wells, the department of health and environmental sciences may adopt more specific or stringent standards.

C. Committee Recommendations.

1. The Ground Water Information Center and the NRIS should work together to ensure that ground water data are inventoried and easily accessible. The committee recognizes the efforts of these two entities to organize water resource data, and encourages them to ensure that available ground water data are accessible to possible users at low cost.

2. Ground water management should be studied by the Water Policy Committee during the next interim. Several topics might be studied by the committee, including interagency coordination of ground water research and data collection, the effectiveness of controlled ground water areas in addressing ground water problems, the conjunctive use of ground water and surface water, and ground water quantity/quality management. The study could focus on developing a comprehensive state approach to the management of ground water.

3. The Board of Natural Resources and Conservation should consider increasing the fees on notices of completions for wells to enable the board of water well contractors and DNRC support staff to achieve water well program objectives. DNRC staff have projected additional budget needs of approximately \$30,000 for the 1987-89 biennium. These costs are primarily because of increased enforcement associated with regulations recently adopted by the board of water well contractors. Based on a 10-year average of approximately 3,400 wells drilled annually, a fee increase on a notice of completion from the current \$10 level would result in additional biennial revenues of approximately:

Increase to \$15 -- \$17,000
Increase to \$20 -- \$34,000
Increase to \$25 -- \$51,000

The average cost of drilling a well, while highly variable depending on depth of well, geology, etc., is about \$1,500 - \$2000.

IV. Water Development

A. Background. Readily available water is critical to a productive Montana economy. Developments that use or store Montana water are therefore very important to future economic growth in our state. Moreover, water developments are an effective method of establishing legal claims to water and thereby providing a defense against out-of-state claims. This defense results from actual water use, as well as by demonstrating progress in perfecting water rights under the reservation program.

1. Montana's Water Development Program

The Montana water development program is described in Title 85, Chapter 1, Part 6, MCA. The program represents the authority under which most of Montana's water development projects are evaluated.

Money from the water development special revenue account pays for operation and maintenance of state-owned water projects, for DNRC Engineering Bureau and Montana Water Courts operations, and for grants and loans to private and public projects. The latter, which represents the water development program, has actively promoted water development in Montana. In addition to technical assistance, the program offers grants and loans to state agencies, local governments and private parties. The degree to which this program is maximizing or is capable of maximizing its response to the needs of Montanans and to statutory directives, however, is not determined.

Project selection is one area that received attention from the 1985 Legislature. House Bill 947 required the DNRC to recognize the important role of agriculture in the state's economy by giving particular attention to the needs of agriculture in its water development programs. Previously, the DNRC had provided funds for a substantial number of municipal water and sewer projects. In addition, the DNRC and the Legislature are directed to give preferential consideration to proposals to the 1987 Legislature that promote the water reservation program, the development of the state water plan, and other state water programs recommended by the Water Policy Committee.

2. State-Owned Water Projects

Montana has 34 active state-owned water projects and 11 inactive or inoperative water projects. The projects were financed by sales of bonds to federal agencies, state funds, private loans and federal flood disaster funds. Private water users associations are paid by the state to operate the projects. Financial returns on the projects come from four sources: water purchase contracts, repayment contracts, outright sales and revenues from land leases and rentals. These revenues are returned to the water development special revenue account.

3. The Federal Water Development Program

Federal projects are also important to water developments in Montana. Under the Pick-Sloan program, development of the Missouri River Basin is encouraged "as speedily as may be consistent with budgetary requirements." Water developments in the Missouri Basin are further promoted beneficial consumptive uses receive priority over navigational uses. HB 680 recognized federal funding potential by requiring DNRC to rank the projects it seeks for congressional authorization and funding, to identify the efforts it will undertake to secure such funding, and to submit a report to the legislature and to the Water Policy Committee.

For the first time in ten years, federal legislation was enacted authorizing new water projects. The list of projects was, however, strongly oriented toward rehabilitation or refinement of existing projects rather than the construction of new projects. Moreover, no new storage projects were authorized for Montana. Perhaps the most

significant project funded for Montana involved recreational development at Fort Peck Reservoir.

B. Committee Activities. Both the water development program and state-owned projects were discussed before the Water Policy Committee. A report by the Legislative Fiscal Analyst (LFA) indicated that the state is not recovering its investment in its water projects. However, DNRC studies indicate that economic benefits to the users of these projects generally appear to exceed their costs. The LFA report additionally pointed to possible contradictions in the water resources laws concerning the recovery of operation, maintenance and repair expenditures made by the state (compare Title 85, chapter 1, part 2 with Title 85, chapter 1, part 6). In policy terms, the issue is whether the state should subsidize water users who are obtaining water from the projects. The Legislative Finance Committee and the DNRC are both addressing this question.

C. Committee Recommendations.

1. The Legislature should adopt a preference for agricultural projects submitted for water development program funding for the biennium ending June 30, 1989. Because agriculture is essential to Montana's economic well-being, it deserves priority for water development program funding. While a preference does not preclude funding for non-agricultural projects, it does suggest that viable agricultural water projects should receive strong consideration by the DNRC and the legislature.

