

MINUTES

MONTANA SENATE 51st LEGISLATURE - REGULAR SESSION

FREE CONFERENCE COMMITTEE ON HOUSE BILL 707

Call to Order: By Chairman Jack Galt, on April 20, 1989, at
11:00 A.M.

ROLL CALL

Members Present: Senator Beck, Senator Galt, and Senator
Yellowtail. Representative Grady,
Representative O'Keefe, and Representative
Spaeth.

Members Excused: None

Members Absent: None

Staff Present: Bob Thompson, Environmental Quality Council
John Larson, Secretary of the Senate

Secretaries: Carla Turk and Jaelene Johnson

DISPOSITION OF HOUSE BILL 707

Discussion: Representative Grady - "The Stockgrowers main concern is a study. Move section 4 into section 7 on page 11, so the whole intent is a study. Along with the study, it allows the Department of Natural Resources to go through the board and commission, to actually try to purchase a lease. That is after they have gone through all the formalities...It also gives authority to go out and try to purchase the lease. Like I say, you will have to go through the Fish and Game Commission and the Board of Natural Resources. That's the main thing the Stockgrowers wanted to make sure it was in this legislation."

Senator Galt - "Well that's fine, if you have seen this amendment."

Representative Grady - "Alright I'm not sure where you want to incorporate this."

Senator Galt - "Page 9, prior to "e", line 2 on Gray bill #2.

Senator Beck - "You insert 'upon receipt of an application for a lease from Department of Fish, Wildlife and Parks, D N R C shall publish notice of the application pursuant to the provisions in 85-2-307. Parties who believe they will be adversely affected by a proposed lease, may file objection pursuant to section 85-2-308. A lease may not be approved until all objections are resolved'. If there is a certain stream reach that they are trying to demonstrate some purposes and there are objections to it; those objections have to be resolved before they can go ahead and pursue it as part of the study."

Representative Grady moves exhibit 1, Free Conference Committee, page 7 {#1}.

Senator Yellowtail expressed a curiosity to, "The difference between this proposed language and the existing language in the changed statute."

Senator Galt said that this amendment applies directly to the leasing of water.

Senator Yellowtail - "Well my question is, doesn't the existing changed statute protection for adverse impact apply anyway and isn't this a duplication? Is it purely a duplication or is there something hidden in these words here?"

Representative O'Keefe - "The intent of the amendment is to give the Senate and the House something to use on the floor to show that objections are going to be dealt with in a prescribed manner. This is as I understand, the intent that this goes no further than the existing changed statutes in 85-2-307. It is a duplication. I think that the reason for it being there is so that people who feel a need for reassurance of a right to object; the state needs to deal with those objections prior to issuing a lease."

Senator Yellowtail said 85-2-402 prevails in any case. "I need to be convinced that this is necessary if it is a duplication."

Senator Galt - "I think it is necessary. I think it will clear a lot of air out and this ties it to the leasing thing. These other statutes address other things in the water law, change of points of diversion and points of use. Now we are dealing with a whole new thing that isn't in the code now, and this ties the protest thing into this new part of the proposed water law concerning leasing."

Senator Yellowtail - "So it is substantially identical to the change process that exists in water law now?"

Senator Galt - "Absolutely, but it is tieing it directly to leasing."

Senator Yellowtail - "I still think it's frivolous but if that reassures some, perhaps then it's worthwhile."

Senator Boylan - "The State of Montana owns a lot of water, and I think that should be inclusive. The Department of Lands owns a lot of water, stored and free water. The institutions, the prison owns a lot of freed water and stored water. Montana State experiment station and its subsidiaries own water out of tributaries in Gallatin Valley. The Huntley Project on the Yellowstone River has water diverted in that. So I think in this study, that should be considered also."

Senator Galt - "That doesn't apply to the question in front of us now. They would just be water owners just like anyone else right now. Bring this up a little later or after we deal with the motion we have on the floor."

The question was called for by Senator Beck. The motion carried unanimously. See exhibit 1, of the Free Conference Committee Report, page 7 {#1}.

Representative O'Keefe read the next proposed amendment which substitutes sub-section 3, on page 9, line 29 of the Gray Bill #2. It reads a study report of the 52nd Legislature shall be adopted by the commission and department and forwarded to the Water Policy Committee who shall adopt and submit a final report by December 1, 1990." Representative O'Keefe said, "My impressions on that is the Gray Bill, as it is currently written, requires that a study report, including the findings and recommendations, must be completed by December 1, 1990. What we are requiring, as I read the proposed language, is an additional review step by the Fish and Game Commission, the Board of Natural Resources, the Water Policy Advisory Group prior to submitting that report. I would like to ask John Larson if that language requires all three of those bodies to adopt the reports, or simply to review?"

John Larson said, "The first report will be adopted by the Fish and Game Commission and the Board of Natural Resources. The final report will be adopted by the Water Policy Committee."

Representative Grady - "This would be after deletion and everything had taken place, toward the end of the study? In other words, before they went to the legislature."

Senator Galt - "Yes, and I think that's already in here. It includes the Water Policy Committee, and that's the arm of the legislature. We want the legislature to have a say in what this report is, and they're the ones who submitted it to the legislature at the next regular session."

George Ochenski - "I don't have any problems with the submittal of the report and adoption of the report. That is what we intended any how. I would say there is a very good chance the department may not have the cumbersome change process."

Senator Galt - "At least they will have been a part of the study and proposed things."

Senator Beck moved the amendment. See exhibit 1, of the Free Conference Committee Report, page 8 {#2}. The motion carried unanimously.

Representative O'Keefe - "Is everyone happy with the change the Stockgrowers asked for? That is the change of putting section 4 into Section 7, which clearly delineates and I think answers some of the concerns in the agricultural community. This is not a project perhaps but a study non the less. Do we have any problems with that?"

Carol Mosher indicated that had been there intent all along.

Jo Brunner asked, "Does the Water Policy Committee--does the legislature have to approve of the study before a lease can be written?"

Senator Galt said, "I don't think it says that in the bill."

Jo Brunner said, "Then it is conceivable that a four year lease could be written before there has been any approval or disapproval by the legislature."

Senator Beck stated, "The way, I understood it in committee, was that this is going to go before both the D N R C and the Fish and Game Commission with some input from the Water Policy Committee. In other words, there is not going to be any leasing before it goes to the Fish and Game Commission itself. That is the way I understand it, is that correct?"

Representative O'Keefe - "This is the way I understand it too."

Senator Beck continued, "After concurrence with the commissions, then there is a possibility to implement a lease for the ground experiment. I guess we are going to call it that to see if the theory it is going to work."

Jo Brunner said, "Then it is conceivable that five-four-year leases could be written before the legislature approves it?"

Senator Galt stated, "That would come in as part of the reports to the Water Policy Committee and they would have their input into it right then."

Jo Brunner asked, "Would those lease contracts terminate when the program terminates?"

Senator Beck said, "In section "e" of the Gray Bill, page 9, states a lease may not be issued for a term of more than four years, but may be renewed for up to ten years, per renewal, if allowed by law upon notification of the department. The law is what we are instigation right here."

Representative Grady said, "I think what Mrs. Brunner is getting at is, do we have to come back to the legislature before we do a lease? I guess the idea of this whole thing is how are we ever going to know if this thing is ever going to work if we actually don't go out there and try doing a lease?...This is an on the ground work, we've done all of the paperwork up to this point.....We need someone in the field, on the ground experiments, to see if it's going to work. This is what this bill is designed for."

Senator Beck stated, "That is my interpretation also. This is a study to determine whether water leasing is feasible or not in the State of Montana. It is going to take other legislation to ever implement any lease."

Senator Galt reminds everyone, "Part of that study could be a proposed lease."

Representative O'Keefe said, "We realize that as a study, in order to get those hard scientific facts, we are going to have a demonstration problem as part of that study. If you are asking, will there be a lease out there without the entire legislature approving it?--Is it

feasible to have a four year lease in place?"

Representative O'Keefe stated, "Yes, Ok five streams." He added in regard to whether leasing could occur without the entire legislature approving it, "the legislative input to the commission is going to be there. The department won't do anything that (a.) the commission doesn't want it to do and (b.) that the legislature doesn't want it to do. In two years, I would wager with you now, if I was a betting man, we still aren't going to have a lease in place. So, we are going to have one more chance to review that report in my opinion, prior to any lease being issued."

Senator Beck said there will not be a ten year lease without legislative approval.

Representative Westlake said, "The question in my mind, I have no problem with joining these two sections. In regard to the four years. I think that we would be more comfortable if it said something to the effect that if for instance the contract was going past the termination. It could, if I understand it correctly, it could be two years past the termination date of this act."

Senator Beck - "No this terminates the act in 1993."

Representative Westlake - "Are you sure? This is the problem that I see with it. If you enacted a four year lease in the last two years of the study, then terminate the study at that particular time, I don't believe there is anything that terminates those contracts."

Senator Yellowtail - "Okay, it seems to me that termination of the law that enables that lease effectively terminates the lease. So, I think there can't be any fear here."

Senator Galt - "We are arguing the merits of the bill here. Let's get right back down to the bill itself. I would propose one. We need to change it as it was in the original bill that we had for the purpose of this study. This section is the exclusive means by which the appropriations may be changed to an instream flow purpose."

Senator Beck - "Was that taken out?"

Senator Galt - "It's not in this one."

Senator Beck asked, "Why is that out of this Gray Bill #2?"

George Ochenski - "It was taken out of here because of what we are codifying. It is temporary language for the purposes of a study. That language was being codified in 707. Our original purposes were to build a continuous law. We are not doing that now; we are having a study. To put that phrase into the bill seemed appropriate to us because we are not making a permanent law here. We are making conditions under which a study may be conducted."

Senator Galt - "Excuse me there is the added an caveat. This is for the purpose of a study."

John Larson - "On page 15 of the original bill, line 6."

Glenn Marks - "When this bill was born, this language was in there. Even though this is just a study, that language should still be in there. It defines the law."

Representative O'Keefe - "I talked with Al Stone earlier today about that language and the applicability of that language. To (a.) the study, (b.) the water law in general, and (c.) the constitution. For the purposes of this study, I think that language would certainly withstand a legal task and would apply to the cases defined in the bill. The department is being allowed to lease water in accordance with this bill. I don't think there's any problem with that language. I think we get into a problem, from my discussions over all appropriators, if we try and apply a carte blanche situation to everyone in the state. That problem could lap over to exactly the thing Senator Boylan brought up about the states control of their water rights. Private individuals ability to change a irrigation right to a stock pond. It's also used for fish and wildlife. I would be willing to go with that language if we can define it to the studies."

Senator Galt - "It says for the purpose of this study."

John Larson identified the language in the original bill (page 15, lines 4 and 5, following the bracket in section 5). With an introduction that says, "for the purposes of this study."

Representative Spaeth - "This section is the exclusive means by which an appropriation may be changed to an instream flow purpose."

John Larson - "Yes."

Representative Spaeth - "What you are suggesting is that we could change that and apply it just for the purpose of this act? I think that makes good legal sense."

Senator Yellowtail - "Why is it necessary to do this? This bill clearly delineates that the Department of Fish, Wildlife, and Parks is the only potential applicant anyway, for the purposes of this study. Once again, I need to be convinced why this is absolutely necessary. This seems to be the Secretary of the Senate's idea and, might I get him to convince us..."

Senator Galt - "No, that was my idea in the original bill. But he did pick up for us that it was not in this particular bill."

Senator Yellowtail - "Alright, then I would like somebody to convince me why this is necessary."

Representative O'Keefe - "Re-thinking this thing and looking again at the language, I'm wondering if we aren't (a.) if it is necessary, and (b.) whether or not we might be creating a problem with fish, wildlife, and parks. Take the example of Painted Rock. Right here we state the exclusive means by which appropriations can be changed. They've got an appropriations and storage there but it's state water and the D N R C wants to buy it. Like they did in the Bitterroot and their changing that into an instream flow for carriage water. They would have to go through this. Which I don't think this is the intent what we want to do. I don't think that's the Senator's intent."

Senator Galt - "Painted Rock is a purchase. You buy that water. This is still applying to the leasing of water."

Representative O'Keefe - "Would it be clearer if we said that the Department of Fish, Wildlife, and Parks may lease an appropriation for the purposes of leasing."

Senator Galt - "Well, your changing the use of the water rights. So, I think the word change perhaps should be in there. The purpose of the study is to lease. It's implicit this is the only way a water right can be changed to a lease or instream flow use for the purpose of leasing."

Representative Spaeth - "I'm never quite sure if it does anything one way or the other and if it makes someone happy--I'm never quite sure why storage got people all excited."

Senator Galt - "We haven't discussed that yet, but I think this would make it much easier to sell. This is the vehicle by which any change from a water right to an instream flow right can be accomplished."

Representative Spaeth - "I don't think it's going to hurt the bill. I so move that amendment."

Representative O'Keefe - "I like the amendment. If we confine the amendment to the study and to the department, which we have done. I also read it (the) exclusive means by which appropriations may be changed. To me that goes well beyond the Department of Fish, Wildlife and Parks and their ability to work within the study."

