

HOUSE BILL NO. 707

INTRODUCED BY IVERSON, HARPER, GLASER, RANEY, O'KEEFE,
WALKER, SIMON, HANNAH, GRADY, HARP, MERCER, LYNCH,
BENGTSON, DRISCOLL, YELLOWTAIL, MCLANE, BISHOP, D. BROWN

BY REQUEST OF THE GOVERNOR

IN THE HOUSE

FEBRUARY 14, 1989	INTRODUCED AND REFERRED TO COMMITTEE ON NATURAL RESOURCES.
FEBRUARY 15, 1989	FIRST READING.
FEBRUARY 18, 1989	COMMITTEE RECOMMEND BILL DO PASS AS AMENDED. REPORT ADOPTED.
FEBRUARY 20, 1989	PRINTING REPORT.
FEBRUARY 21, 1989	SECOND READING, DO PASS AS AMENDED.
FEBRUARY 22, 1989	ENGROSSING REPORT.
	THIRD READING, PASSED. AYES, 63; NOES, 34.
	TRANSMITTED TO SENATE.

IN THE SENATE

FEBRUARY 28, 1989	INTRODUCED AND REFERRED TO COMMITTEE ON AGRICULTURE, LIVESTOCK & IRRIGATION.
	FIRST READING.
MARCH 21, 1989	COMMITTEE RECOMMEND BILL BE CONCURRED IN AS AMENDED. REPORT ADOPTED.
MARCH 23, 1989	SECOND READING, INDEFINITELY POSTPONED.
APRIL 13, 1989	ON MOTION, RULES SUSPENDED TO RECONSIDER PREVIOUS ACTION.
	ON MOTION, REQUEST HOUSE TO RETURN

HB 707.

BILL PLACED ON SECOND READING.

IN THE HOUSE

APRIL 14, 1989

ON MOTION OF REPRESENTATIVE HARPER,
REQUEST OF SENATE GRANTED FOR
RETURN OF HB 707 FOR FURTHER
CONSIDERATION.

IN THE SENATE

APRIL 14, 1989

SECOND READING, CONCURRED IN AS
AMENDED.

APRIL 17, 1989

THIRD READING, CONCURRED IN.
AYES, 28; NOES, 21.

RETURNED TO HOUSE WITH AMENDMENTS.

IN THE HOUSE

APRIL 18, 1989

RECEIVED FROM SENATE.

ON MOTION, RULES SUSPENDED TO ALLOW
LATE TRANSMITTAL FROM SENATE.

APRIL 19, 1989

SECOND READING, AMENDMENTS NOT
CONCURRED IN.

APRIL 19, 1989

ON MOTION, CONFERENCE COMMITTEE
REQUESTED AND APPOINTED.

IN THE SENATE

APRIL 19, 1989

ON MOTION, CONFERENCE COMMITTEE
REQUESTED AND APPOINTED.

IN THE HOUSE

APRIL 19, 1989

CONFERENCE COMMITTEE REPORTED.

ON MOTION, FREE CONFERENCE
COMMITTEE REQUESTED AND APPOINTED.

APRIL 20, 1989

FREE CONFERENCE COMMITTEE REPORTED.

SECOND READING, FREE CONFERENCE
COMMITTEE REPORT ADOPTED.

ON MOTION, RULES SUSPENDED TO PLACE
BILL ON THIRD READING THIS DAY.

IN THE SENATE

APRIL 20, 1989

FREE CONFERENCE
COMMITTEE REPORT ADOPTED.

IN THE HOUSE

APRIL 20, 1989

THIRD READING, FREE CONFERENCE
COMMITTEE REPORT ADOPTED.

SENT TO ENROLLING.

REPORTED CORRECTLY ENROLLED.