2. Water development program funding should be used solely for water projects and programs. Even though fiscal shortages exist, it is essential to promote water development in Montana. The water development program was funded by coal severance tax proceeds to help ensure a productive future for Montanans, and continued use of these funds for water development will help achieve this goal. Thus, these proceeds should not be used to support local government infrastructure or other non-water related programs where such use could adversely affect the water development program.

3. The committee endorses the statutory inclusion of an ability-to-pay criterion in establishing what water users should pay toward the cost of water projects funded by the water development program. The Legislative Fiscal Analyst study of state-owned water projects indicated that local water users often do not pay the full costs of construction projects funded under the water development program. Because of public benefits associated with these projects, however, it may be inequitable to require full reimbursement from water users. The amendment offered by the Legislative Fiscal Analyst would provide a clear statutory basis for existing DNRC practices which do not require full reimbursement and instead rely on an ability-to-pay criterion similar to that employed by the federal government.

V. Water Research

A. Background. Water research and water resource research centers were discussed at the committee's January 1986 meeting. Committee members heard from representatives of the Montana Water Resources Center, the Montana Groundwater Information Center, the Wyoming Water Research Center and the Utah Water Research Center. The presentations raised questions concerning the adequacy of funding for water research in Montana, how research needs are ascertained, and the organization and coordination of entities involved in water research in Montana.

Montana's Water Resources Research Center was created by the Board of Regents in 1964 to manage the program initiated by the federal Water Resources Research Act. The regents established an administrative center at Montana State University, but mandated the cooperation with the University of Montana and the Montana College of Mineral Science and Technology to form a joint center. The charter for the Water Center was renewed by the Board of Regents in September 1985. Staffing of the Water Center is as follows:

Director, MSU	0.4 FTE
Associate Director, U of M	0.1 FTE
Associate Director, Montana Tech	0.1 FTE
Secretary	0.5 FTE
Total	1.1 FTE

Montana's Water Center is one of 54 such institutes throughout the United States and its territories. These centers operate as federal-state partners in research, education and information dissemination. The federal part of the program is now administered by the U.S. Geological Survey (USGS) under the Water Resource Research Act of 1984. During the current fiscal year, \$6.2 million is being granted by the USGS to these institutes.

Yet, not all water centers are the same. Some centers have multi-million dollar budgets augmented by state funds, grants and contract fees. They frequently have their own staff and faculty, and they often specialize in areas bringing them national recognition. Other centers are decentralized and simply regrant the basic federal funds to faculty in various academic departments. In many instances, the only state funds involved are those necessary to meet the non-federal match requirements. While it has provided valuable services to the state over the last two decades, the Montana Water Center falls into the latter category.

Since 1964, the Water Center has received approximately \$115,000 per year of federal funds through the Department of Interior. Until 1984, the state was required to match one non-federal dollar for each two dollars of federal funds received. The Water Resources Research Act of 1984 escalated this matching requirement to 1:1 in fiscal years 1985 and

1986, 1:1-1/2 in fiscal year 1987, and 2:1 in fiscal year 1988 and beyond.

Direct state funding to the Montana Water Center is \$15,000 per year. This amount, supplemented with legacy program funds passed through the center, has allowed the center to meet the 1:1 match requirement. If this funding level is continued, it is unlikely that the eventual 2:1 match can be met for the total amount of federal funds available to the Center.

B. Committee Activities. The Water Policy Committee listened to presentations from directors of the Utah and Wyoming water research programs at its January 1986 meeting. Both programs were much larger than Montana's and, while different from each other in several respects, both provided coordinated and centralized research for their respective states. As a result of these presentations and general discussion, committee members expressed interest in the possibility of establishing a single coordinated water research program for Montana.

Following the January meeting, committee staff worked with representatives from the governor's office, the DNRC, the Department of Health and Environmental Sciences, and the Montana Water Resources Center to develop recommendations concerning improved and expanded water research and education programs in the state. This working group reached the following conclusions:

- Montana's water research efforts are too limited and too fragmented given the importance of water to Montana's environment, economy and culture -- now and in the future.
- In general, water research and policy issues are receiving increased attention by government agencies, foundations and the private sector.
- In particular, Montana may be well situated to excel in research and educational programs in the areas of the water-related effects of hazardous wastes and mineral development, river basin and interjurisdictional water management, water use efficiency, and interdisciplinary water resource management.
- A "center of excellence" in these and other fields might result in timely contributions to the solution of Montana's water problems; could attract high quality faculty, students, and private sector firms interested in these areas of expertise; and might provide a modest though important contribution to the state's economy.
- The Montana Water Resources Center is the logical organization to coordinate and promote water research and educational programs in the state.

- The Montana Water Resources Center lacks sufficient resources to develop a strategy to take advantage of the market opportunities or to attract additional funds, from the private sector and otherwise, to the center.

The working group discussions resulted in a recommendation that an objective study, under the sponsorship of the Environmental Quality Council, be proposed for Resource Indemnity Trust program funding to look at the feasibility of developing a center of excellence for water research and education in Montana. The \$62,500 proposal will be ranked by the DNRC and submitted for consideration by the 1987 Legislature.

C. Committee Recommendations.

1. Current level funding (\$15,000 per year) for the Montana Water Resources Center should be continued. Without this funding, a diminution of services over time because of increased federal matching requirements could result.