Representative Grady - "I think we need to keep this as clean as we can keep it and see if it's going to work. If we don't make some kind of an effort to make some lease work, they're never going to work. If we put too many barriers in here, it's never going to work."

Senator Beck - "How is this going to be a barrier against leasing? I'll tell you what I'm trying to do is make this comfortable for about 26 Senators in the Senate. I think if they know the exclusive way for leasing water is through this study, and there is no other way at the present time. Until we get the study concluded, then I think what we're saying is let's get the study completed and then take a look at it down the road."

Representative O'Keefe - "I understand. Would you agree Senator that the only entity that can hold an instream flow right now for fish and wildlife purposes is the Department of Fish, Wildlife, and Parks?"

Senator Galt - "Except the reservation board."

Representative O'Keefe - "I'm trying to define this language just to the Department Fish, Wildlife, and Parks to lease water in accordance with a study and I think you are too. All I'm trying to do is get that word 'the department' into that language."

Senator Yellowtail - "To that I have language, and I would move a substitute motion. For the purpose of this study, this section is the exclusive means by which the

Department of Fish, Wildlife, and Parks may seek to change an appropriation right to an instream flow purpose'." See exhibit 1, Free Conference Committee Report, page 7 {#4}

The motion carried unanimously for the House and the Senate.

Senator Galt - "I'm not comfortable with the responsibility you've given to the Water Policy Committee. They don't have the staff or time. Gray Bill #2, page 7."

Bob Thompson - "At this point it appears the Water Policy Committee will receive approximately \$26,000 in funding. Most of that is used for committee meetings and payment of committee members. So there isn't a lot of extra money available for the committee. A lot of this study, the committee would direct, is very technical. Given the training, this staff person and probably the entire staff at E Q C, we really don't have the expertise to do it. So in some ways, the Water Policy Committee would be very dependant on the executive branch agencies to do this. Because of the lack of expertise of it's own staff."

Senator Galt - "I don't know how to change that language to make the Water Policy Committee the over-seer and the final say on these things but not put them into a collaboration that sounds as though Bob Thompson would have to go out with every fish, wildlife, and parks (person) to measure a stream...One possible alternative here, is to restructure the lead in to section 6 by saying "the Department of Fish, Wildlife, and Parks and the department, in consultation with the Water Policy Committee, shall conduct and coordinate a study that, at a minimum"...See exhibit 1, Free Conference Committee Report, page 7 {#5}. You already made an amendment in section 3 which provides that the Water Policy Committee has the final say."

Senator Galt - "Will that wording itself satisfy the Water Policy Committee and the staff of the Water Policy Committee?"

Bob Thompson - "As to the staff of the Water Policy Committee, we have no problem with that."

Representative Spaeth - "I don't think you can do much about it with a budget like that. I would move the amendment." See exhibit 1, Free Conference Committee Report, page 7 {#5}.

Senator Beck - "Ron Marcoux do you have any problem with this?"

Ron Marcoux - "Personally, I think it's going to simplify it for all of us and get the job done."

The House and the Senate adopted the amendment unanimously.

Representative Grady-"We really haven't addressed the funding. I would like to ask Ron Marcoux to talk a little bit about some funding."

Ron Marcoux - "I guess what we would like to see, from the department's standpoint, is to have some funding available for the department within the contracts. I see us having to go on in time with our existing staff and identify the unknowns. I feel the existing staff can accomplish a lot of this, but we also have some unknowns on how to deal with the adverse impacts and how to identify them. What we would like to do is request the authority to utilize federal funding that is available for the fisheries efforts. I think we could request about \$60,000 be made available to match the license dollars that already existing in the budget."

Senator Galt asked Representative Spaeth if HB 707 would need to go to Finance and Claims with \$60,000 proposed change.

Representative Spaeth - "(1.) I think you could do that with this bill without any problem, because this would become an appropriations bill. (2.) HB 100 is at the Governors desk right now, so I don't think there would be any problem. I do think you would be better served in here as far as fish, wildlife, and parks funding is concerned. They have the money."

Representative Spaeth moved to insert the language, "The federal funding, via department of fish, wildlife, and parks, may be expended up to \$60,000 of federal special revenue." See exhibit 1, Free Conference Committee Report, page 9 {#6}."

The motion carried unanimously with no dissenting votes from the House and the Senate.

Senator Galt asked if there was any comments from the audience.

Representative Westlake - "I realize there is nothing in this bill as far as addressing off-stream storage for

enhancement of fish and wildlife. That's been the stand of our particular groups through this whole thing. As far as I'm concerned it's unacceptable in my eyes unless something is addressed in the title and in the project as being part of the study. I realize that this is a very costly part of the project. This bill doesn't say that it is going to develop any off-stream storage. I can't see why we can't include that in the title. I also have a problem with section 4, not with consolidating it with section 7. I support that. I would feel better and I know the people that I'm representing would too. Let's make sure that the contracts aren't renewed or extended before the four year period of the study is concluded...We would be a lot happier with line 25 and I just have the older bill. where it says the lease may not be issued for a term of more than four years...Even if an act would be terminated and there was some on going contracts those have to be honored according to what I have been told. Regardless of whether the act has been terminated. Am I right on this retroactivity thing?"

Bob Thompson - "It would be possible under this scenario, for the Department of Natural Resources to issue a lease authorization on January 1, 1993 for four years. That means the lease would go to 1997. It would go pass the termination date. The other scenario that could evolve under this is the Department of Natural Resources could on January 1, 1990 issue a two year lease to the Department of Fish, wildlife and Parks. So, it goes to 1992 and it will be up for renewal...In which case, could be 10 additional years."

Jo Brunner - "Our water association has supported this since it came out of the House with the amendments for storage. That is the main reason that our association has supported 707. We continue to request that there is some recognition of the importance of water storage to stream preservation. I would like to offer a sentence that came up in discussion with several other organizations this morning. We felt this would recognize the benefits of water storage and preservation but it would not include an in-depth study on the costs of storage. I would like to insert and ask you to consider inserting after the words 'Board of Natural Resources and Conservation', line 6. That's the first page of the Gray Bill #1. I would like you to consider inserting after the word conservation 'to determine benefits derived by the construction of storage facilities on reaches defined'. I believe that does not require an in-depth study of great cost, but it would ask the recognition and the leasing program

that storage facilities are beneficial."

Representative Spaeth - "I would like--because the title is not substantive law. It would need to be someplace else."

Jo Brunner - "It probably needs to be within the section 7. Insert another paragraph after paragraph (ii) on page 5 following line 12, this same language. 'To determine benefits derived by the construction of storage facilities on the reaches defined'." See exhibit 4, Gray Bill #1.

Jo Brunner - "The top portion of the study requests the definition of the reach."

Representative Westlake asked Glenn Marks, "Where are we at on the water storage within the water plans? Do you know the Governor's intentions of where we're going to go with that?"

Glenn Marks - "The Department of Natural Resources starts their scoping sessions of the next eight water plans in May. We have meetings set for August 8th. We want water storage looked at. We are trying to get public input before we suggest the next water plan. We're trying to get public input before the subject of the next water process is picked...Certainly, the Governor wants storage to be part of the next water plan...I'm absolutely convinced that storage will be part of the next legislature and I hope we come to the next session with a water storage bill."

Representative Grady - "I want to tell you where I come from. I am the originator of this bill. I had to talk to the other people long and hard to convince them, "Let's go back to the table". One of the main things was storage all along. It was a big problem. It is probably the reason the bill got killed originally. I guess, I can see some real bad things coming down the road if we don't make some effort here to do something. That's why we came up with this piece of legislation. I don't want storage in here. I don't think we need storage in this bill. I've made up my mind, as well as a few others that have put this stuff together. If we have to include storage in here, we're probably going to kill this piece of legislation and we'll be back where we were. I think storage is very costly."

Senator Galt - "You'd have to convince me that a little sentence suggesting storage would kill the bill."

Representative Grady - "If you address it in the study, Senator Galt, you're talking about a whole lot more cost. I can't see how you can study storage without getting into a huge amount of dollars. Storage is very costly as you all know...I don't know what period of time you are looking to do with storage, compared to what we can do with leasing."

Senator Galt - "Would there be anything wrong with the fish and game technician doing his measurement on the stream, and just noting there's a good dam site on this stream?"

Representative O'Keefe - "I'm a fan of storage, particularly off-stream storage. I think it's essential. I think it is something that needs to be looked at. I don't know if it belongs in the bill. We spent \$1.6 million in the Yellowstone Basin from 1981 through 1983, on Senator Manning's bill, to determine potential off-stream storage sites in that basin. Hydroelectric production, instream flow restrictions, wildlife benefits, you name it, they were in that study. \$400,000 of that money was spent on the economic and benefit analysis portion of those off-stream storage facilities. My concern is if we use the word determined, as proposed, Senator Beck will end up asking not for \$60,000, but closer to \$200,000. I see determined as changing the whole focus of this study. It becomes a storage study not a leasing study. I think we have the provisions within the law for storage studies for water development. Determining the effects of storage at a site is not as easy as having storage as an object of the study."

Representative Spaeth - "I understand the people on one side are concerned that the whole amount of money will just be eaten up, because storage is an expensive thing to study. I also think that people on the other side think storage is something that should be looked at and emphasized. I'm not sure how much economically feasible storage we have left available in this state. We have used up a very large portion of our economical sites. I think it is important to a lot of people to at least have that included as a consideration. I've come up with some language to that affect on page 8. Insert 'to determine if there may be possible storage sites for the reaches of the stream defined and to include information which may be obtained about such sites without incurring additional expenditures'. There has been a lot of information the bureau reclamation has put together, and that could be

referenced for when it comes before some kind of review...I'm trying to say this should not cost us a whole lot more money. This information may be obtained without additional expenditures."

Jo Brunner - "We would agree with Representative Spaeth's amendment."

Stan Bradshaw - "Keep in mind what this bill is to be used for. It's a study to see if a lease is going to work and that's all it is. I just think the idea of this study suggests that, on the side, people ought to be looking out for storage."

Representative Grady - "How much work has D N R C done in studying sites already? I think the amendment goes broader than that."

Senator Beck asked Senator Galt - "I don't know what study the Governor has on storage, but I assuming. What would be the possibility of putting into his recommendation on storage emphasis to look upon those streams which have been identified as lease streams for the purposes of surviving the fisheries. If we identify streams that have to be leased to maintain the fisheries in this study, the emphasis should be put on storage and maybe the Governor's policy."

Glenn Marks - "What I would like to do is to come back in two years with a plan that says; we're going to build a little dam on this creek, this is how we're going to do it, and this how we're going to fund it...Keep in mind that around this bill evolves the water plan process. It took us a year and half to get to this point. If water storage is looked at next year, then water storage will get us to this point."

Representative Spaeth - "What I'm trying to do here is come up with language that might not do a whole lot but make a lot of people happy. I'm not sure what the intransigents against the amendment is. It is not going to incur any additional costs, and while they're out there they can glance around and somebody can reference a study. I'm not even saying they should be included. There should be a reference to storage sites.. What I have tried to do is compromise so that both sides could agree."

Representative Spaeth said, "I move the language, `to determine that there may be possible storage sites for the reaches to the stream to find and to reference any information that may be available on the sites without

incurring additional expenditures'."

Representative O'Keefe - "I'm going to offer a substitute motion. I would like, within the bill, a statement that says, "There's nothing in this act to preclude the consideration of storage for potential beneficial use of water in any of the stream reaches under consideration."

Representative Spaeth - "I appreciate what Representative O'Keefe is trying to do. (1.) He says less than I did, and (2.) I think that he has failed to make the storage folks happy with it. You are back to square one if you adopt that."

Senator Galt - Asked if they were ready for the substitute motion by Representative O'Keefe. The motion failed, with Representative Spaeth, Senators Beck, and Senator Galt voting no.

Senator Galt - Announced they would be going back to the original motion by Representative Spaeth. The motion failed again with Representative O'Keefe and Representative Grady voting no.

Senator Beck said, "I have one more concern with the bill, and that's with Bob Thompson's comments. I thought this was a four year study dealing with the leases. Evidently these leases can be extended past and beyond the study. I would like to see something in here that would say, when this study terminates, the leases also terminate unless there is further legislation to extend those leases."

Senator Beck asked Bob Thompson if this language needed to be clarified.

Bob Thompson - "It all depends on what you want. If indeed you want the lease to end on the termination date June 30, 1993, then this may or may not accomplish it. It does say a lease can be issued for four years. So if the lease is issued on June 30, 1991 it could go until June 30, 1995."

Senator Beck - "My intent is to keep this within the bounds of this study. If we do extend this, the leases can be extended. If this piece of legislation terminates, I want it concurrent, with the leases also terminating."

Representative O'Keefe - "I would move an amendment on the Gray Bill number 2, page 9, line 3; after years on line three, insert a (period), strike the language between

`but and department on line 5' and insert `if allowed by law existing leases may be renewed for up to ten years'."