1 HB BILL NO. 707 Raney
 2 INTRODUCED BY James Hanger Mr E. S.
 3 BY REQUEST OF THE GOVERNOR MERCER Spink
 4 Samuel H. Hanger Grady, Bryant
 5 A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR LEASING
 6 OF EXISTING WATER RIGHTS FOR THE PURPOSE OF ENHANCING OR
 7 MAINTAINING STREAMFLOWS FOR FISH, WILDLIFE, OR RECREATION IN
 8 STREAM REACHES DESIGNATED BY THE BOARD OF NATURAL RESOURCES
 9 AND CONSERVATION; SPECIFYING THAT THE DEPARTMENT OF FISH,
 10 WILDLIFE, AND PARKS IS THE LESSEE AND ALLOWING THE
 11 DEPARTMENT TO ACCEPT CONTRIBUTIONS FROM PUBLIC OR PRIVATE
 12 ENTITIES FOR THE PURPOSE OF ACQUIRING LEASES; AMENDING
 13 SECTIONS 85-2-102, 85-2-402, AND 85-2-404, MCA; AND
 14 PROVIDING A TERMINATION DATE."

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,

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.

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

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

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

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

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

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

(12) "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) "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) "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.

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

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

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

(18) "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.

1 (b) The Except for a lease authorization pursuant to
 2 {section 4} that does not require appropriation works, the
 3 proposed means of diversion, construction, and operation of
 4 the appropriation works are adequate.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 (ii) whether the water that is the subject of the

1 proposed change in appropriation might feasibly be
2 transported to alleviate water shortages within the state of
3 Montana;

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

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

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

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

24 (7) The department or the legislature, if applicable,
25 may approve a change subject to such terms, conditions,

1 restrictions, and limitations as it considers necessary to
 2 satisfy the criteria of this section, including limitations
 3 on the time for completion of the change. The department
 4 may extend time limits specified in the change approval
 5 under the applicable criteria and procedures of 85-2-312(3).

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

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

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

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

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

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

6 **"85-2-404. Abandonment of appropriation right.** (1) If
 7 an appropriator ceases to use all or a part of his
 8 appropriation right with the intention of wholly or
 9 partially abandoning the right or if he ceases using his
 10 appropriation right according to its terms and conditions
 11 with the intention of not complying with those terms and
 12 conditions, the appropriation right shall, to that extent,
 13 be ~~deemed~~ considered abandoned and shall immediately expire.

14 (2) If an appropriator ceases to use all or part of
 15 his appropriation right or ceases using his appropriation
 16 right according to its terms and conditions for a period of
 17 10 successive years and there was water available for his
 18 use, there ~~shall be~~ is a prima facie presumption that the
 19 appropriator has abandoned his right in whole or for the
 20 part not used.

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

25 (a) the set-aside and resulting reduction in use of

1 the appropriation right does not represent an intent by the
2 appropriator to wholly or partially abandon the
3 appropriation right or to not comply with the terms and
4 conditions attached to the right; and

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

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

13 ~~†4~~(5) Subsections (1) and (2) do not apply to
14 existing rights until they have been determined in
15 accordance with part 2 of this chapter."

16 NEW SECTION. Section 4. Leases to enhance or maintain
17 streamflows for fish, wildlife, or recreation -- department
18 authorization. (1) The department of fish, wildlife, and
19 parks may lease existing rights for the purpose of
20 maintaining or enhancing streamflows for fish, wildlife, or
21 recreation in stream reaches determined eligible by the
22 board pursuant to [section 5]. This section is the exclusive
23 means by which appropriations may be changed to an instream
24 flow purpose.

25 (2) The department shall authorize a lease of an

1 existing right for the purpose of maintaining or enhancing
2 streamflows for fish, wildlife, or recreation in an eligible
3 stream reach if the applicant submits a completed
4 application and meets the requirements of 85-2-402.

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

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

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

1 of adverse effects to his rights that has not been
2 considered previously.

3 (6) During the term of the original lease, the
4 department may modify or revoke the lease authorization if
5 an appropriator, other than an appropriator described in
6 subsection (9), proves by substantial credible evidence that
7 his water right is adversely affected.

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

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

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

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

1 (2) The board may declare a stream reach eligible for
2 leasing pursuant to [section 4] only if it finds that water
3 leasing is necessary or is likely to be necessary to
4 maintain or enhance fish, wildlife, or recreation.

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

8 NEW SECTION. Section 6. Contributions for leasing
9 appropriation rights. (1) The department may accept
10 contributions from public or private entities for the
11 purpose of leasing appropriation rights to maintain or
12 enhance instream flows for fish, wildlife, or recreation
13 purposes.

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

17 (3) The department shall expend money obtained under
18 this section and deposited in the fish and wildlife
19 mitigation trust fund to lease existing rights for the
20 purpose of maintaining or enhancing instream flows for fish,
21 wildlife, or recreation.