2. The EQC Resource Indemnity Trust proposal for an independent feasibility and marketing study should be funded. This proposal is the one recommended by the working group, as discussed above. It would fund an outside contractor to conduct a detailed study to determine opportunities for a stronger and more effective research program for Montana.

CHAPTER THREE: INTERSTATE AND INTERGOVERNMENTAL WATER ISSUES

As a headwaters state, Montana is a source of water for two major basins: the Missouri and the Columbia. While it has a "first chance" at these waters, this advantage does not carry over to legal water rights or apportionment theories. As a result, Montana must attempt to ensure its present and future water needs by working with state and federal entities.

The subjects in this section represent two areas that are occasionally controversial. In the Missouri Basin, the concerns of the upstream and downstream states at one point spurred litigation and more recently led to efforts by the basin governors to negotiate a temporary solution to basin water allocation questions. As to hydropower, issues often revolve around the relative rights of water uses and efforts to subordinate one use to another, thereby affecting significantly upstream and downstream water interests. Both areas involve a complex set of policy issues and actors that will require continuous monitoring and dialogue to avoid major conflicts.

I. Missouri Basin Water Issues

A. Background. Tensions have increased for the Missouri River Basin states over the last four years, but there are hopeful signs that these tensions can be reduced. Starting in 1982, South Dakota's attempted sale of 50,000 acre-feet of water from Oahe reservoir was frustrated by suits filed by Iowa, Missouri and Nebraska (as well as by private groups). In the summer of 1985 and again in fall 1986, South Dakota retaliated by filing an original action in the U.S. Supreme Court against these three states and asking the court to quiet the title to the waters of the Oahe reservoir. South Dakota's first suit was not accepted by the Supreme Court, and the second petition is still pending.

In an effort to reduce tensions in the basin, Governor Carlin of Kansas asked the nine other basin governors to appoint personal representatives to meet to negotiate settlement of outstanding problems in the basin. Discussions among these states commenced in March 1986 and have continued on a monthly basis. It is possible that the negotiators will recommend that their governors endorse a non-binding "Statement of Principles" by early 1987.

B. Committee Activities. At all of its meetings, the Water Policy Committee received reports on the status of litigation concerning the Missouri River. At its July 1986 meeting, the committee examined options for resolving Missouri River Basin water allocation disputes and heard an update on the status of the negotiations. Committee members expressed some concern that legislators be briefed on the substance of the

negotiations, particularly if the resulting agreement on principles leads to recommendations for legislation.

Responding to recommendations made by the Select Committee on Water Marketing, the Water Policy Committee also worked actively with the National Conference of State Legislatures (NCSL) to encourage better communication among the legislators of the basin states. Immediately following its July 1986 meeting, the committee hosted an NCSL meeting of basin legislators in Billings to discuss interstate water issues. A similar meeting will be held in Omaha in 1987.

C. Committee Recommendations.

1. In the event the executive-branch negotiators conclude an agreement by the end of the year that requests legislative endorsement, the Water Policy Committee would meet early in the session. At this time, it is uncertain whether an agreement on principles will be reached or whether legislative endorsement will be requested. If an agreement is achieved, the committee may wish to convene to make a detailed review of its terms and conditions.

2. If an agreement is reached that calls for continued discussions on selected issues, the legislature should support such discussions. Indications of support could be a formal resolution or designation of necessary funding to enable the governor's office and DNRC to participate in the discussions. The committee also recommends a regular, informal consultation process between Montana's negotiators and selected committee members. However, the committee recognizes that some information known by the negotiators must be kept confidential to ensure the integrity of the negotiations.

3. Continued efforts to improve communications among the legislators and citizens of the basin states should be undertaken. These efforts might include:

- a) additional legislative meetings such as the Billings seminar sponsored by NCSL;
- b) inviting state officials and citizens from other basin states to address the committee on water issues in those states; and
- c) an interstate water conference exploring model water management programs in other states.

II. Hydropower Issues

A. Background. Hydroelectric power is a clean and inexpensive source of energy that is essential for the energy needs of the Pacific Northwest. Montana's hydroelectric production includes 15 utility-operated hydro plants and seven federal projects, with a total generating capacity of about 2,100 megawatts. These projects are

supplemented by smaller developments along streams and irrigation ditches.

From a water rights perspective, the major concern with hydropower is the water it requires and the effect this requirement has on other water users. Of particular concern is the effect of large water demands from downstream hydro projects on upstream development. To address this concern, Montana has requested stipulations on Federal Energy Regulatory Commission (FERC) licenses so that proposed hydro projects, and certain hydro projects that are submitted for amendment or relicensing, are subordinated to future upstream uses. States are also urging amendments to the Federal Power Act to clarify that FERC decisionmaking in regard to water rights is subject to state law.

In Montana, the concerns vary regionally. In the Missouri basin, the major concern is whether hydro rights could tie up water and prevent potential agricultural consumptive use. A pending case -- Montana Power Company et al. v. Don L. Brown et al., No. 50612 (D. Mont. 1986) -- involves claims by Montana Power Company and the U.S. Bureau of Reclamation that additional water permits for agricultural development upstream from Canyon Ferry reservoir should not be issued because available water is fully appropriated, and the issuance of permits would infringe on water appropriated for hydropower. The resolution of this case will help clarify the relationship of federal hydropower rights to other water rights.