George Ochenski - "What happens if this piece of legislation terminates and in fact it does work and you changed your words? You want those leases to be able to be renewed without going back through it."

Representative Spaeth - "I don't see why we can't say, in the bill itself, `upon the event of the act terminating or with no re-authorization of leasing is made by the legislature then all present existing leases shall be terminated'."

Representative O'Keefe - "I shall withdraw my motion."

Senator Galt - "Where do we want this to be put in?"

Senator Beck - "Can you put it in with the terminating?"

Representative Spaeth - "In section 6 sub (e), following department, insert "If this section terminates without re-authorization by the legislature, all leases and lease authorizations expire on the date of termination." See exhibit 1, Free Conference Committee Report, page 8 {#11}.

Representative Spaeth moved the language providing for termination on page 8, {#11}. The House and Senate concurred in it unanimously.

Representative O'Keefe - "I would like to move that the language be included that this act is affective upon passage."

The House and Senate concurred in it unanimously.

Carol Mosher - "The wording critical low flow periods. Is that in there?"

Senator Galt - "We never addressed that."

Representative Grady - "I talked with the Stockgrowers and we discussed it somewhat. Why we have that in there is because we all know sometimes streams get low. We still have a flow which is going all the way through, but there is not enough water to maintain the temperature of that water and you start losing fish. That is the idea of this whole thing, is to maintain fisheries."

Representative Grady moved the Gray Bill #2, TO BE CONCURRED
IN AS AMENDED.


Bob Thompson - "The bill, as you have seen it, does not have
all of the amendments that have occurred through the
session. As a technical question, is the intent to
consider a substitute bill this afternoon?"

John Larson - "Just strike everything that's happened to the
bill and insert the Gray Bill #2."

The motion carried. The Senate concurred unanimously with
Senator Galt, Senator Beck, and Senator Yellowtail
voting yes. The House concurred with Representative
O'Keefe and Representative Grady voting yes, and
Representative Spaeth voting no.

ADJOURNMENT

Adjournment At: 12:50 P.M.


SENATOR JACK GALT, Chairman

JG/jj-ct

HOUSE BILL 707

COMMITTEE

Date 4-20-89

Each day attach to minutes.

Free Conference Committee Report
on HB 707
Report No. 1, April 20, 1989
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Mr President and Mr. Speaker:

We, your Free Conference Committee on HB 707 met and considered:

The Senate amendments to HB 707 (third reading copy -- blue) in their entirety.

We recommend that HB 707 (reference copy -- salmon) be amended as follows:

1. Title, lines 7 through 23.

Following: "AN ACT"

Strike: lines 7 through 23 in their entirety

Insert: "PROVIDING FOR A THOROUGH STUDY THAT INCLUDES A PILOT PROGRAM TO LEASE WATER RIGHTS FOR THE PURPOSE OF MAINTAINING OR ENHANCING STREAMFLOWS FOR THE BENEFIT OF FISHERIES IN STREAM REACHES DESIGNATED BY THE BOARD OF NATURAL RESOURCES AND CONSERVATION; SPECIFYING THAT THE DEPARTMENT OF FISH, WILDLIFE, AND PARKS IS THE LESSEE AND ALLOWING THE DEPARTMENT TO ACCEPT CONTRIBUTIONS FROM PUBLIC OR PRIVATE ENTITIES FOR THE PURPOSE OF ACQUIRING LEASES; REQUIRING THE DEPARTMENT OF FISH, WILDLIFE, AND PARKS AND THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION TO COMPLETE A STUDY REPORT BY DECEMBER 1, 1990, THAT INCLUDES RECOMMENDATIONS ON WATER LEASING FOR STREAMFLOWS UNDER THIS ACT; APPROPRIATING FEDERAL SPECIAL REVENUE TO THE DEPARTMENT OF FISH, WILDLIFE, PARKS TO UNDERTAKE A WATER LEASING STUDY; AMENDING SECTIONS 85-2-102, 85-2-402, AND 85-2-404, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND A TERMINATION DATE."

2. Page 1, line 25 through page 4, line 14.

Strike: the statement of intent in its entirety

3. Pages 4 through 23.

Strike: everything following the enacting clause

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

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

(1) "Appropriate" means to:

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

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

(c) in the case of the department of fish, wildlife, and parks, to lease water in accordance with [section 6].

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

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

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

(c) a use of water by the department of fish, wildlife, and parks pursuant to a lease authorized under [section 6].

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

(4) "Certificate" means a certificate of water right issued by the department. (5) "Change in appropriation right" means a change in the place of diversion, the place of use, the purpose of use, or the place of storage.

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

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

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

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

~~(9)~~(10) "Groundwater" means any water beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water, and which is not a part of that surface water.

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

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

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

~~(13)~~(14) "Waste" means the unreasonable loss of water through the design or negligent operation of an appropriation or water distribution facility or the application of water to anything but a beneficial use.

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

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

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

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

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

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

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

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

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

(b) The Except for a lease authorization pursuant to [section 6] that does not require appropriation works, the proposed means of diversion, construction, and operation of the appropriation works are adequate.

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

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

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

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

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

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

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

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

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

(vi) the probable significant adverse environmental impacts of the proposed use of water as determined by the department

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pursuant to Title 75, chapter 1, or Title 75, chapter 20.

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

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

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

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

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

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

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

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

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

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

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

(iii) the supply and source of water available to the applicant in the state where the applicant intends to use the water; and

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

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

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

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

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

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

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

(11) A change in appropriation right contrary to the provisions of this section is invalid. ~~No~~ An officer, agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner ~~such an~~ unauthorized change in appropriation right. ~~No~~ A person or corporation may not, directly or indirectly, personally or through an agent, officer, or employee, attempt to change an appropriation right except in accordance with this section."

Section 3. Section 85-2-404, MCA, is amended to read:

"85-2-404. ~~Abandonment of appropriation right.~~ If an appropriator ceases to use all or a part of his appropriation right with the intention of wholly or partially abandoning the right or if he ceases using his appropriation right according to its terms and conditions with the intention of not complying with those terms

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and conditions, the appropriation right shall, to that extent, be ~~deemed~~ considered abandoned and shall immediately expire.

(2) If an appropriator ceases to use all or part of his appropriation right or ceases using his appropriation right according to its terms and conditions for a period of 10 successive years and there was water available for his use, there ~~shall be~~ is a prima facie presumption that the appropriator has abandoned his right in whole or for the part not used.

(3) If an appropriator ceases to use all or part of his appropriation right because the land to which the water is applied to a beneficial use is contracted under a state or federal conservation set-aside program:

(a) the set-aside and resulting reduction in use of the appropriation right does not represent an intent by the appropriator to wholly or partially abandon the appropriation right or to not comply with the terms and conditions attached to the right; and

(b) the period of nonuse that occurs for part or all of the appropriation right as a result of the contract may not create or may not be added to any previous period of nonuse to create a prima facie presumption of abandonment.

(4) The lease of an existing right pursuant to [section 6] does not constitute an abandonment by the lessor or serve as evidence that could be used to establish an abandonment by the lessor of any part of the right.

~~(4)~~(5) Subsections (1) and (2) do not apply to existing rights until they have been determined in accordance with part 2 of this chapter."

NEW SECTION. Section 4. Board designation of eligible stream reaches. (1) The department of fish, wildlife, and parks, with the consent of the commission, may apply to the board for designation of stream reaches for which water leasing to maintain or enhance streamflows pursuant to [section 4] may occur.

(2) The board may declare a stream reach eligible for leasing pursuant to [section 4] only if it finds that water leasing is necessary to maintain or enhance streamflows for fisheries.

(3) The board may designate no more than 5 stream reaches in the state where water leasing pursuant to [section 6] may occur.

NEW SECTION. Section 5. Contributions for leasing appropriation rights -- general spending authority. (1) The department may accept contributions from public or private entities for the purpose of leasing appropriation rights to maintain or enhance instream flows for the benefit of fisheries;

(a) Any contributions accepted by the department under this section must be deposited in the fish and wildlife mitigation trust fund established in 87-1-611.

(b) The department shall expend money obtained for and deposited in the fish and wildlife mitigation trust fund exclusively to lease existing rights for the purpose of maintaining

or enhancing instream flows for fisheries.

(2) The department may also expend other departmental funds to lease existing rights for the purpose of maintaining or enhancing instream flows for fisheries.

NEW SECTION. Section 6. Water leasing study. (1) The department of fish, wildlife, and parks and the department, in consultation with the water policy committee, shall conduct and coordinate a study that, at a minimum:

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

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

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

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

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

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

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

(2) For purposes of undertaking the study described in subsection (1) and as authorized by law, the department of fish, wildlife, and parks and the department may engage in the activities described in this subsection. [For purposes of this study, this section is the exclusive means by which the department of fish, wildlife, and parks may seek to change an appropriation right to an instream flow purpose.]

(a) The department of fish, wildlife, and parks, with the consent of the commission, may lease existing rights for the purpose of maintaining or enhancing streamflows for the benefit of fisheries in stream reaches determined eligible by the board pursuant to [section 4].

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

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(c) The application for a lease authorization must include specific information on the length and location of the stream reach in which the streamflow shall be maintained or enhanced and must provide a detailed streamflow measuring plan that describes the points where and the manner in which the streamflow shall be measured.

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

(e) The lease may not be issued for a term of more than 4 years but may be renewed for up to 10 years per renewal, if allowed by law and upon notification to the department. ☐ If this section terminates without reauthorization by the legislature, all leases and lease authorizations expire on the date of termination. Upon receiving notice of a lease renewal, the department shall notify other appropriators potentially affected by the lease and shall allow 30 days for submission of new evidence of adverse effects to other water rights. A lease authorization is not required for a renewal unless an appropriator, other than an appropriator described in subsection (2)(i), submits evidence of adverse effects to his rights that has not been considered previously. If new evidence is submitted, a lease authorization must be obtained according to the requirements of 85-2-402. (11)

(f) During the term of the original lease, the department may modify or revoke the lease authorization if an appropriator, other than an appropriator described in subsection (2)(i), proves by substantial credible evidence that his water right is adversely affected.

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

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

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

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

(3) A study report must be adopted by the board and commission and submitted to the water policy committee, which shall complete a final report by December 1, 1990.

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NEW SECTION. Section 7. Appropriation of federal revenue for water leasing study. For the biennium ending June 30, 1991, the department of fish, wildlife and parks may expend up to \$60,000 of federal special revenue to undertake the water leasing study required under [section 6].

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

NEW SECTION. Section 9. Codification instruction. (1) [Sections 4 and 6] are intended to be codified as an integral part of Title 85, chapter 2, part 4, and the provisions of Title 85, chapter 2, part 4, apply to [sections 4 and 6].

(2) [Section 5] is intended to be codified as an integral part of Title 87, chapter 1, part 6, and the provisions of Title 87, chapter 1, part 6, apply to [section 5].

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

NEW SECTION. Section 11. Termination. [This act] terminates June 30, 1993."

-END-

And that this Conference Committee Report be adopted.

FOR THE SENATE

FOR THE HOUSE

Sen. Galt, Chairman

Rep. O'Keefe, Chairman

Sen. Beck

Rep. Spaeth

Sen. Yellowtail

Rep. Grady

ADOPT

REJECT

Note: This gray bill is written in "introduced" bill form.

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR A PILOT PROGRAM TO LEASE WATER RIGHTS FOR THE PURPOSE OF MAINTAINING OR ENHANCING STREAMFLOWS FOR THE BENEFIT OF FISHERIES IN STREAM REACHES DESIGNATED BY THE BOARD OF NATURAL RESOURCES AND CONSERVATION; SPECIFYING THAT THE DEPARTMENT OF FISH, WILDLIFE, AND PARKS IS THE LESSEE AND ALLOWING THE DEPARTMENT TO ACCEPT CONTRIBUTIONS FROM PUBLIC OR PRIVATE ENTITIES FOR THE PURPOSE OF ACQUIRING LEASES; REQUIRING THE WATER POLICY COMMITTEE TO COMPLETE A THOROUGH REPORT BY DECEMBER 1, 1990, THAT INCLUDES RECOMMENDATIONS ON WATER LEASING FOR INSTREAM FLOWS UNDER THIS ACT; AMENDING SECTIONS 85-2-102, 85-2-402, AND 85-2-404, MCA; AND PROVIDING A TERMINATION DATE."

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

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

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

(1) "Appropriate" means to:

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

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

(c) in the case of the department of fish, wildlife, and parks, to lease water in accordance with [section 6].

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

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

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

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1 (c) a use of water by the department of fish, wildlife, and parks pursuant to
2 a lease authorized under [section 6].

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

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

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

8 (6) "Commission" means the fish and game commission provided for in 2-
9 15-3402.

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

12 ~~(7)~~(8) "Department" means the department of natural resources and
13 conservation provided for in Title 2, chapter 15, part 33.

14 ~~(8)~~(9) "Existing right" means a right to the use of water which would be
15 protected under the law as it existed prior to July 1, 1973.