22 NEW SECTION. Section 7. Extension of authority. Any
23 existing authority to make rules on the subject of the
24 provisions of [this act] is extended to the provisions of
25 [this act].

LC 1663/01

1 NEW SECTION. **Section 8.** Codification instruction. (1)
2 {Sections 4 and 5} are intended to be codified as an
3 integral part of Title 85, chapter 2, part 4, and the
4 provisions of Title 85, chapter 2, part 4, apply to
5 [sections 4 and 5].

6 (2) [Section 6] is intended to be codified as an
7 integral part of Title 87, chapter 1, part 6, and the
8 provisions of Title 87, chapter 1, part 6, apply to [section
9 6].

10 NEW SECTION. **Section 9.** Termination. [This act]
11 terminates October 1, 1999.

-End-

STATE OF MONTANA - FISCAL NOTE

Form BD-15

In compliance with a written request, there is hereby submitted a Fiscal Note for HB707, as introduced.

DESCRIPTION OF PROPOSED LEGISLATION:

HB707 would provide for leasing of existing water rights for the purpose of maintaining or enhancing stream flows for fish, wildlife or recreation in stream reaches designated by the Board of Natural Resources and Conservation, with the Department of Fish, Wildlife and Parks to be the lessee authorized to accept contributions from public or private entities for the purpose of acquiring leases.

ASSUMPTIONS:

1. The Department of Natural Resources and Conservation (DNRC) will absorb any additional workload within its existing budget.
2. The Department of Fish, Wildlife and Parks (DFWP) requests appropriation of state special revenue fisheries funds in the amount of \$12,500 in FY90 and \$16,000 in FY91, which would be matched with federal sport fish restoration money and private authority for the following purposes:
 - 2.1. Research to identify streams on which the department could potentially acquire a lease including review of in-stream flow data, historical water records, water rights, priority dates, types and uses and potential conflicts in uses and users.
 - 2.1. Analysis in one or two selected basins upon approval of the streams for leasing by the DNRC.
3. DFWP would contract for the expertise needed at a total cost of \$43,000 in FY90 and \$55,000 in FY91, plus communications and travel expenses.
4. There is no fiscal impact on any other state entities.

FISCAL IMPACT:Expenditures:

	Current	FY90		Current	FY91	
	Law	Proposed	Difference	Law	Proposed	Difference
DFWP						
Operating Expenses	\$ -0-	\$50,000	\$50,000	\$ -0-	\$64,000	\$64,000

Funding:

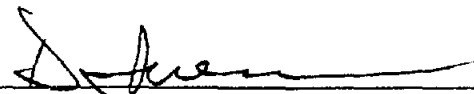
State Special Revenue	\$ -0-	\$12,500	\$12,500	\$ -0-	\$16,000	\$16,000
Federal & Private	-0-	37,500	37,500	-0-	48,000	48,000
Total	\$ -0-	\$50,000	\$50,000	\$ -0-	\$64,000	\$64,000

LONG-RANGE EFFECTS OF PROPOSED LEGISLATION:

The proposed law establishes an opportunity to lease water for in-stream uses. Depending on the type of leases, future expenses might include negotiating new or renegotiating existing leases, making lease payments primarily in drought years, and managing leased water. The potential cost of future leasing cannot be projected at this time.


DATE 2/20/89

RAY SHACKLEFORD, BUDGET DIRECTOR
OFFICE OF BUDGET AND PROGRAM PLANNING


DATE 2/20/89

DENNIS IVERSON, PRIMARY SPONSOR

Fiscal Note for HB707, as introduced

HB 707

APPROVED BY COMM. ON
NATURAL RESOURCES

HOUSE BILL NO. 707

INTRODUCED BY IVERSON, HARPER, GLASER, RANEY, O'KEEFE,
WALKER, SIMON, HANNAH, GRADY, HARP, MERCER, LYNCH,
BENGTSON, DRISCOLL, YELLOWTAIL, MCLANE, BISHOP, D. BROWN
BY REQUEST OF THE GOVERNOR

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR LEASING
OF EXISTING WATER RIGHTS FOR THE PURPOSE OF ENHANCING OR
MAINTAINING STREAMFLOWS FOR FISH, WILDLIFE, OR RECREATION
DURING CRITICAL LOW FLOW PERIODS 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; AMENDING
SECTIONS 85-2-102, 85-2-402, AND 85-2-404, MCA; AND
PROVIDING A TERMINATION DATE."