The Clark Fork Basin is a more complex region. Along with agriculture and hydropower, there exist environmental, recreational and homeowner interests. Water and fisheries are important recreational attractions that are affected by fluctuating water levels associated with hydropower generation. In addition, changing lake levels along Flathead Lake have resulted in concerns from homeowners along the lake. Varying water levels also affect water quality, a principal concern with the Clark Fork River. These interests are made even more complex because of the variety of agencies and utilities that have hydropower facilities in the basin.

The multiple interests in the region's water resources have resulted in some efforts to study the resources and to develop a coordinated water management approach. Two state-created advisory entities are active in the region. The legislature created the Flathead Basin Commission in 1983 to help preserve the existing high quality of Flathead lake and its tributaries as well as to promote economic development in the basin. The Clark Fork Basin project was created by the Governor's office in 1984 to coordinate studies conducted on that river and to establish an overall management plan. On the federal level, the Northwest Power Planning Council is working with affected tribes, federal agencies and state representatives to plan for energy needs in the Pacific Northwest region and to temper the impacts of hydropower operations on fish and wildlife.

B. Committee activities. The committee addressed hydropower issues on October 6, 1986. A panel composed of representatives from the DNRC, Northwest Power Planning Council, Department of Fish, Wildlife and Parks, Washington Water Power, Montana Power Company, Governor's office, and U.S. Bureau of Reclamation addressed a variety of hydro issues in the Clark Fork basin. The importance of hydropower to the Pacific Northwest region was stressed, as was the need to address wildlife and water quality concerns. Also addressed were concerns about the state's adjudication and reservation systems, and the efforts to coordinate water management in the Clark Fork region.

C. Committee recommendation.

1. Because of the complexity of hydro and other interests in the Clark Fork and Flathead basins, efforts should be undertaken to develop a comprehensive water management policy for the region. The Governor's office, through the Flathead Basin Commission and Clark Fork Project, is coordinating some water management efforts in the region that emphasize water quality. This undertaking could be expanded, by these entities and/or other water management entities, to include the development of a comprehensive water management policy addressing both water quality and quantity issues for the region. The effort could include private, state, local government, federal and tribal participation. The policy could then be incorporated into the state water plan.

CHAPTER FOUR: DETERMINING PRESENT AND FUTURE WATER USE IN MONTANA

Present and future water uses in Montana are heavily dependent on the successful completion of the adjudication of pre-1973 water rights, the quantification of Indian and federal reserved rights, and the completion of water reservations on the major waterways of the state. Each of these statewide programs are highly interdependent, and delay or disruption in one can have adverse implications for the others.

Unfortunately, turmoil and litigation concerning the operation of the general stream adjudication have almost brought that process to a halt and severely strained the working relationship between the Water Court and the DNRC. Also, limited financial resources require a careful targeting of efforts in the state's most critical water management areas.

The committee's recommendations in the following three program areas are designed to improve the programs' individual workings as well as their contribution to the success of the other programs. The recommendations are also made to help coordinate the emphasis of all three programs on the critical water management areas of the state.

I. Water Rights Adjudication

A. Background. Western states undertake general stream adjudications for several reasons. For effective state water management, states need to determine existing rights before future needs can be assessed and new permits issued. A complete adjudication can also prevent a multiplicity of individual suits brought because existing rights have not been determined, or determined in a piecemeal fashion. Finally, the adjudication process is a crucial element in defending existing water uses from claims that might be brought by other states to the same water.

Stream adjudication processes vary considerably in design. In Wyoming, for example, the state engineer directs a program to adjudicate water rights. Colorado, on the other hand, relies almost entirely on a judicial process that has existed for over 100 years. The district courts have jurisdiction over the process, and act through the water judge of each division.

Montana's process involves an adjudication of existing water rights prior to July 1, 1973, by the Montana water courts. Montana is divided into four water divisions to facilitate the adjudication process: the Yellowstone River Basin, the lower Missouri River Basin, the upper Missouri River Basin, and the Clark Fork River Basin. Each water division is presided over by a water judge, who has the assistance of a water master. The DNRC also assists the courts by providing water rights information and conducting field investigations to verify claims. The

chief water judge is responsible for coordinating the relationship with the DNRC.

Questions concerning the structure and operation of Montana's water adjudication process generated litigation brought in mid-1985 by the Department of Fish, Wildlife and Parks and joined in by numerous other parties. Many of the contested issues were resolved by agreement among the litigants in February 1986. The major terms of the agreement are as follows:

1. Late claims. Until heard by the Supreme Court, the Water Court will continue to process late claims. The Water Court will reopen the objection period in those basins where late claims were not identified in the temporary preliminary or preliminary decrees.
2. Storage and instream fish and wildlife claims. Fish and wildlife claims will be decreed as claimed, subject to the normal verification and objection procedure. The Water Court will decide issues concerning the existence, scope and quantification of stored water for fish, wildlife, and livestock purposes. Rather than continue to use a presumption of non-consumptive use for mining and power generation claims, the Water Court will quantify the consumptive and non-consumptive portions of these rights.