16 ~~(9)~~(10) "Groundwater" means any water beneath the land surface or beneath
17 the bed of a stream, lake, reservoir, or other body of surface water, and which
18 is not a part of that surface water.

19 ~~(10)~~(11) "Permit" means the permit to appropriate issued by the department
20 under 85-2-301 through 85-2-303 and 85-2-306 through 85-2-314.

21 ~~(11)~~(12) "Person" means an individual, association, partnership, corporation,
22 state agency, political subdivision, the United States or any agency thereof, or
23 any other entity.

24 ~~(12)~~(13) "Political subdivision" means any county, incorporated city or town,
25 public corporation, or district created pursuant to state law or other public body
26 of the state empowered to appropriate water but not a private corporation,
27 association, or group.

28 ~~(13)~~(14) "Waste" means the unreasonable loss of water through the design or
29 negligent operation of an appropriation or water distribution facility or the
30 application of water to anything but a beneficial use.

31 ~~(14)~~(15) "Water" means all water of the state, surface and subsurface,
32 regardless of its character or manner of occurrence, including but not limited to
33 geothermal water, diffuse surface water, and sewage effluent.

34 ~~(15)~~(16) "Water division" means a drainage basin as defined in 3-7-102.

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1 ~~(16)~~(17) "Water judge" means a judge as provided for in Title 3, chapter 7.

2 ~~(17)~~(18) "Water master" means a master as provided for in Title 3, chapter

3 7.

4 ~~(18)~~(19) "Well" means any artificial opening or excavation in the ground,
5 however made, by which groundwater is sought or can be obtained or through
6 which it flows under natural pressures or is artificially withdrawn."

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

8 **"85-2-402. Changes in appropriation rights.** (1) An appropriator may not
9 make a change in an appropriation right except as permitted under this section
10 and with the approval of the department or, if applicable, of the legislature.

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

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

17 (b) The Except for a lease authorization pursuant to [section 6] that does not
18 require appropriation works, the proposed means of diversion, construction, and
19 operation of the appropriation works are adequate.

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

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

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

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

28 (i) the existing demands on the state water supply, as well as projected
29 demands of water for future beneficial purposes, including municipal water
30 supplies, irrigation systems, and minimum streamflows for the protection of
31 existing water rights and aquatic life;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

26 (7) The department or the legislature, if applicable, may approve a change
27 subject to ~~such~~ terms, conditions, restrictions, and limitations as it considers
28 necessary to satisfy the criteria of this section, including limitations on the time
29 for completion of the change. The department may extend time limits specified
30 in the change approval under the applicable criteria and procedures of 85-2-
31 312(3).

32 (8) If a change is not completed as approved by the department or
33 legislature or if the terms, conditions, restrictions, and limitations of the change
34 approval are not complied with, the department may, after notice and opportunity

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1 for hearing, require the appropriator to show cause why the change approval
2 should not be modified or revoked. If the appropriator fails to show sufficient
3 cause, the department may modify or revoke the change approval.

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

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

11 (11) A change in appropriation right contrary to the provisions of this section
12 is invalid. ~~No~~ An officer, agent, agency, or employee of the state may not
13 knowingly permit, aid, or assist in any manner ~~such an~~ unauthorized change in
14 appropriation right. ~~No~~ A person or corporation may not, directly or indirectly,
15 personally or through an agent, officer, or employee, attempt to change an
16 appropriation right except in accordance with this section."

17 Section 3. Section 85-2-404, MCA, is amended to read:

18 **"85-2-404. Abandonment of appropriation right.** (1) If an appropriator ceases
19 to use all or a part of his appropriation right with the intention of wholly or
20 partially abandoning the right or if he ceases using his appropriation right
21 according to its terms and conditions with the intention of not complying with
22 those terms and conditions, the appropriation right shall, to that extent, be
23 ~~deemed~~ considered abandoned and shall immediately expire.

24 (2) If an appropriator ceases to use all or part of his appropriation right or
25 ceases using his appropriation right according to its terms and conditions for a
26 period of 10 successive years and there was water available for his use, there
27 ~~shall be~~ is a prima facie presumption that the appropriator has abandoned his
28 right in whole or for the part not used.

29 (3) If an appropriator ceases to use all or part of his appropriation right
30 because the land to which the water is applied to a beneficial use is contracted
31 under a state or federal conservation set-aside program:

32 (a) the set-aside and resulting reduction in use of the appropriation right
33 does not represent an intent by the appropriator to wholly or partially abandon
34 the appropriation right or to not comply with the terms and conditions attached

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1 to the right; and

2 (b) the period of nonuse that occurs for part or all of the appropriation right
3 as a result of the contract may not create or may not be added to any
4 previous period of nonuse to create a prima facie presumption of abandonment.

5 (4) The lease of an existing right pursuant to [section 6] does not constitute
6 an abandonment by the lessor or serve as evidence that could be used to
7 establish an abandonment by the lessor of any part of the right.

8 ~~(4)(5)~~ Subsections (1) and (2) do not apply to existing rights until they have
9 been determined in accordance with part 2 of this chapter."

10 NEW SECTION. Section 4. Board designation of eligible stream reaches.

11 (1) The department of fish, wildlife, and parks, with the consent of the
12 commission, may apply to the board for designation of stream reaches for which
13 water leasing to maintain or enhance streamflows pursuant to [section 4] may
14 occur.

15 (2) The board may declare a stream reach eligible for leasing pursuant to
16 [section 4] only if it finds that water leasing is necessary to maintain or enhance
17 streamflows for fisheries.

18 (3) The board may designate no more than 5 stream reaches in the state
19 where water leasing pursuant to [section 6] may occur.

20 NEW SECTION. Section 5. Contributions for leasing appropriation rights --
21 **general spending authority.** (1) The department may accept contributions from
22 public or private entities for the purpose of leasing appropriation rights to
23 maintain or enhance instream flows for the benefit of fisheries;

24 (a) Any contributions accepted by the department under this section must be
25 deposited in the fish and wildlife mitigation trust fund established in 87-1-611.

26 (b) The department shall expend money obtained for and deposited in the
27 fish and wildlife mitigation trust fund exclusively to lease existing rights for the
28 purpose of maintaining or enhancing instream flows for fisheries.

29 (2) The department may also expend other departmental funds to lease
30 existing rights for the purpose of maintaining or enhancing instream flows for
31 fisheries.

32 NEW SECTION. Section 6. Water leasing study. (1) The water policy
33 committee, in cooperation with the department of fish, wildlife, and parks and the
34 department of natural resources and conservation, shall conduct and coordinate

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1 a study that, at a minimum:

2 (a) provides the following data for for each of the pilot leases:

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

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

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

8 (iv) contractual parameters, conditions, and other steps taken to ensure that
9 leases and lease authorizations in no way harm other appropriators, particularly
10 if the stream is one that experiences natural dewatering; and

11 (v) methods and technical means used to monitor use of water under the
12 leases;

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

16 (2) For purposes of undertaking the study described in subsection (1) and
17 as authorized by law, the department of fish, wildlife, and parks and the
18 department may engage in the activities described in this subsection.

19 (a) The department of fish, wildlife, and parks, with the consent of the
20 commission, may lease existing rights for the purpose of maintaining or
21 enhancing streamflows for the benefit of fisheries in stream reaches determined
22 eligible by the board pursuant to [section 4].

23 (b) The department shall authorize a lease of an existing right for the
24 purpose of maintaining or enhancing streamflows for the benefit of fisheries if the
25 applicant submits a complete application and meets the requirements of 85-2-
26 402.

27 (c) The application for a lease authorization must include specific information
28 on the length and location of the stream reach in which the streamflow will be
29 maintained or enhanced and must provide a detailed streamflow measuring plan
30 that describes the points where and the manner in which the streamflow will be
31 measured.

32 (d) The maximum quantity of water that may be leased is the amount
33 historically diverted by the lessor. However, only the amount historically
34 consumed, or a smaller amount if specified by the department in the lease

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1 authorization, may be used to maintain or enhance streamflows below the
2 lessor's point of diversion.

3 * (e) The lease may not be issued for a term of more than 4 years but may
4 be renewed for up to 10 years per renewal if allowed by law and upon
5 notification to the department. Upon receiving notice of a lease renewal, the
6 department shall notify other appropriators potentially affected by the lease and
7 shall allow 30 days for submission of new evidence of adverse effects to other
8 water rights. A lease authorization is not required for a renewal unless an
9 appropriator, other than an appropriator described in subsection (9), submits
10 evidence of adverse effects to his rights that has not been considered
11 previously. If new evidence is submitted, a lease authorization must be obtained
12 according to the requirements of 85-2-402.

13 (f) During the term of the original lease, the department may modify or
14 revoke the lease authorization if an appropriator, other than an appropriator
15 described in subsection (9), proves by substantial credible evidence that his
16 water right is adversely affected.

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

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

21 (i) A person issued a water use permit with a priority of appropriation after
22 the date of filing of an application for a lease authorization under this section
23 may not object to the exercise of the lease according to its terms, the renewal
24 of the lease, or the reversion of the appropriation right to the lessor according
25 to the lessor's previous use.

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

29 (3) A study report that includes findings and recommendations concerning
30 subsections (1) and (2) must be completed by December 1, 1990.

31 NEW SECTION. Section 7. Extension of authority. Any existing authority to
32 make rules on the subject of the provisions of [this act] is extended to the
33 provisions of [this act].

34 NEW SECTION. Section 8. Codification instruction. (1) [Sections 4 and 6]

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1 are intended to be codified as an integral part of Title 85, chapter 2, part 4,
2 and the provisions of Title 85, chapter 2, part 4, apply to [sections 4 and 6].

3 (2) [Section 5] is intended to be codified as an integral part of Title 87,
4 chapter 1, part 6, and the provisions of Title 87, chapter 1, part 6, apply to
5 [section 5].

6 NEW SECTION. Section 9. Termination. [This act] terminates June 30,
7 1993. -END-

8

SENATE COMMITTEE OF THE WHOLE AMENDMENT

page 1 of 2
April 14, 1989 11:56 am

Mr. Chairman: I move to amend HB 707 (third reading copy -- blue) as follows.

1. Amend the Senate Committee on Agriculture, Livestock and Irrigation amendments dated March 21, 1989, as follows:

Amendment no. 24

In Insert
Strike, "The department of fish, wildlife, and parks shall pay the cost, including reasonable attorney fees, for any proprietor who successfully objects to a proposed department of fish, wildlife, and parks lease."

Amendment no. 28.

Strike: "Strike: 'substantial credible'"
Insert: "a preponderance of the"

Amend third reading copy as follows:

2. Title.

Following, line 18

Insert: "REQUIRING THE WATER POLICY COMMITTEE TO COMPLETE A THOROUGH REPORT BY DECEMBER 1, 1990, THAT INCLUDES RECOMMENDATIONS ON THE PRACTICAL AND LEGAL WORKABILITY OF THIS ACT;"

3. Page 18.

Following, line 21

Insert: "NEW SECTION. Section 8. Report to legislature by water policy committee. (1) The water policy committee, in cooperation with the department of fish, wildlife, and parks and the department of natural resources and conservation, shall conduct and coordinate a study that, at a minimum:

(a) identifies a range of water leasing alternatives that may be considered in developing instream water leasing legislation;

(b) develops criteria for selecting stream reaches and evaluates and identifies five stream reaches where water leasing may be a feasible alternative;

(c) evaluates and pursues opportunities for voluntary water leasing in the identified stream reaches;

(d) provides the following data for each of the identified stream reaches:

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

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

- (iii) legal standards and technical data that may be used to determine and substantiate the amount of water available for instream flows through leasing of existing rights;
- (iv) contractual parameters, conditions, and other steps that may be taken to ensure that leases and lease authorizations in no way harm other appropriators, particularly if the stream is one that experiences natural dewatering;
- (v) methods and technical means that would be used to monitor use of water under the leases;
- (vi) legal implications that water leasing would present for appropriators holding existing rights to water within and below the stream reach;
- (vii) comparison of the costs and benefits of water leasing with the costs and benefits of additional storage for the stream reach;
- (viii) socioeconomic impacts that water leasing would have on local communities; and
- (ix) fiscal impacts that water leasing would have on the state of Montana;
- (f) based on the data provided under subsection (1)(d), develops a complete model of a possible water lease and lease authorization that includes a step-by-step explanation of the process from initiation to completion.
- (2) The report must be completed by December 1, 1990."