STATEMENT OF INTENT

A statement of intent is provided for this bill in
order to give additional guidance to the board of natural
resources and conservation and the involved state agencies
concerning the review and processing of lease applications
for the purpose of maintaining or enhancing stream flows for
fish, wildlife, or recreation.

The legislature intends that the board designate stream
reaches eligible for water leasing in areas where leasing is
necessary or likely to be necessary to enhance or maintain
fish, wildlife, or recreation. Upon receipt of a list of
stream reaches from the department of fish, wildlife, and
parks, the board shall act expeditiously to designate
eligible stream reaches. However, the legislature also
encourages the board to select stream reaches where leasing
has a good chance of success and where all interests may be
satisfied.

The legislature also intends that the review process
for lease applications be thorough and provide ample
opportunity for consideration and input by concerned
persons. As required in [section 4], the process should
involve notice and opportunity for objections and hearing in
the same manner provided for proposed changes in
appropriation rights. The legislature contemplates that the
department of fish, wildlife, and parks will meet with
appropriators along each designated stream reach to assess
and consider any concerns before filing applications for
lease authorizations. The legislature also encourages the
department of fish, wildlife, and parks to assemble lease
applications for filing at the same time to minimize costs
to potential objectors. Moreover, the legislature
anticipates that the department of natural resources and

1 conservation will review the proposed leases for a single
2 stream reach in one proceeding, though the potential for
3 another set of lease applications at a future date is
4 recognized.

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

22 From a broad policy perspective, the legislature
23 desires to emphasize that the department of natural
24 resources and conservation should consider and, if
25 potentially feasible, recommend supplemental or alternative

1 strategies that provide long-term solutions to problems that
2 are not or probably will not be addressed adequately by
3 water leasing in the board-designated stream reaches. These
4 strategies may include storage enhancement or development
5 and recharge from ground water sources.

6
7 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

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

9 "85-2-102. Definitions. Unless the context requires
10 otherwise, in this chapter the following definitions apply:

11 (1) "Appropriate" means to:

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

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

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

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

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

25 (b) a use of water appropriated by the department for

1 the state water leasing program under 85-2-141 and of water
2 leased under a valid lease issued by the department under
3 85-2-141; AND

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

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

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

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

14 (6) "Declaration" means the declaration of an existing
15 right filed with the department under section 8, Chapter
16 452, Laws of 1973.

17 (7) "Department" means the department of natural
18 resources and conservation provided for in Title 2, chapter
19 15, part 33.

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

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

1 surface water.

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

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

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

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

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

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

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

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

(18) "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 4] 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 pursuant to Title 75, chapter 1, or Title 75, chapter 20.

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

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

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

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

23 (b) The department and, if applicable, the legislature
24 may not approve a change in appropriation right for the
25 withdrawal and transportation of appropriated water for use

1 outside the state unless the appropriator proves by clear
2 and convincing evidence and, if applicable, the legislature
3 approves after one or more public hearings that:

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

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

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

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

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

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

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

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

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

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

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

25 (8) If a change is not completed as approved by the

1 department or legislature or if the terms, conditions,
2 restrictions, and limitations of the change approval are not
3 complied with, the department may, after notice and
4 opportunity for hearing, require the appropriator to show
5 cause why the change approval should not be modified or
6 revoked. If the appropriator fails to show sufficient cause,
7 the department may modify or revoke the change approval.

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

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

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

24 **Section 3.** Section 85-2-404, MCA, is amended to read:
25 "85-2-404. Abandonment of appropriation right. (1) If

1 an appropriator ceases to use all or a part of his
 2 appropriation right with the intention of wholly or
 3 partially abandoning the right or if he ceases using his
 4 appropriation right according to its terms and conditions
 5 with the intention of not complying with those terms and
 6 conditions, the appropriation right shall, to that extent,
 7 be deemed considered abandoned and shall immediately expire.