Water judges from the basin involved, and not water masters, will hear and decide storage and instream fish and wildlife claims.

3. Verification of claims. The Water Court, after consultation with the DNRC, will determine the schedule for verification and will specify the elements to be verified. DNRC's verification will be limited to factual analysis and the identification of issues. The Water Court will not participate in the verification process unless the DNRC exceeds its authority. Field investigations will be conducted where the DNRC or the Water Court believe the claimed right is erroneous, exaggerated, or nonexistent. Field verifications will be preceded by notice to the court and the claimant with opportunity for the claimant to attend. Verification information conflicting with the claimed rights and changes made by the court will be included in the temporary and preliminary decrees, and the claimant will be warned that his right may be modified. For good cause shown, the Water Court will order additional verification under this new procedure in basins where decrees have been issued.
4. Priority and full definition of claims. The stipulation specifies a detailed notice that will be sent in the future with temporary and preliminary decrees. This notice provides information helpful in understanding the priority of rights.

5. Procedure for judicial review of a claim when no objection is filed. The authority of the Water Court to hold hearings on factual or legal issues, on its own motion, is clarified.
6. Disqualification procedure. The agreement provides for a disqualification procedure for water judges and masters. Motions for disqualification will be heard by a judge other than the one challenged.
7. Consistent processing of claims. Temporary, preliminary and final decrees will describe how the claimed right, or the previous decree, was modified.
8. General. The issuance of temporary or preliminary decrees is stayed pending implementation of the procedural portions of the stipulation. The Water Court can otherwise proceed with the adjudication process. If additional verification is allowed in an already-decreed basin, additional hearings or new hearings must be held. The parties agreed to support additional funding requests for the DNRC or the Water Court made necessary by the settlement.

Two major unresolved issues were submitted to the Montana Supreme Court for consideration: a) the constitutionality of including late claims in the adjudication process and b) the constitutionality of quantifying pre-1973 water rights on the basis of volume.

In April 1986 the court rendered a decision (McDonald v. State of Montana) upholding the constitutionality of the statutory requirement that water rights be quantified by volume, although the decision left questions concerning the finality of the adjudications. By providing that the ultimate test for a water right is beneficial use, the court may be subjecting adjudicated volume and flow measurements to modification upon later showings that additional water is needed to serve the original beneficial use. Some observers speculate that the decision may so change the character of the adjudication process that it is no longer adequate under federal law to quantify federal and Indian reserved rights.

The water adjudication process continues to be controversial, and portions of the earlier settlement have fallen apart. The Water Court and the DNRC are now joined in litigation before the Montana Supreme Court concerning the authority of the department to subject its rules concerning the verification process to the procedural review and time guidelines imposed by the Montana Administrative Procedures Act. Concern has also been raised about other aspects of the adjudication process: the speed and accuracy of the process, the burden the process places on claimants, the evidentiary weight given to claims and reports, the status of late claims, the adequacy of notice to claimants and other interested persons throughout the process, and the treatment of prior decreed rights.

Finally, some observers have questioned whether the adjudication process should emphasize and prioritize certain basins in the state that are important for an interstate apportionment or because of exceptionally conflicting water uses.

B. Committee Activities. The water adjudication process was discussed at the committee's January 1986 meeting in Bozeman. The committee toured the Water Court facilities and conducted a public hearing to obtain comment on the water adjudication process. Public comment addressed a number of concerns, ranging from the need to expedite the adjudication process to the need for accuracy in the process.

Committee representatives also met informally with water law attorneys and with DNRC and Water Court representatives throughout the last months of 1986 to obtain information concerning what recommendations, if any, the committee might make to the 1987 legislature.

C. Committee Recommendations.

1. The committee recommends implementing a system for setting priority basins for adjudication; the system should include a petition process to enable claimants to request priority status for a basin. Setting priority basins for adjudication appears to be generally supported because it would assure that basins most in need of adjudication would be addressed first. Committee staff is directed, therefore, to work with interested parties to develop specific proposals to implement this recommendation. The 1985 Legislature has already provided that the Milk River basin should receive priority for early adjudication because of the fully appropriated nature of the stream, the unresolved federal and Indian reserved rights in the basin, and the potential for construction of a major reservoir in Alberta, Canada.

2. The appointment process for the chief water judge and water judge should be modified to require that candidates fulfill the constitutional requirements for district court judges and supreme court justices and be appointed by the Chief Justice of the Supreme Court with confirmation by the Senate. The committee endorses a widening of qualified candidates for the positions of chief water judge, water judge, and alternate judge consistent with the requirements for district judges and supreme court justices. Also, the committee recommends an appointment process for the chief water judge and water judges that would require the existing judicial nomination commission to submit a list of selected applicants to the chief justice of the supreme court, who would then make the appointment subject to confirmation by the senate. Senate confirmation ensures public representation in the appointment process.

3. The DNRC's role in the water rights adjudication process should focus on verifying existing water rights. To accomplish this objective, the DNRC should submit amendments to substantially remove the conflict of interest posed when it acts as both water rights claimant and verifier

and objector in the adjudication process. The DNRC should continue its verification and water rights data management functions.