Renumber, subsequent sections

4. Page 19, line 11.
Strike, "October 1, 1990"
Insert: "June 30, 1991"

ADOPT

REJECT

Signed: 
Senator Beck

HB 707

SENATE

SENATE STANDING COMMITTEE REPORT

page 1 of 6
March 21, 1989

MR. PRESIDENT:

We, your committee on Agriculture, Livestock, and Irrigation, having had under consideration HB 707 (third reading copy -- blue), respectfully report that HB 707 be amended and as so amended be concurred in:

Sponsor: Iverson ()

1. Title, lines 8 and 9.

Following: "PURPOSE OF"

Strike: "ENHANCING OR MAINTAINING"

Insert: "PROVIDING"

2. Title, line 9.

Following: "FOR"

Strike: remainder of line 9

Insert: "THE BENEFIT OF FISHERIES"

3. Title, line 17.

Strike: "DEPARTMENT"

Insert: "BOARD"

4. Page 2, line 2.

Following: "of"

Strike: "maintaining or enhancing"

Insert: "providing"

5. Page 2, line 3.

Following: line 2

Strike: "fish, wildlife, or recreation"

Insert: "the benefit of fisheries"

6. Page 2, lines 6 and 7.

Strike: "enhance" on line 6 through "recreation" on line 7

Insert: "provide for fisheries"

7. Page 2, line 9.

Following: "parks"

Insert: "that have the approval of the fish and game commission"

8. Page 3, line 4.

Following: "conservation"

Strike: "will"

Insert: ", with the consent of the board, shall"

SENATE COMMITTEE ON AGRICULTURE, HB 707
page 2 of 6

9. Page 3, lines 23 and 24.

Following: "authorization" on line 23

Strike: remainder of line 23 through "contract" on line 24

10. Page 4, line 2.

Following: "conservation"

Strike: "should"

Insert: ", with the consent of the board, shall"

11. Page 4, line 5.

Following: "are not"

Strike: "or probably will not be"

12. Page 5, line 17.

Following: line 16

Insert: "(6) 'Commission' means the fish and game commission provided for in 2-15-3402."

Renumber: subsequent subsections

13. Page 14, line 13.

Following: "to"

Strike: "enhance or maintain"

Insert: "provide"

14. Page 14, line 14.

Following: "for"

Strike: "fish, wildlife, or recreation"

Insert: "benefit of fisheries"

15. Page 14, line 16.

Following: "parks"

Insert: ", with the consent of the commission, "

16. Page 14, lines 17 and 18.

Following: "of" on line 17

Strike: "maintaining or enhancing"

Insert: "providing"

Following: "for" on line 17

Strike: "fish, wildlife, or recreation"

Insert: "the benefit of fisheries"

17. Page 14, line 22.

Following: "department"

Insert: ", with the consent of the board, "

continued

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continued

SENATE
HB 707

18. Page 14, line 23.

Following: "of"
Strike: "maintaining or enhancing"
Insert: "providing"

19. Page 14, line 24.

Following: "for"
Strike: "fish, wildlife, or recreation"
Insert: "the benefit of fisheries"

20. Page 15, lines 5 and 6.

Following: "streamflow" on line 5
Strike: "will" through "enhanced" on line 6
Insert: "must be provided"
Following: "must" on line 6
Strike: "provide"
Insert: "include"

21. Page 15, line 8.

Strike: "will"
Insert: "must"

22. Page 15, line 12.

Strike: "lessor"
Insert: "lessor's crop, if applicable, and excluding water used as recharge or return flow"

23. Page 15, line 14.

Following: line 13
Strike: "enhance or maintain"
Insert: "provide"

24. Page 15, line 21.

Following: line 20
Insert: "(5) The department of fish, wildlife, and parks has the responsibility to prove to the board under 85-2-402 that a proposed lease authorization does not adversely affect existing water rights. The department of fish, wildlife, and parks shall pay the cost, including reasonable attorney fees, for any appropriator who successfully objects to a proposed department of fish, wildlife, and parks lease."
Renumber: subsequent subsections

25. Page 16, line 4.

Strike: "(9)"
Insert: "(10)"

continued

scrhb707.321

26. Page 16, line 6.

Following: "."
Insert: "If an appropriator proves adverse effects to his water rights, the department of fish, wildlife, and parks shall pay to the appropriator an amount equal to the damages that resulted from exercise of its lease and the costs of proving the adverse effects, including reasonable attorney fees and court costs. This provision applies only to water leases entered into under this section."

27. Page 16, line 8.

Following: "department"
Insert: ", with the consent of the board,"

28. Page 16, line 10.

Strike: "(9)"
Insert: "(10)"
Following: "by"
Strike: "substantial credible"
Insert: "a preponderance of the"

29. Page 16, line 11.

Following: "."
Insert: "If an appropriator proves adverse effects to his water rights, the department of fish, wildlife, and parks shall pay to the appropriator an amount equal to the damages that resulted from exercise of its lease and the costs of proving the adverse effects, including reasonable attorney fees and court costs. This provision applies only to water leases entered into under this section."

30. Page 17, line 5.

Following: "parks,"
Strike: "in consultation with the department"
Insert: "with the consent of the commission"

31. Page 17, line 7.

Following: "to"
Strike: "maintain or enhance"
Insert: "provide"

32. Page 17, line 12.

Following: line 11
Strike: "maintain" through "recreation"
Insert: "provide for fisheries"

continued

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33. Page 17, line 14.
Insert: "(3) Upon declaring a stream reach eligible for leasing, the board shall request the department to prepare an analysis concerning whether longer term solutions to the critical low flows in the stream reach are feasible. Longer term solutions to be considered include storage enhancement or development and recharge from ground water sources. The preparation of or recommendations resulting from the analysis may not preclude, inhibit, or delay the negotiation or implementation of leases on the stream reach as provided in [section 4]."
Renumber: subsequent subsection

34. Page 17, lines 21 through 23.
Following: "to" on line 21
Strike: "maintain" on line 21 through "enhance" on line 22
Insert: "provide"
Following: "for" on line 22
Strike: remainder of line 22 through "purposes" on line 23
Insert: "the benefit of fisheries"

35. Page 17, line 24 through page 18, line 1.
Following: "to" on line 24
Strike: remainder of line 24 through "ENHANCE" on line 25
Insert: "provide"
Following: "STREAMFLOWS" on line 25
Strike: remainder of line 25 through "PURPOSES" page 18, line 1

36. Page 18, line 8.
Following: "of"
Strike: "maintaining or enhancing"
Insert: "providing"

37. Page 18, line 9.
Following: "flows"
Strike: "for" through "recreation"

38. Page 18, lines 14 and 15.
Following: "to" on line 14
Strike: "MAINTAIN OR ENHANCE"
Insert: "provide"
Following: "STREAMFLOWS" on line 14
Strike: remainder of line 14 through "PURPOSES" on line 15

39. Page 18, line 19.
Strike: "DEPARTMENT" in two places
Insert: "board"

40. Page 19, line 2.
Following: "4"
Strike: "and"
Insert: ", "
Following: "5"
Insert: ", and 7"

41. Page 19, line 5.
Following: "4"
Strike: "and"
Insert: ", "
Following: "5"
Insert: ", and 7"

AND AS AMENDED BE CONCURRED IN

Signed:


Thomas A. Beck, Chairman

51st Legislature

HB 0707/04

HB 0707/04

1 HOUSE BILL NO. 707

2 INTRODUCED BY IVERSON, HARPER, GLASER, RANEY, O'KEEFE,

3 WALKER, SIMON, HANNAH, GRADY, HARP, MERCER, LYNCH,

4 BENGTON, DRISCOLL, YELLOWTAIL, MCLANE, BISHOP, D. BROWN

5 BY REQUEST OF THE GOVERNOR

6
7 A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR LEASING
8 OF EXISTING WATER RIGHTS FOR THE PURPOSE OF ENHANCING-OR
9 MAINTAINING PROVIDING STREAMFLOWS FOR FISH7--WILDLIFE7--OR
10 RECREATION THE BENEFIT OF FISHERIES DURING CRITICAL LOW FLOW
11 PERIODS IN STREAM REACHES DESIGNATED BY THE BOARD OF NATURAL
12 RESOURCES AND CONSERVATION; SPECIFYING THAT THE DEPARTMENT
13 OF FISH, WILDLIFE, AND PARKS IS THE LESSEE AND ALLOWING THE
14 DEPARTMENT TO ACCEPT CONTRIBUTIONS FROM PUBLIC OR PRIVATE
15 ENTITIES FOR THE PURPOSE OF ACQUIRING LEASES OR FOR
16 DEVELOPING STORAGE FACILITIES; SPECIFYING THAT THE
17 DEPARTMENT BOARD OF NATURAL RESOURCES AND CONSERVATION SHALL
18 MAKE A REPORT TO EACH REGULAR SESSION OF THE LEGISLATURE;
19 REQUIRING THE WATER POLICY COMMITTEE TO COMPLETE A THOROUGH
20 REPORT BY DECEMBER 1, 1990, THAT INCLUDES RECOMMENDATIONS ON
21 THE PRACTICAL AND LEGAL WORKABILITY OF THIS ACT; AMENDING
22 SECTIONS 85-2-102, 85-2-402, AND 85-2-404, MCA; AND
23 PROVIDING A TERMINATION DATE."

STATEMENT OF INTENT

1 A statement of intent is provided for this bill in
2 order to give additional guidance to the board of natural
3 resources and conservation and the involved state agencies
4 concerning the review and processing of lease applications
5 for the purpose of maintaining-or-enhancing PROVIDING stream
6 flows for fish7--wildlife7--or--recreation THE BENEFIT OF
7 FISHERIES.

8 The legislature intends that the board designate stream
9 reaches eligible for water leasing in areas where leasing is
10 necessary or--likely-to-be-necessary to enhance-or-maintain
11 fish7--wildlife7--or--recreation PROVIDE FOR FISHERIES. Upon
12 receipt of a list of stream reaches from the department of
13 fish, wildlife, and parks THAT HAVE THE APPROVAL OF THE FISH
14 AND GAME COMMISSION, the board shall act expeditiously to
15 designate eligible stream reaches. However, the legislature
16 also encourages the board to select stream reaches where
17 leasing has a good chance of success and where all interests
18 may be satisfied.

19 The legislature also intends that the review process
20 for lease applications be thorough and provide ample
21 opportunity for consideration and input by concerned
22 persons. As required in (section 4), the process should
23 involve notice and opportunity for objections and hearing in
24 the same manner provided for proposed changes in
25 appropriation rights. The legislature contemplates that the



1 department of fish, wildlife, and parks will meet with
 2 appropriators along each designated stream reach to assess
 3 and consider any concerns before filing applications for
 4 lease authorizations. The legislature also encourages the
 5 department of fish, wildlife, and parks to assemble lease
 6 applications for filing at the same time to minimize costs
 7 to potential objectors. Moreover, the legislature
 8 anticipates that the department of natural resources and
 9 conservation ~~will~~, WITH THE CONSENT OF THE BOARD, SHALL
 10 review the proposed leases for a single stream reach in one
 11 proceeding, though the potential for another set of lease
 12 applications at a future date is recognized.

13 The accurate identification of the stream reach in both
 14 the application and lease authorization is critical to a
 15 successful leasing program. Upon issuance of a lease
 16 authorization with an identified stream reach, the
 17 legislature intends that the entire leased appropriation may
 18 be protected to the extent provided under Title 85, chapter
 19 2, in any part of the stream reach that is above the
 20 lessor's point of diversion. However, only the historical
 21 consumptive use of the right, or a smaller amount if
 22 specified in the lease authorization by the department of
 23 natural resources and conservation, may be protected in any
 24 part of the stream reach that is below the lessor's point of
 25 diversion. Finally, the legislature intends for the lessor

1 to be responsible for taking action, if necessary, to
 2 protect the instream flow amount specified in the lease
 3 authorization, ~~though the lessor--and--lessee--may--specify~~
 4 ~~otherwise--by--contract.~~
 5 From a broad policy perspective, the legislature
 6 desires to emphasize that the department of natural
 7 resources and conservation should, WITH THE CONSENT OF THE
 8 BOARD, SHALL consider and, if potentially feasible,
 9 recommend supplemental or alternative strategies that
 10 provide long-term solutions to problems that are not or
 11 probably ~~will~~ ~~not~~ be addressed adequately by water leasing
 12 in the board-designated stream reaches. These strategies may
 13 include storage enhancement or development and recharge from
 14 ground water sources.

15
 16 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

17 **Section 1.** Section 85-2-102, MCA, is amended to read:
 18 "85-2-102. Definitions. Unless the context requires
 19 otherwise, in this chapter the following definitions apply:

20 (1) "Appropriate" means to:

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

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

25 (c) in the case of the department of fish, wildlife,

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1 and parks, to lease water in accordance with [section 4].

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

3 means:

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

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

13 (C) A USE OF WATER BY THE DEPARTMENT OF FISH,
14 WILDLIFE, AND PARKS PURSUANT TO A LEASE AUTHORIZED UNDER
15 [SECTION 4].

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

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

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

23 (6) "COMMISSION" MEANS THE FISH AND GAME COMMISSION
24 PROVIDED FOR IN 2-15-3402.

25 (6)(7) "Declaration" means the declaration of an

1 existing right filed with the department under section 8,
2 Chapter 452, Laws of 1973.

3 (7)(8) "Department" means the department of natural
4 resources and conservation provided for in Title 2, chapter
5 15, part 33.