8 (2) If an appropriator ceases to use all or part of
 9 his appropriation right or ceases using his appropriation
 10 right according to its terms and conditions for a period of
 11 10 successive years and there was water available for his
 12 use, there ~~shall be~~ is a prima facie presumption that the
 13 appropriator has abandoned his right in whole or for the
 14 part not used.

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

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

24 (b) the period of nonuse that occurs for part or all
 25 of the appropriation right as a result of the contract may

1 not create or may not be added to any previous period of
 2 nonuse to create a prima facie presumption of abandonment.

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

7 (4)(5) Subsections (1) and (2) do not apply to
 8 existing rights until they have been determined in
 9 accordance with part 2 of this chapter."

10 NEW SECTION. Section 4. Leases to enhance or maintain
 11 streamflows for fish, wildlife, or recreation -- department
 12 authorization. (1) The department of fish, wildlife, and
 13 parks may lease existing rights for the purpose of
 14 maintaining or enhancing streamflows for fish, wildlife, or
 15 recreation DURING CRITICAL LOW FLOW PERIODS in stream
 16 reaches determined eligible by the board pursuant to
 17 [section 5]. This section is the exclusive means by which
 18 appropriations may be changed to an instream flow purpose.

19 (2) The department shall authorize a lease of an
 20 existing right for the purpose of maintaining or enhancing
 21 streamflows for fish, wildlife, or recreation DURING
 22 CRITICAL LOW FLOW PERIODS in an eligible stream reach if the
 23 applicant submits a completed application and meets the
 24 requirements of 85-2-402.

25 (3) The application for a lease authorization must

1 include specific information on the length and location of
2 the stream reach in which the streamflow will be maintained
3 or enhanced and must provide a detailed streamflow measuring
4 plan that describes the points where and the manner in which
5 the streamflow will be measured.

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

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

24 (6) During the term of the original lease, the
25 department may modify or revoke the lease authorization if

1 an appropriator, other than an appropriator described in
2 subsection (9), proves by substantial credible evidence that
3 his water right is adversely affected.

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

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

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

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, may apply to the
19 board for designation of stream reaches for which water
20 leasing to maintain or enhance streamflows pursuant to
21 [section 4] may occur.

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

1 CRITICAL LOW FLOW PERIODS.

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

5 NEW SECTION. Section 6. Contributions for leasing
6 appropriation rights. (1) The department may accept
7 contributions from public or private entities for the
8 purpose of leasing appropriation rights to maintain or
9 enhance instream flows for fish, wildlife, or recreation
10 purposes.

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

14 (3) The department shall expend money obtained under
15 this section and deposited in the fish and wildlife
16 mitigation trust fund EXCLUSIVELY to lease existing rights
17 for the purpose of maintaining or enhancing instream flows
18 for fish, wildlife, or recreation UNLESS EXPENDITURE FOR A
19 DIFFERENT PURPOSE IS AUTHORIZED PURSUANT TO 87-1-614.

20 NEW SECTION. Section 7. Extension of authority. Any
21 existing authority to make rules on the subject of the
22 provisions of [this act] is extended to the provisions of
23 [this act].

24 NEW SECTION. Section 8. Codification instruction. (1)
25 [Sections 4 and 5] are intended to be codified as an

1 integral part of Title 85, chapter 2, part 4, and the
2 provisions of Title 85, chapter 2, part 4, apply to
3 [sections 4 and 5].

4 (2) [Section 6] is intended to be codified as an
5 integral part of Title 87, chapter 1, part 6, and the
6 provisions of Title 87, chapter 1, part 6, apply to [section
7 6].

8 NEW SECTION. Section 9. Termination. [This act]
9 terminates October 1, 1999.

-End-

HOUSE BILL NO. 707

INTRODUCED BY IVERSON, HARPER, GLASER, RANEY, O'KEEFE,
WALKER, SIMON, HANNAH, GRADY, HARP, MERCER, LYNCH,
BENGTON, DRISCOLL, YELLOWTAIL, MCLANE, BISHOP, D. BROWN
BY REQUEST OF THE GOVERNOR

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR LEASING
OF EXISTING WATER RIGHTS FOR THE PURPOSE OF ENHANCING OR
MAINTAINING STREAMFLOWS FOR FISH, WILDLIFE, OR RECREATION
DURING CRITICAL LOW FLOW PERIODS 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 OR FOR
DEVELOPING STORAGE FACILITIES; SPECIFYING THAT THE
DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION SHALL MAKE
A REPORT TO EACH REGULAR SESSION OF THE LEGISLATURE;
AMENDING SECTIONS 85-2-102, 85-2-402, AND 85-2-404, MCA; AND
PROVIDING A TERMINATION DATE."