4. Section 85-2-243, MCA, should be amended to delineate clearly the role of the DNRC in the adjudication process. The existing statutory language requires the DNRC to assist the Water Court. In addition to separation of powers and due process concerns, this language promotes conflict between the two entities because the duties are not specified. The committee recommends that committee staff work with DNRC, Water Court, and Attorney General's Office representatives to determine appropriate amendments for consideration by the legislature.

II. Federal and Indian Reserved Water Rights

A. Background. The Reserved Water Rights Compact Commission continues to represent Montana in negotiations with federal agencies and Indian tribes to quantify federal and Indian reserved rights without resort to litigation. The first compact (Fort Peck) was submitted to and ratified by the legislature in 1985. The commission hopes to submit another compact to the 1987 legislature. The statutory deadline for legislative and tribal approval of a compact is July 1, 1987; thus, the commission is facing a very immediate deadline. If the deadline is not extended by the 1987 legislature, the commission will have no authority to continue negotiations.

There is a definite trend in the West for states to attempt to negotiate reserved rights. Wyoming has sought to litigate, but \$12 million and several years later, it is still fighting an unfavorable award in the state supreme court. Idaho, learning from Wyoming's experience, is seeking to negotiate, and Colorado has recently concluded an agreement with some tribes in that state.

If Montana's Compact Commission is to continue negotiations, attention may need to be given to the following: (1) ways to expedite the negotiation process; (2) the resources available to the commission and how they should be employed; and (3) preparation for litigation should it be necessary.

B. Committee Activities. Gordon McOmber, then-chairman of the Reserved Water Rights Compact Commission, provided a status report on the commission to the Water Policy Committee in April 1986. While noting progress with some Indian tribes and federal agencies (particularly with the National Park Service), McOmber emphasized that the process is going slowly and that the July 1987 deadline must be addressed by the 1987 legislature.

The committee examined an option at its October 1986 meeting that posed statutory timeframes and limited the number of parties with whom negotiations could occur within any two-year period. The option provided that if a compact proposal has not been completed with a party selected

for negotiation by the end of a two-year negotiation period, the matter would be transferred to the Water Court. The committee did not adopt this recommendation because the proposal lacked flexibility to address circumstances beyond the control of the parties or the time needed for detailed studies. Moreover, the commission indicated that efforts are being made in-house to target its resources more effectively.

C. Committee Recommendations.

1. Authority for continued negotiations by the Reserved Water Rights Compact Commission should be extended until July 1, 1993. The commission should remain attached to the office of the governor and it should continue to have a line-item appropriation in the budget of the DNRC. The committee also proposes to sponsor the bill.

2. The Reserved Water Rights Compact Commission's biennial budget request for \$472,000 from the general fund should be granted. This funding would enable the commission to proceed actively in its negotiations with federal agencies and the Indian tribes to quantify their water rights, and would provide additional legislative endorsement to settling these claims through negotiation rather than litigation.

III. Water Reservations

A. Background. Montana's water reservation process provides a means by which public entities (e.g., state and federal agencies, conservation districts, municipalities) may reserve water for future needs. By establishing the future water demand, water use may be managed to reduce potential conflict. In addition, the reservation of water provides evidence of intended water use that would be persuasive to the U.S. Supreme Court or Congress if either elects to apportion water on interstate streams. For these reasons, the Select Committee on Water Marketing recommended an expedited system to establish water reservations on the entire Missouri. By enacting House Bill 680, the 1985 legislature recognized the completion of water reservations on the Missouri as an indispensable element of Montana's protection strategy.

The 1985 legislature appropriated \$167,500 to the DNRC to undertake water reservations in the upper Missouri (the part of the basin upstream from Canyon Ferry Reservoir). Funding was also provided to the departments of State Lands; Fish, Wildlife and Parks; and Health and Environmental Sciences. The money will enable their participation in the process.

The DNRC has approached this assignment by developing new, more specific rules to provide clearer direction to applicants. The rules reflect changes based on experiences with the water reservation process in the Yellowstone Basin. In addition, DNRC staff are working to explain the process to potential applicants, and the DNRC has hired a consultant to assist applicants in preparing applications.

A water reservation process is also occurring in the upper Clark Fork Basin and, most recently, water reservations have been proposed for the lower Missouri Basin. As to the latter, DNRC staff are making preliminary efforts in the lower Missouri to inform conservation districts about the process.

It is desirable that close coordination exists among the water reservation process, the water adjudication process and the reserved water rights negotiations as they occur in a basin. Ideally, for a major basin these three processes should occur at the same time to facilitate early completion of high-priority basins.

B. Committee Activities. The Water Policy Committee addressed the water reservation process at its July 1986 meeting. In addition to presentations on Montana's reservation laws and reservation systems in other states, the committee was briefed on ongoing activity in the upper Missouri Basin and proposed work in the lower Missouri Basin. Committee members also heard discussion concerning the reservation of instream flow rights.

C. Committee Recommendations.

1. The reservation process should focus on priority basins, such as the Missouri, where adjudications and reserved rights negotiations are also being expedited. The committee encourages efforts to determine present and future water rights in high priority basins first. This recommendation acknowledges, however, that the adjudication, reserved rights negotiation and reservation processes will proceed at varying speeds and that completion will occur at different times.