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

9 (9)(10) "Groundwater" means any water beneath the land
10 surface or beneath the bed of a stream, lake, reservoir, or
11 other body of surface water, and which is not a part of that
12 surface water.

13 (10)(11) "Permit" means the permit to appropriate
14 issued by the department under 85-2-301 through 85-2-303 and
15 85-2-306 through 85-2-314.

16 (11)(12) "Person" means an individual, association,
17 partnership, corporation, state agency, political
18 subdivision, the United States or any agency thereof, or any
19 other entity.

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

25 (13)(14) "Waste" means the unreasonable loss of water

1 through the design or negligent operation of an
 2 appropriation or water distribution facility or the
 3 application of water to anything but a beneficial use.

4 ~~†147(15)~~ "Water" means all water of the state, surface
 5 and subsurface, regardless of its character or manner of
 6 occurrence, including but not limited to geothermal water,
 7 diffuse surface water, and sewage effluent.

8 ~~†157(16)~~ "Water division" means a drainage basin as
 9 defined in 3-7-102.

10 ~~†167(17)~~ "Water judge" means a judge as provided for in
 11 Title 3, chapter 7.

12 ~~†177(18)~~ "Water master" means a master as provided for
 13 in Title 3, chapter 7.

14 ~~†187(19)~~ "Well" means any artificial opening or
 15 excavation in the ground, however made, by which groundwater
 16 is sought or can be obtained or through which it flows under
 17 natural pressures or is artificially withdrawn."

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

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

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

1 that the following criteria are met:

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

6 (b) The Except for a lease authorization pursuant to
 7 [section 4] that does not require appropriation works, the
 8 proposed means of diversion, construction, and operation of
 9 the appropriation works are adequate.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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1 section.

2 (11) A change in appropriation right contrary to the
3 provisions of this section is invalid. No An officer,
4 agent, agency, or employee of the state may not knowingly
5 permit, aid, or assist in any manner such an unauthorized
6 change in appropriation right. No A person or corporation
7 may not, directly or indirectly, personally or through an
8 agent, officer, or employee, attempt to change an
9 appropriation right except in accordance with this section."

10 Section 3. Section 85-2-404, MCA, is amended to read:

11 *85-2-404. Abandonment of appropriation right. (1) If
12 an appropriator ceases to use all or a part of his
13 appropriation right with the intention of wholly or
14 partially abandoning the right or if he ceases using his
15 appropriation right according to its terms and conditions
16 with the intention of not complying with those terms and
17 conditions, the appropriation right shall, to that extent,
18 be deemed considered abandoned and shall immediately expire.

19 (2) If an appropriator ceases to use all or part of
20 his appropriation right or ceases using his appropriation
21 right according to its terms and conditions for a period of
22 10 successive years and there was water available for his
23 use, there ~~shall~~-be is a prima facie presumption that the
24 appropriator has abandoned his right in whole or for the
25 part not used.

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1 (3) If an appropriator ceases to use all or part of
2 his appropriation right because the land to which the water
3 is applied to a beneficial use is contracted under a state
4 or federal conservation set-aside program:

5 (a) the set-aside and resulting reduction in use of
6 the appropriation right does not represent an intent by the
7 appropriator to wholly or partially abandon the
8 appropriation right or to not comply with the terms and
9 conditions attached to the right; and

10 (b) the period of nonuse that occurs for part or all
11 of the appropriation right as a result of the contract may
12 not create or may not be added to any previous period of
13 nonuse to create a prima facie presumption of abandonment.

14 (4) The lease of an existing right pursuant to
15 [section 4] does not constitute an abandonment by the lessor
16 or serve as evidence that could be used to establish an
17 abandonment by the lessor of any part of the right.

18 (4)(5) Subsections (1) and (2) do not apply to
19 existing rights until they have been determined in
20 accordance with part 2 of this chapter."

21 NEW SECTION. Section 4. Leases to enhance or maintain
22 streamflows for fish,--wildlife,--or---recreation
23 BENEFIT OF FISHERIES -- department authorization. (1) The
24 AFTER JULY 1, 1991, THE department of fish, wildlife, and
25 parks, WITH THE CONSENT OF THE COMMISSION, may lease

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1 existing rights for the purpose of maintaining-or--enhancing
 2 PROVIDING streamflows for fish-wildlife-or-recreation THE
 3 BENEFIT OF FISHERIES DURING CRITICAL LOW FLOW PERIODS in
 4 stream reaches determined eligible by the board pursuant to
 5 [section 5]. This section is the exclusive means by which
 6 appropriations may be changed to an instream flow purpose.

7 (2) The department, WITH THE CONSENT OF THE BOARD,
 8 shall authorize a lease of an existing right for the purpose
 9 of maintaining-or-enhancing PROVIDING streamflows for fish
 10 wildlife-or-recreation THE BENEFIT OF FISHERIES DURING
 11 CRITICAL LOW FLOW PERIODS in an eligible stream reach if the
 12 applicant submits a completed application and meets the
 13 requirements of 85-2-402.

14 (3) The application for a lease authorization must
 15 include specific information on the length and location of
 16 the stream reach in which the streamflow will-be--maintained
 17 or--enhanced MUST BE PROVIDED and must provide INCLUDE a
 18 detailed streamflow measuring plan that describes the points
 19 where and the manner in which the streamflow will MUST be
 20 measured.

21 (4) The maximum quantity of water that may be leased
 22 is the amount historically diverted by the lessor. However,
 23 OF THE AMOUNT LEASED, only the amount historically consumed
 24 by the lessor LESSOR'S CROP, IF APPLICABLE, AND EXCLUDING
 25 WATER USED AS RECHARGE OR RETURN FLOW, or a smaller amount

1 if specified by the department in the lease authorization,
 2 may be used to enhance-or-maintain PROVIDE streamflows below
 3 the lessor's point of diversion. THE LEASE MUST TAKE INTO
 4 ACCOUNT THE HISTORICAL USE OF THE WATER RIGHT, INCLUDING BUT
 5 NOT LIMITED TO THE USUAL SHUTOFF OF ALL OR A PORTION OF THE
 6 WATER SUBJECT TO THE WATER RIGHT DUE TO NORMAL IRRIGATION
 7 PRACTICES, HARVESTING, NORMAL CLIMATE CONDITIONS, AND
 8 COOPERATIVE PRACTICES WITH OTHER IRRIGATORS.

9 (5) THE DEPARTMENT OF FISH, WILDLIFE, AND PARKS HAS
 10 THE RESPONSIBILITY TO PROVE TO THE BOARD UNDER 85-2-402 THAT
 11 A PROPOSED LEASE AUTHORIZATION DOES NOT ADVERSELY AFFECT
 12 EXISTING WATER RIGHTS. THE-DEPARTMENT-OF-FISH-WILDLIFE-AND
 13 PARKS--SHALL--PAY--THE--COST--INCLUDING-REASONABLE-ATTORNEY
 14 FEES--FOR-ANY-APPROPRIATOR-WHO--SUCCEEDS-PUBLY--OBJECTS--TO--A
 15 PROPOSED-DEPARTMENT-OF-FISH-WILDLIFE-AND-PARKS-LEASE.

16 (5)(6) The lease may not be issued for a term of more
 17 than 10 years but may be renewed for up to 10 years per
 18 renewal upon notification to the department. Upon receiving
 19 notice of a lease renewal, the department shall notify other
 20 appropriators potentially affected by the lease and shall
 21 allow 30 days for submission of new evidence of adverse
 22 effects to other water rights. A lease authorization is not
 23 required for a renewal unless an appropriator, other than an
 24 appropriator described in subsection (9) [10], submits
 25 evidence of adverse effects to his rights that has not been

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1 considered previously. IF AN APPROPRIATOR PROVES ADVERSE
 2 EFFECTS TO HIS WATER RIGHTS, THE DEPARTMENT OF FISH,
 3 WILDLIFE, AND PARKS SHALL PAY TO THE APPROPRIATOR AN AMOUNT
 4 EQUAL TO THE DAMAGES THAT RESULTED FROM EXERCISE OF ITS
 5 LEASE AND THE COSTS OF PROVING THE ADVERSE EFFECTS,
 6 INCLUDING REASONABLE ATTORNEY FEES AND COURT COSTS. THIS
 7 PROVISION APPLIES ONLY TO WATER LEASES ENTERED INTO UNDER
 8 THIS SECTION.

9 {6}(7) During the term of the original lease, the
 10 department, WITH THE CONSENT OF THE BOARD, may modify or
 11 revoke the lease authorization if an appropriator, other
 12 than an appropriator described in subsection {9}(10),
 13 proves by substantial--credible SUBSTANTIAL CREDIBLE A
 14 PREPONDERANCE--OF--THE evidence that his water right is
 15 adversely affected. IF AN APPROPRIATOR PROVES ADVERSE
 16 EFFECTS TO HIS WATER RIGHTS, THE DEPARTMENT OF FISH,
 17 WILDLIFE, AND PARKS SHALL PAY TO THE APPROPRIATOR AN AMOUNT
 18 EQUAL TO THE DAMAGES THAT RESULTED FROM EXERCISE OF ITS
 19 LEASE AND THE COSTS OF PROVING THE ADVERSE EFFECTS,
 20 INCLUDING REASONABLE ATTORNEY FEES AND COURT COSTS. THIS
 21 PROVISION APPLIES ONLY TO WATER LEASES ENTERED INTO UNDER
 22 THIS SECTION.

23 {7}(8) The priority of appropriation for a lease under
 24 this section is the same as the priority of appropriation of
 25 the right that is leased.

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1 {8}(9) Neither a change in appropriation right nor any
 2 other authorization is required for the reversion of the
 3 appropriation right to the lessor's previous use.
 4 {9}(10) A person issued a water use permit with a
 5 priority of appropriation after the date of filing of an
 6 application for a lease authorization under this section may
 7 not object to the exercise of the lease according to its
 8 terms, the renewal of the lease, or the reversion of the
 9 appropriation right to the lessor according to the lessor's
 10 previous use.

11 {10}(11) THE DEPARTMENT OF FISH, WILDLIFE, AND PARKS
 12 SHALL PAY ALL COSTS ASSOCIATED WITH INSTALLING MEASURING
 13 DEVICES OR PROVIDING PERSONNEL TO MEASURE STREAMFLOWS
 14 ACCORDING TO THE MEASURING PLAN SUBMITTED UNDER THIS
 15 SECTION.

16 NEW SECTION. Section 5. Board designation of eligible
 17 stream reaches. (1) The department of fish, wildlife, and
 18 parks, in consultation with the department with the consent
 19 of the commission, may apply to the board for designation of
 20 stream reaches for which water leasing to maintain or
 21 enhance provide streamflows pursuant to [section 4] may
 22 occur.

23 (2) The board may declare a stream reach eligible for
 24 leasing pursuant to [section 4] only if it finds that water
 25 leasing is necessary or is likely to be necessary to

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1 maintain-or-enhance-fish7-wildlife--or--recreation PROVIDE
 2 FOR FISHERIES DURING CRITICAL LOW FLOW PERIODS.

3 (3) UPON DECLARING A STREAM REACH ELIGIBLE FOR
 4 LEASING, THE BOARD SHALL REQUEST THE DEPARTMENT TO PREPARE
 5 AN ANALYSIS CONCERNING WHETHER LONGER TERM SOLUTIONS TO THE
 6 CRITICAL LOW FLOWS IN THE STREAM REACH ARE FEASIBLE. LONGER
 7 TERM SOLUTIONS TO BE CONSIDERED INCLUDE STORAGE ENHANCEMENT
 8 OR DEVELOPMENT AND RECHARGE FROM GROUND WATER SOURCES. THE
 9 PREPARATION OF OR RECOMMENDATIONS RESULTING FROM THE
 10 ANALYSIS MAY NOT PRECLUDE, INHIBIT, OR DELAY THE NEGOTIATION
 11 OR IMPLEMENTATION OF LEASES ON THE STREAM REACH AS PROVIDED
 12 IN [SECTION 4].

13 (3)(4) The board may designate no more than 10 stream
 14 reaches in the state where water leasing pursuant to
 15 [section 4] may occur.

16 NEW SECTION. Section 6. Contributions for leasing
 17 appropriation rights OR DEVELOPING STORAGE FACILITIES. (1)
 18 The department may accept contributions from public or
 19 private entities for the purpose of:

20 (A) leasing appropriation rights to maintain--or
 21 enhance PROVIDE instream flows for fish7--wildlife--or
 22 recreation--purposes THE BENEFIT OF FISHERIES; OR

23 (B) DEVELOPING STORAGE FACILITIES TO MAINTAIN--OR
 24 ENHANCE PROVIDE STREAMFLOWS FOR-FISH7-WILDLIFE7--RECREATION7
 25 AND-OTHER-PURPOSES.

1 (2) Any contributions accepted by the department under
 2 this section must be deposited in the fish and wildlife
 3 mitigation trust fund established in 87-1-611.