STATEMENT OF INTENT

A statement of intent is provided for this bill in
order to give additional guidance to the board of natural
resources and conservation and the involved state agencies

concerning the review and processing of lease applications
for the purpose of maintaining or enhancing stream flows for
fish, wildlife, or recreation.

The legislature intends that the board designate stream
reaches eligible for water leasing in areas where leasing is
necessary ~~or likely to be necessary~~ to enhance or maintain
fish, wildlife, or recreation. Upon receipt of a list of
stream reaches from the department of fish, wildlife, and
parks, the board shall act expeditiously to designate
eligible stream reaches. However, the legislature also
encourages the board to select stream reaches where leasing
has a good chance of success and where all interests may be
satisfied.

The legislature also intends that the review process
for lease applications be thorough and provide ample
opportunity for consideration and input by concerned
persons. As required in [section 4], the process should
involve notice and opportunity for objections and hearing in
the same manner provided for proposed changes in
appropriation rights. The legislature contemplates that the
department of fish, wildlife, and parks will meet with
appropriators along each designated stream reach to assess
and consider any concerns before filing applications for
lease authorizations. The legislature also encourages the
department of fish, wildlife, and parks to assemble lease

1 applications for filing at the same time to minimize costs
2 to potential objectors. Moreover, the legislature
3 anticipates that the department of natural resources and
4 conservation will review the proposed leases for a single
5 stream reach in one proceeding, though the potential for
6 another set of lease applications at a future date is
7 recognized.

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

25 From a broad policy perspective, the legislature

1 desires to emphasize that the department of natural
2 resources and conservation should consider and, if
3 potentially feasible, recommend supplemental or alternative
4 strategies that provide long-term solutions to problems that
5 are not or probably will not be addressed adequately by
6 water leasing in the board-designated stream reaches. These
7 strategies may include storage enhancement or development
8 and recharge from ground water sources.

9
10 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

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

12 **"85-2-102. Definitions.** Unless the context requires
13 otherwise, in this chapter the following definitions apply:

14 (1) "Appropriate" means to:

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

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

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

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

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

1 domestic, fish and wildlife, industrial, irrigation, mining,
2 municipal, power, and recreational uses; and

3 (b) a use of water appropriated by the department for
4 the state water leasing program under 85-2-141 and of water
5 leased under a valid lease issued by the department under
6 85-2-141; AND

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

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

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

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

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

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

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

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

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

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

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

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

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

25 (15) "Water division" means a drainage basin as defined

1 in 3-7-102.

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

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

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

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

11 **"85-2-402. Changes in appropriation rights.** (1) An
12 appropriator may not make a change in an appropriation right
13 except as permitted under this section and with the approval
14 of the department or, if applicable, of the legislature.

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

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

23 (b) The Except for a lease authorization pursuant to
24 [section 4] that does not require appropriation works, the
25 proposed means of diversion, construction, and operation of

1 the appropriation works are adequate.

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

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

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

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

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

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

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

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

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

25 (vi) the probable significant adverse environmental

1 impacts of the proposed use of water as determined by the
2 department pursuant to Title 75, chapter 1, or Title 75,
3 chapter 20.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

11 (6) For any application for a change in appropriation
12 right involving 4,000 or more acre-feet of water a year and
13 5.5 or more cubic feet per second of water, the department
14 shall give notice of the proposed change in accordance with
15 85-2-307 and shall hold one or more hearings in accordance
16 with 85-2-309 prior to its approval or denial of the
17 proposed change. The department shall provide notice and may
18 hold one or more hearings upon any other proposed change if
19 it determines that such a change might adversely affect the
20 rights of other persons.