2. The legislature should appropriate the money requested in the DNRC budget proposal to undertake water reservations in the lower Missouri. The committee also endorses the resource indemnity trust interest account as the funding source. In making this recommendation, the committee emphasizes the importance of water reservations in Montana's water management strategy and the priority given to completing reservations in the Missouri Basin.

3. The basin designation in 85-2-316 should be amended to clarify that water may be reserved for future beneficial use only in the designated basin in which it is reserved. However, if water is not reasonably available for an interbasin transfer through the DNRC water leasing program, water may be reserved for an out-of-basin use provided the use is in one of the six designated basins. The six basins described in 85-2-316 (the Kootenai, Clark Fork, St. Mary, Little Missouri, Missouri, and Yellowstone) cover the state of Montana. Because a literal reading of 85-2-316 might support an interpretation that a water reservation involving an interbasin transfer is allowable if the final place of use is in one of the six basins, the committee recommends that the statute be amended to clarify the limit on interbasin transfers.

This recommendation appears to follow the intent of the 1985 Legislature and the Select Committee on Water Marketing. The change does not preclude interbasin water transfers; these transfers would still be possible under the DNRC water leasing program or by reservation if water for leasing is not reasonably available.

4. The Water Policy Committee should consider investigating other specific statutory questions concerning the water reservation system during the next interim period. At least two specific legal questions might be addressed:

- a) the status of a water reservation once it is perfected by the reservant (i.e., does it become a water right, or is it a water right subject to adjustment periodically by the Board of Natural Resources and Conservation?); and
- b) the effect of the July 1, 1985 priority date granted to new water reservations within the Missouri River Basin (e.g., as compared to a permit to appropriate water with a priority date of October 1, 1986).

These questions have significant implications for Montana's prior appropriation system and require extensive committee discussion and evaluation.

APPENDIX A: COMMITTEE MEETINGS

August 26, 1985 -- Helena
Organizational
Review of Study Plan

November 14-15, 1985
Drought Management
Ground Water Management
Water Data Management
Water Use Efficiency

January 30-31, 1986
Water Research
Water Rights Adjudication

April 18-19, 1986
Federal Reserved Water Rights
State Water Plan
Water Development

June 24, 1986 -- Helena
Organizational
(Working Group Format)

July 14, 1986 -- Billings
Water Reservations
Interstate Water Issues

October 6-7, 1986-- Billings
Hydropower Rights
Review of Draft Committee
Report
Preliminary Recommendations

November 20, 1986 -- Helena
Review of Committee Report
Development of Final Committee
Recommendations

APPENDIX B: A COMPILATION OF STAFF REPORTS TO THE COMMITTEE

1. Memorandum. Montana's Response to the 1985 Drought. August 23, 1985.
2. Synopsis of Montana Department of Fish, Wildlife and Parks v. Montana Water Court (No. 85345, Mt. Sup. Ct., filed July 17, 1985). August 23, 1985.
3. Synopsis of South Dakota v. Nebraska (103 Orig., U.S. Sup. Ct., filed August 16, 1985). August 23, 1985.
4. Memorandum. Increasing Communication Among Legislators in the Missouri Basin States. August 23, 1985.
5. Water-Related Legislation Enacted by the 1985 Legislature. August 23, 1985.
6. Study Alternatives for the Water Policy Committee. August 23, 1985.
7. Status Report on Judicial Challenges to Montana's Water Adjudication Process. November 12, 1985.
8. A Summary of Concerns Expressed to the Water Policy Committee and of Possible Committee Actions. January 29, 1986.
9. Water Adjudication Presentation (John Thorson). January 30, 1986.
10. Montana's Water Adjudication Statutes. January 30, 1986.
11. Statutory Funding Sources for Water Development in Montana. April 18, 1986.
12. A Comparison of State Water Plans Used by the Missouri Basin States and Idaho. April 18, 1986.
13. Update of Montana Department of Fish, Wildlife and Parks v. Water Court (No. 85345, Mont. Sup. Ct., filed July 17, 1985). April 18, 1986.
14. A Report Concerning the History of the Volume Requirement in the Final Decree Statute. April 18, 1986.
15. Implications of Modifying the Volume Requirement for Montana's General Stream Adjudication Process. April 18, 1986.
16. Water Policy Options. June 23, 1986.

17. Memorandum. Water Development Program Proposals. July 11, 1986.
18. The Montana Water Reservation System: A Description and History of the Statutory Requirements. July 14, 1986.
19. State Approaches for Protecting Water Needed for Future Use (presentation outline). July 14, 1986.
20. A Summary of Missouri River Basin Water Allocation Options. July 14, 1986.
21. Draft Committee Reports. October and November, 1986.

Copies of these documents are available by contacting the Montana Environmental Quality Council, Capitol Station, Helena, MT 59620 (406-444-3742).

APPENDIX C: PROPOSED LEGISLATION

** The following bills are drafts only. The final committee bills, as provided in the report, will reflect suggestions of committee members and any modifications made during the Legislative Council review process.