4 (3) The department shall expend money obtained under
 5 this-section SUBSECTION (1)(A) and deposited in the fish and
 6 wildlife mitigation trust fund EXCLUSIVELY to lease existing
 7 rights for the purpose of maintaining-or-enhancing PROVIDING
 8 instream flows for--fish7--wildlife7--or-recreation UNLESS
 9 EXPENDITURE FOR A DIFFERENT PURPOSE IS AUTHORIZED PURSUANT
 10 TO 87-1-614.

11 (4) THE DEPARTMENT SHALL EXPEND MONEY OBTAINED UNDER
 12 SUBSECTION (1)(B) AND DEPOSITED IN THE FISH AND WILDLIFE
 13 MITIGATION TRUST FUND EXCLUSIVELY TO DEVELOP STORAGE
 14 FACILITIES TO MAINTAIN-OR-ENHANCE PROVIDE STREAMFLOWS FOR
 15 FISH7--WILDLIFE7--RECREATION7--AND--OTHER-PURPOSES UNLESS AN
 16 EXPENDITURE FOR OTHER PURPOSES IS AUTHORIZED PURSUANT TO
 17 87-1-614.

18 NEW SECTION. SECTION 7. REPORT TO THE LEGISLATURE --
 19 BY THE DEPARTMENT BOARD. THE DEPARTMENT BOARD SHALL REPORT
 20 TO EACH REGULAR SESSION OF THE LEGISLATURE AS TO THE
 21 OPERATION OF [THIS ACT].

22 NEW SECTION. SECTION 8. REPORT TO LEGISLATURE BY
 23 WATER POLICY COMMITTEE. (1) THE WATER POLICY COMMITTEE, IN
 24 COOPERATION WITH THE DEPARTMENT OF FISH, WILDLIFE, AND PARKS
 25 AND THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION,

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1 SHALL CONDUCT AND COORDINATE A STUDY THAT, AT A MINIMUM:
2 (A) IDENTIFIES A RANGE OF WATER LEASING ALTERNATIVES
3 THAT MAY BE CONSIDERED IN DEVELOPING INSTREAM WATER LEASING
4 LEGISLATION;
5 (B) DEVELOPS CRITERIA FOR SELECTING STREAM REACHES AND
6 EVALUATES AND IDENTIFIES FIVE STREAM REACHES WHERE WATER
7 LEASING MAY BE A FEASIBLE ALTERNATIVE;
8 (C) EVALUATES AND PURSUES OPPORTUNITIES FOR VOLUNTARY
9 WATER LEASING IN THE IDENTIFIED STREAM REACHES;
10 (D) PROVIDES THE FOLLOWING DATA FOR EACH OF THE
11 IDENTIFIED STREAM REACHES:
12 (I) THE LENGTH OF THE STREAM REACH AND HOW IT IS
13 DETERMINED;
14 (II) TECHNICAL METHODS AND DATA TO BE USED TO DETERMINE
15 CRITICAL STREAMFLOW OR VOLUME NEEDED TO PRESERVE FISHERIES;
16 (III) LEGAL STANDARDS AND TECHNICAL DATA THAT MAY BE
17 USED TO DETERMINE AND SUBSTANTIATE THE AMOUNT OF WATER
18 AVAILABLE FOR INSTREAM FLOWS THROUGH LEASING OF EXISTING
19 RIGHTS;
20 (IV) CONTRACTUAL PARAMETERS, CONDITIONS, AND OTHER
21 STEPS THAT MAY BE TAKEN TO ENSURE THAT LEASES AND LEASE
22 AUTHORIZATIONS IN NO WAY HARM OTHER APPROPRIATORS,
23 PARTICULARLY IF THE STREAM IS ONE THAT EXPERIENCES NATURAL
24 DEWATERING;
25 (V) METHODS AND TECHNICAL MEANS THAT WOULD BE USED TO

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1 MONITOR USE OF WATER UNDER THE LEASES;
2 (VI) LEGAL IMPLICATIONS THAT WATER LEASING WOULD
3 PRESENT FOR APPROPRIATORS HOLDING EXISTING RIGHTS TO WATER
4 WITHIN AND BELOW THE STREAM REACH;
5 (VII) COMPARISON OF THE COSTS AND BENEFITS OF WATER
6 LEASING WITH THE COSTS AND BENEFITS OF ADDITIONAL STORAGE
7 FOR THE STREAM REACH;
8 (VIII) SOCIOECONOMIC IMPACTS THAT WATER LEASING WOULD
9 HAVE ON LOCAL COMMUNITIES; AND
10 (IX) FISCAL IMPACTS THAT WATER LEASING WOULD HAVE ON
11 THE STATE OF MONTANA;
12 (E) BASED ON THE DATA PROVIDED UNDER SUBSECTION
13 (1)(D), DEVELOPS A COMPLETE MODEL OF A POSSIBLE WATER LEASE
14 AND LEASE AUTHORIZATION THAT INCLUDES A STEP-BY-STEP
15 EXPLANATION OF THE PROCESS FROM INITIATION TO COMPLETION.
16 (2) THE REPORT MUST BE COMPLETED BY DECEMBER 1, 1990.
17 NEW SECTION. Section 9. Extension of authority. Any
18 existing authority to make rules on the subject of the
19 provisions of [this act] is extended to the provisions of
20 [this act].
21 NEW SECTION. Section 10. Codification instruction.
22 (1) [Sections 4 and, 5, AND 7] are intended to be codified
23 as an integral part of Title 85, chapter 2, part 4, and the
24 provisions of Title 85, chapter 2, part 4, apply to
25 [sections 4 and, 5, AND 7].

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1 (2) [Section 6] is intended to be codified as an
2 integral part of Title 87, chapter 1, part 6, and the
3 provisions of Title 87, chapter 1, part 6, apply to [section
4 6].

5 NEW SECTION. Section 11. Termination. [This act]
6 terminates October-17-1999 JUNE 30, 1991.

-End-

#1

Gray House Bill No. 707 -- Unofficial BILL NO. HB 707
March 17, 1989

1 A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR LEASING OF
2 EXISTING WATER RIGHTS FOR THE PURPOSE OF ~~ENHANCING OR~~
3 ~~MAINTAINING PROVIDING~~ STREAMFLOWS FOR FISH, WILDLIFE, OR
4 ~~RECREATION~~ THE BENEFIT OF FISHERIES DURING CRITICAL LOW FLOW
5 PERIODS IN STREAM REACHES DESIGNATED BY THE BOARD OF NATURAL
6 RESOURCES AND CONSERVATION; SPECIFYING THAT THE DEPARTMENT OF
7 FISH, WILDLIFE, AND PARKS IS THE LESSEE AND ALLOWING THE
8 DEPARTMENT TO ACCEPT CONTRIBUTIONS FROM PUBLIC OR PRIVATE
9 ENTITIES FOR THE PURPOSE OF ACQUIRING LEASES OR FOR DEVELOPING
10 STORAGE FACILITIES; SPECIFYING THAT THE DEPARTMENT BOARD OF
11 NATURAL RESOURCES AND CONSERVATION SHALL MAKE A REPORT TO
12 EACH REGULAR SESSION OF THE LEGISLATURE; AMENDING SECTIONS 85-
13 2-102, 85-2-402, AND 85-2-404, MCA; AND PROVIDING A TERMINATION DATE."

14
15
16 STATEMENT OF INTENT

17 A statement of intent is provided for this bill in order to give additional
18 guidance to the board of natural resources and conservation and the involved
19 state agencies concerning the review and processing of lease applications for
20 the purpose of ~~maintaining or enhancing~~ PROVIDING stream flows for fish,
21 ~~wildlife, or recreation~~ THE BENEFIT OF FISHERIES.

22 The legislature intends that the board designate stream reaches eligible for
23 water leasing in areas where leasing is necessary ~~or likely to be necessary~~ to
24 ~~enhance or maintain fish, wildlife, or recreation~~ PROVIDE FOR FISHERIES.

25 Upon receipt of a list of stream reaches from the department of fish, wildlife,
26 and parks THAT HAVE THE APPROVAL OF THE FISH AND GAME
27 COMMISSION, the board shall act expeditiously to designate eligible stream
28 reaches. However, the legislature also encourages the board to select stream
29 reaches where leasing has a good chance of success and where all interests
30 may be satisfied.

31 The legislature also intends that the review process for lease applications be
32 thorough and provide ample opportunity for consideration and input by concerned
33 persons. As required in [section 4], the process should involve notice and
34 opportunity for objections and hearing in the same manner provided for proposed

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1 changes in appropriation rights. The legislature contemplates that the department
2 of fish, wildlife, and parks will meet with appropriators along each designated
3 stream reach to assess and consider any concerns before filing applications for
4 lease authorizations. The legislature also encourages the department of fish,
5 wildlife, and parks to assemble lease applications for filing at the same time to
6 minimize costs to potential objectors. Moreover, the legislature anticipates that
7 the department of natural resources and conservation will WITH THE
8 CONSENT OF THE BOARD, SHALL review the proposed leases for a single
9 stream reach in one proceeding, though the potential for another set of lease
10 applications at a future date is recognized.

11 The accurate identification of the stream reach in both the application and
12 lease authorization is critical to a successful leasing program. Upon issuance of
13 a lease authorization with an identified stream reach, the legislature intends that
14 the entire leased appropriation may be protected to the extent provided under
15 Title 85, chapter 2, in any part of the stream reach that is above the lessor's
16 point of diversion. However, only the historical consumptive use of the right, or a
17 smaller amount if specified in the lease authorization by the department of
18 natural resources and conservation, may be protected in any part of the stream
19 reach that is below the lessor's point of diversion. Finally, the legislature intends
20 for the lessor to be responsible for taking action, if necessary, to protect the
21 instream flow amount specified in the lease authorization, ~~though the lessor and~~
22 ~~lessee may specify otherwise by contract.~~

23 From a broad policy perspective, the legislature desires to emphasize that
24 the department of natural resources and conservation ~~should~~ WITH THE
25 CONSENT OF THE BOARD, SHALL consider and, if potentially feasible,
26 recommend supplemental or alternative strategies that provide long-term solutions
27 to problems that are not ~~or probably will not be~~ addressed adequately by water
28 leasing in the board-designated stream reaches. These strategies may include
29 storage enhancement or development and recharge from ground water sources.

30

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

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

33 "85-2-102. Definitions. Unless the context requires otherwise, in this chapter
34 the following definitions apply:

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(1) "Appropriate" means to:

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

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

(c) in the case of the department of fish, wildlife, and parks, to lease water in accordance with [section 4].

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

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

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

(C) A USE OF WATER BY THE DEPARTMENT OF FISH, WILDLIFE, AND PARKS PURSUANT TO A LEASE AUTHORIZED UNDER [SECTION 4].

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

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

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

(6) "COMMISSION" MEANS THE FISH AND GAME COMMISSION PROVIDED FOR IN 2-15-3402.

~~(6)~~(7) "Declaration" means the declaration of an existing right filed with the department under section 8, Chapter 452, Laws of 1973.

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

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

~~(9)~~(10) "Groundwater" means any water beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water, and which is not a part of that surface water.

~~(10)~~(11) "Permit" means the permit to appropriate issued by the department

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

2 ~~(11)~~(12) "Person" means an individual, association, partnership, corporation,
3 state agency, political subdivision, the United States or any agency thereof, or
4 any other entity.

5 ~~(12)~~(13) "Political subdivision" means any county, incorporated city or town,
6 public corporation, or district created pursuant to state law or other public body
7 of the state empowered to appropriate water but not a private corporation,
8 association, or group.

9 ~~(13)~~(14) "Waste" means the unreasonable loss of water through the design or
10 negligent operation of an appropriation or water distribution facility or the
11 application of water to anything but a beneficial use.

12 ~~(14)~~(15) "Water" means all water of the state, surface and subsurface,
13 regardless of its character or manner of occurrence, including but not limited to
14 geothermal water, diffuse surface water, and sewage effluent.

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

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

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

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

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

23 "85-2-402. Changes in appropriation rights. (1) An appropriator may not
24 make a change in an appropriation right except as permitted under this section
25 and with the approval of the department or, if applicable, of the legislature.

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

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

32 (b) The Except for a lease authorization pursuant to [section 4] that does
33 not require appropriation works, the proposed means of diversion, construction,
34 and operation of the appropriation works are adequate.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

22 (ii) whether the water that is the subject of the proposed change in
23 appropriation might feasibly be transported to alleviate water shortages within the
24 state of Montana;

25 (iii) the supply and sources of water available to the applicant in the state
26 where the applicant intends to use the water; and

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

29 (d) When applying for a change in appropriation right to withdraw and
30 transport water for use outside the state, the applicant shall submit to and
31 comply with the laws of the state of Montana governing the appropriation and
32 use of water.

33 (6) For any application for a change in appropriation right involving 4,000 or
34 more acre-feet of water a year and 5.5 or more cubic feet per second of water,

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

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

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

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

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

26 (11) A change in appropriation right contrary to the provisions of this section
27 is invalid. ~~No~~ An officer, agent, agency, or employee of the state may not
28 knowingly permit, aid, or assist in any manner ~~such~~ an unauthorized change in
29 appropriation right. ~~No~~ A person or corporation may not, directly or indirectly,
30 personally or through an agent, officer, or employee, attempt to change an
31 appropriation right except in accordance with this section."

32 Section 3. Section 85-2-404, MCA, is amended to read:

33 "85-2-404. Abandonment of appropriation right. (1) If an appropriator ceases
34 to use all or a part of his appropriation right with the intention of wholly or

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1 partially abandoning the right or if he ceases using his appropriation right
2 according to its terms and conditions with the intention of not complying with
3 those terms and conditions, the appropriation right shall, to that extent, be
4 ~~deemed~~ considered abandoned and shall immediately expire.

5 (2) If an appropriator ceases to use all or part of his appropriation right or
6 ceases using his appropriation right according to its terms and conditions for a
7 period of 10 successive years and there was water available for his use, there
8 ~~shall be~~ is a prima facie presumption that the appropriator has abandoned his
9 right in whole or for the part not used.

10 (3) If an appropriator ceases to use all or part of his appropriation right
11 because the land to which the water is applied to a beneficial use is contracted
12 under a state or federal conservation set-aside program:

13 (a) the set-aside and resulting reduction in use of the appropriation right
14 does not represent an intent by the appropriator to wholly or partially abandon
15 the appropriation right or to not comply with the terms and conditions attached
16 to the right; and

17 (b) the period of nonuse that occurs for part or all of the appropriation right
18 as a result of the contract may not create or may not be added to any
19 previous period of nonuse to create a prima facie presumption of abandonment.

20 (4) The lease of an existing right pursuant to [section 4] does not constitute
21 an abandonment by the lessor or serve as evidence that could be used to
22 establish an abandonment by the lessor of any part of the right.

23 ~~(4)(5)~~ Subsections (1) and (2) do not apply to existing rights until they have
24 been determined in accordance with part 2 of this chapter."

25 NEW SECTION. Section 4. ~~Leases to enhance or maintain~~ PROVIDE
26 streamflows for fish, wildlife, or recreation THE BENEFIT OF FISHERIES -
27 department authorization. (1) The AFTER JULY 1, 1991, THE department of fish,
28 wildlife, and parks , WITH THE CONSENT OF THE COMMISSION, may lease
29 existing rights for the purpose of ~~maintaining or enhancing~~ PROVIDING
30 streamflows for fish, wildlife, or recreation THE BENEFIT OF FISHERIES DURING
31 CRITICAL LOW FLOW PERIODS in stream reaches determined eligible by the
32 board pursuant to [section 5]. This section is the exclusive means by which
33 appropriations may be changed to an instream flow purpose.

34 (2) The department , WITH THE CONSENT OF THE BOARD, shall authorize

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1 a lease of an existing right for the purpose of ~~maintaining or enhancing~~
2 PROVIDING streamflows for fish, wildlife, or recreation THE BENEFIT OF
3 FISHERIES DURING CRITICAL LOW FLOW PERIODS in an eligible stream
4 reach if the applicant submits a completed application and meets the
5 requirements of 85-2-402.

6 (3) The application for a lease authorization must include specific information
7 on the length and location of the stream reach in which the streamflow ~~will be~~
8 ~~maintained or enhanced~~ MUST BE PROVIDED and must provide INCLUDE a
9 detailed streamflow measuring plan that describes the points where and the
10 manner in which the streamflow ~~will~~ MUST be measured.

11 (4) The maximum quantity of water that may be leased is the amount
12 historically diverted by the lessor. However, OF THE AMOUNT LEASED, only the
13 amount historically consumed by the lessor LESSOR'S CROP, IF APPLICABLE,
14 AND EXCLUDING WATER USED AS RECHARGE OR RETURN FLOW, or a
15 smaller amount if specified by the department in the lease authorization, may be
16 used to ~~enhance or maintain~~ PROVIDE streamflows below the lessor's point of
17 diversion. THE LEASE MUST TAKE INTO ACCOUNT THE HISTORICAL USE OF
18 THE WATER RIGHT, INCLUDING BUT NOT LIMITED TO THE USUAL SHUTOFF
19 OF ALL OR A PORTION OF THE WATER SUBJECT TO THE WATER RIGHT
20 DUE TO NORMAL IRRIGATION PRACTICES, HARVESTING, NORMAL CLIMATE
21 CONDITIONS, AND COOPERATIVE PRACTICES WITH OTHER IRRIGATORS.

22 (5) THE DEPARTMENT OF FISH, WILDLIFE, AND PARKS HAS THE
23 RESPONSIBILITY TO PROVE TO THE BOARD UNDER 85-2-402 THAT A
24 PROPOSED LEASE AUTHORIZATION DOES NOT ADVERSELY AFFECT
25 EXISTING WATER RIGHTS. THE DEPARTMENT OF FISH, WILDLIFE, AND
26 PARKS SHALL PAY THE COST, INCLUDING REASONABLE ATTORNEY FEES,
27 FOR ANY APPROPRIATOR WHO SUCCESSFULLY OBJECTS TO A PROPOSED
28 DEPARTMENT OF FISH, WILDLIFE, AND PARKS LEASE.

29 (5)(6) The lease may not be issued for a term of more than 10 years but
30 may be renewed for up to 10 years per renewal upon notification to the
31 department. Upon receiving notice of a lease renewal, the department shall notify
32 other appropriators potentially affected by the lease and shall allow 30 days for
33 submission of new evidence of adverse effects to other water rights. A lease
34 authorization is not required for a renewal unless an appropriator, other than an

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1 appropriator described in subsection ~~(9)~~(10), submits evidence of adverse effects
2 to his rights that has not been considered previously. IF AN APPROPRIATOR
3 PROVES ADVERSE EFFECTS TO HIS WATER RIGHTS, THE DEPARTMENT OF
4 FISH, WILDLIFE, AND PARKS SHALL PAY TO THE APPROPRIATOR AN
5 AMOUNT EQUAL TO THE DAMAGES THAT RESULTED FROM EXERCISE OF
6 ITS LEASE AND THE COSTS OF PROVING THE ADVERSE EFFECTS,
7 INCLUDING REASONABLE ATTORNEY FEES AND COURT COSTS. THIS
8 PROVISION APPLIES ONLY TO WATER LEASES ENTERED INTO UNDER THIS
9 SECTION.

10 ~~(6)~~(7) During the term of the original lease, the department, WITH THE
11 CONSENT OF THE BOARD, may modify or revoke the lease authorization if an
12 appropriator, other than an appropriator described in subsection ~~(9)~~(10), proves
13 by ~~substantial-credible~~ A PREPONDERANCE OF THE evidence that his water
14 right is adversely affected. IF AN APPROPRIATOR PROVES ADVERSE EFFECTS
15 TO HIS WATER RIGHTS, THE DEPARTMENT OF FISH, WILDLIFE, AND PARKS
16 SHALL PAY TO THE APPROPRIATOR AN AMOUNT EQUAL TO THE DAMAGES
17 THAT RESULTED FROM EXERCISE OF ITS LEASE AND THE COSTS OF
18 PROVING THE ADVERSE EFFECTS, INCLUDING REASONABLE ATTORNEY
19 FEES AND COURT COSTS. THIS PROVISION APPLIES ONLY TO WATER
20 LEASES ENTERED INTO UNDER THIS SECTION.

21 ~~(7)~~(8) The priority of appropriation for a lease under this section is the
22 same as the priority of appropriation of the right that is leased.

23 ~~(8)~~(9) Neither a change in appropriation right nor any other authorization is
24 required for the reversion of the appropriation right to the lessor's previous use.

25 ~~(9)~~(10) A person issued a water use permit with a priority of appropriation
26 after the date of filing of an application for a lease authorization under this
27 section may not object to the exercise of the lease according to its terms, the
28 renewal of the lease, or the reversion of the appropriation right to the lessor
29 according to the lessor's previous use.

30 ~~(10)~~(11) THE DEPARTMENT OF FISH, WILDLIFE, AND PARKS SHALL PAY
31 ALL COSTS ASSOCIATED WITH INSTALLING MEASURING DEVICES OR
32 PROVIDING PERSONNEL TO MEASURE STREAMFLOWS ACCORDING TO THE
33 MEASURING PLAN SUBMITTED UNDER THIS SECTION.

34 NEW SECTION. Section 5. Board designation of eligible stream reaches.

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(1) The department of fish, wildlife, and parks, ~~in consultation with the department~~
WITH THE CONSENT OF THE COMMISSION, may apply to the board for
designation of stream reaches for which water leasing to ~~maintain or enhance~~
PROVIDE streamflows pursuant to [section 4] may occur.

(2) The board may declare a stream reach eligible for leasing pursuant to
[section 4] only if it finds that water leasing is necessary ~~or is likely to be~~
~~necessary to maintain or enhance fish, wildlife, or recreation~~ PROVIDE FOR
FISHERIES DURING CRITICAL LOW FLOW PERIODS.

(3) UPON DECLARING A STREAM REACH ELIGIBLE FOR LEASING, THE
BOARD SHALL REQUEST THE DEPARTMENT TO PREPARE AN ANALYSIS
CONCERNING WHETHER LONGER TERM SOLUTIONS TO THE CRITICAL LOW
FLOWS IN THE STREAM REACH ARE FEASIBLE. LONGER TERM SOLUTIONS
TO BE CONSIDERED INCLUDE STORAGE ENHANCEMENT OR DEVELOPMENT
AND RECHARGE FROM GROUND WATER SOURCES. THE PREPARATION OF
OR RECOMMENDATIONS RESULTING FROM THE ANALYSIS MAY NOT
PRECLUDE, INHIBIT, OR DELAY THE NEGOTIATION OR IMPLEMENTATION OF
LEASES ON THE STREAM REACH AS PROVIDED IN [SECTION 4].

~~(3)(4)~~ The board may designate no more than 10 stream reaches in the
state where water leasing pursuant to [section 4] may occur.

NEW SECTION. Section 6. Contributions for leasing appropriation rights
OR DEVELOPING STORAGE FACILITIES. (1) The department may accept
contributions from public or private entities for the purpose of:

(A) leasing appropriation rights to ~~maintain or enhance~~ PROVIDE instream
flows for ~~fish, wildlife, or recreation purposes~~ THE BENEFIT OF FISHERIES; OR

(B) DEVELOPING STORAGE FACILITIES TO MAINTAIN OR ENHANCE
PROVIDE STREAMFLOWS FOR FISH, WILDLIFE, RECREATION, AND OTHER
PURPOSES.

(2) Any contributions accepted by the department under this section must be
deposited in the fish and wildlife mitigation trust fund established in 87-1-611.

(3) The department shall expend money obtained under this section
SUBSECTION (1)(A) and deposited in the fish and wildlife mitigation trust fund
EXCLUSIVELY to lease existing rights for the purpose of ~~maintaining or~~
~~enhancing~~ PROVIDING instream flows for ~~fish, wildlife, or recreation~~ UNLESS
EXPENDITURE FOR A DIFFERENT PURPOSE IS AUTHORIZED PURSUANT TO

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1 87-1-614.

2 (4) THE DEPARTMENT SHALL EXPEND MONEY OBTAINED UNDER
3 SUBSECTION (1)(B) AND DEPOSITED IN THE FISH AND WILDLIFE
4 MITIGATION TRUST FUND EXCLUSIVELY TO DEVELOP STORAGE FACILITIES
5 TO MAINTAIN OR ENHANCE PROVIDE STREAMFLOWS FOR FISH, WILDLIFE,
6 RECREATION, AND OTHER PURPOSES UNLESS AN EXPENDITURE FOR
7 OTHER PURPOSES IS AUTHORIZED PURSUANT TO 87-1-614.

8 NEW SECTION. Section 7. REPORT TO THE LEGISLATURE -- BY THE
9 DEPARTMENT BOARD. THE DEPARTMENT BOARD SHALL REPORT TO EACH
10 REGULAR SESSION OF THE LEGISLATURE AS TO THE OPERATION OF [THIS
11 ACT].

12 NEW SECTION. Section 8. Extension of authority. Any existing authority to
13 make rules on the subject of the provisions of [this act] is extended to the
14 provisions of [this act].

15 NEW SECTION. Section 9. Codification instruction. (1) [Sections 4, and 5,
16 AND 7] are intended to be codified as an integral part of Title 85, chapter 2,
17 part 4, and the provisions of Title 85, chapter 2, part 4, apply to [sections 4,
18 and 5, AND 7].

19 (2) [Section 6] is intended to be codified as an integral part of Title 87,
20 chapter 1, part 6, and the provisions of Title 87, chapter 1, part 6, apply to
21 [section 6].

22 NEW SECTION. Section 10. Termination. [This act] terminates October 1,
23 1999.

24 -END-

25

RC

1/20/21

(e)

Upon receipt of an application for a lease from DFWT, PURC shall publish notice of the application pursuant to the provisions in 85-2-307. Parties who believe they will be adversely affected by a proposed lease may file objection pursuant to section 85-2-308. A lease may not be approved until all objections are resolved.