1. LC 487 -- Water Policy Committee recommendations concerning the water development program.

A BILL FOR AN ACT ENTITLED: "AN ACT DIRECTING THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION TO GIVE PREFERENCE TO CERTAIN PROPOSALS FOR FUNDING FROM THE WATER DEVELOPMENT PROGRAM; PROVIDING AN EFFECTIVE DATE; AND PROVIDING A TERMINATION DATE."

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

Section 1. Water development program direction -- future preference for appropriations. (1) The department of natural resources and conservation is directed to recognize in particular the primary role of agriculture in the state's economy and the needs of its agricultural constituency when it formulates its promotion, assistance, and development programs under Title 85, chapter 1, part 6.

(2) In evaluating proposals for use of funds from the water development state special revenue account for the biennium ending June 30, 1991, the department of natural resources and conservation and the legislature shall give preferential consideration to proposals that promote:

(a) the development of agriculture in Montana; and

(b) other state water projects or programs recommended by the legislative water policy committee established in 85-2-105.

Section 2. Effective date. This act is effective July 1, 1987.

Section 3. Termination. This act terminates June 30, 1989.

2. LC 488 -- Water Policy Committee recommendations concerning the Reserved Water Rights Compact Commission.

A BILL FOR AN ACT ENTITLED: "AN ACT EXTENDING THE AUTHORITY OF THE RESERVED WATER RIGHTS COMPACT COMMISSION TO CONTINUE NEGOTIATIONS WITH THE INDIAN TRIBES UNTIL JULY 1, 1993; AMENDING SECTIONS 85-2-217 AND 85-2-702, MCA; AND PROVIDING AN EFFECTIVE DATE."

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

Section 1. Section 85-2-217, MCA, is amended to read:

"85-2-217. Suspension of adjudication. While negotiations for the conclusion of a compact under part 7 are being pursued, all proceedings to generally adjudicate reserved Indian water rights and federal reserved water rights of those tribes and federal agencies which are negotiating are suspended. The obligation to file water rights claims for those reserved rights is also suspended. This suspension shall be effective until July 1, ~~1987~~ 1993, as long as negotiations are continuing or ratification of a ~~completed~~ compact is being sought. If approval by the state legislature and tribes or federal agencies has not been accomplished by July 1, ~~1987~~ 1993, the suspension shall terminate on that date. Upon termination of the suspension of this part, the tribes and the federal agencies shall be subject to the special filing requirements of 85-2-702(3) and all other requirements of the state water adjudication system provided for in Title 85, chapter 2. Those tribes and federal agencies that choose not to negotiate their reserved water rights shall be subject to the full operation of the state adjudication system and may not benefit from the suspension provisions of this section."

Section 2. Section 85-2-702, MCA, is amended to read:

"85-2-702. Negotiation with Indian tribes. (1) The reserved water rights compact commission, created by 2-15-212, may negotiate with the Indian tribes or their authorized representatives jointly or severally to conclude compacts authorized under 85-2-701. Compact proceedings shall be commenced by the commission. The commission shall serve by certified mail directed to the governing body of each tribe a written request for the initiation of negotiations under this part and a request for the designation of an authorized representative of the tribe to conduct compact negotiations. Upon receipt of such written designation from the governing body of a tribe, compact negotiations shall be considered to have commenced.

(2) When the compact commission and the Indian tribes or their authorized representatives have agreed to a compact, they shall sign a copy and file an original copy with the department of state of the United States of America and copies with the secretary of state of Montana and with the governing body for the tribe involved. The compact is effective and binding upon all parties upon ratification by the legislature of Montana and any affected tribal governing body, and approval by the appropriate federal authority.

(3) Upon its ratification by the Montana legislature and the tribe, the terms of a compact must be included in the preliminary decree as provided by 85-2-231, and unless an objection to the compact is sustained under 85-2-233, the terms of the compact must be included in the final decree without alteration. However, if approval of the state legislature and tribe has not been accomplished by July 1, ~~1987~~ 1993, all Indian claims for reserved water rights that have not been resolved by a compact must be filed with the department within 6 months. These new filings shall be used in the formulation of the preliminary decree and shall be given treatment similar to that given to all other findings."

Section 3. Effective date. This act is effective July 1, 1987.

3. LC 489 -- Water Policy Committee recommendations concerning the water rights adjudication program. This bill is being developed. The draft bill, along with a report concerning discussions with the DNRC and the Water Court, will be provided to committee members in early January.

4. LC 490 -- Water Policy Committee recommendations concerning the water reservation program.

A BILL FOR AN ACT ENTITLED: "AN ACT CLARIFYING THAT WATER MAY BE RESERVED FOR FUTURE BENEFICIAL USE ONLY IN THE BASIN WHERE IT IS RESERVED UNLESS WATER FOR AN INTERBASIN TRANSFER IS NOT REASONABLY AVAILABLE UNDER THE WATER LEASING PROGRAM; AND AMENDING SECTION 85-2-316, MCA."

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

Section 1. Section 85-2-316, MCA, is amended to read:

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

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

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

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

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

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

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

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

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

* This section continues with subsections 3 through 14.

Section 2. Extension of authority. Any existing authority of the board of natural resources and conservation to make rules on the subject of the provisions of this act is extended to the provisions of this act.

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