21 (7) The department or the legislature, if applicable,
22 may approve a change subject to such terms, conditions,
23 restrictions, and limitations as it considers necessary to
24 satisfy the criteria of this section, including limitations
25 on the time for completion of the change. The department

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

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

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

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

19 (11) A change in appropriation right contrary to the
20 provisions of this section is invalid. ~~No~~ An officer,
21 agent, agency, or employee of the state may not knowingly
22 permit, aid, or assist in any manner ~~such~~ an unauthorized
23 change in appropriation right. ~~No~~ A person or corporation
24 may not, directly or indirectly, personally or through an
25 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. (1) 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 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 4] 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. Leases to enhance or maintain streamflows for fish, wildlife, or recreation -- department authorization. (1) ~~The~~ AFTER JULY 1, 1991, THE department of fish, wildlife, and parks may lease existing rights for the purpose of maintaining or enhancing streamflows for fish, wildlife, or recreation DURING CRITICAL LOW FLOW PERIODS in stream reaches determined eligible by the board pursuant to [section 5]. This section is the exclusive means by which appropriations may be changed to an instream flow purpose.

(2) The department shall authorize a lease of an existing right for the purpose of maintaining or enhancing streamflows for fish, wildlife, or recreation DURING CRITICAL LOW FLOW PERIODS in an eligible stream reach if the

1 applicant submits a completed application and meets the
2 requirements of 85-2-402.

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

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

21 (5) The lease may not be issued for a term of more
22 than 10 years but may be renewed for up to 10 years per
23 renewal upon notification to the department. Upon receiving
24 notice of a lease renewal, the department shall notify other
25 appropriators potentially affected by the lease and shall

1 allow 30 days for submission of new evidence of adverse
2 effects to other water rights. A lease authorization is not
3 required for a renewal unless an appropriator, other than an
4 appropriator described in subsection (9), submits evidence
5 of adverse effects to his rights that has not been
6 considered previously.

7 (6) During the term of the original lease, the
8 department may modify or revoke the lease authorization if
9 an appropriator, other than an appropriator described in
10 subsection (9), proves by substantial credible evidence that
11 his water right is adversely affected.

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

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

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

24 (10) THE DEPARTMENT OF FISH, WILDLIFE, AND PARKS SHALL
25 PAY ALL COSTS ASSOCIATED WITH INSTALLING MEASURING DEVICES

OR PROVIDING PERSONNEL TO MEASURE STREAMFLOWS ACCORDING TO
THE MEASURING PLAN SUBMITTED UNDER THIS SECTION.

NEW SECTION. Section 5. Board designation of eligible
stream reaches. (1) The department of fish, wildlife, and
parks, in consultation with the department, 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 ~~or--is--likely--to--be--necessary~~ to
maintain or enhance fish, wildlife, or recreation DURING
CRITICAL LOW FLOW PERIODS.

(3) 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 instream flows for fish, wildlife, or recreation
purposes; OR

(B) DEVELOPING STORAGE FACILITIES TO MAINTAIN OR
ENHANCE 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 instream
flows for fish, wildlife, or recreation UNLESS EXPENDITURE
FOR A DIFFERENT PURPOSE IS AUTHORIZED PURSUANT TO 87-1-614.

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

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

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].

HB 0707/03

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

6 (2) [Section 6] is intended to be codified as an
7 integral part of Title 87, chapter 1, part 6, and the
8 provisions of Title 87, chapter 1, part 6, apply to [section
9 6].

10 NEW SECTION. **Section 10.** Termination. [This act]
11 terminates October 1, 1999.

-End-

SENATE STANDING COMMITTEE REPORT

page 1 of 6
March 21, 1989

SENATE COMMITTEE ON AGRICULTURE, HB 707
page 2 of 6

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"

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)"

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"

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

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 appropriator 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;

SENATE COMMITTEE OF THE WHOLE, HB 707

Page 2 of 2
April 14, 1989

(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, 1999"

Insert: "June 30, 1991"

ADOPT

REJECT

Signed: 

Senator Beck

continued

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HB 707

SENATE

HOUSE BILL NO. 707

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

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

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

BY REQUEST OF THE GOVERNOR

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR LEASING OF EXISTING WATER RIGHTS FOR THE PURPOSE OF ENHANCING-OR MAINTAINING PROVIDING STREAMFLOWS FOR FISH,--WILDLIFE,--OR RECREATION THE BENEFIT OF FISHERIES DURING CRITICAL LOW FLOW PERIODS 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 OR FOR DEVELOPING STORAGE FACILITIES; SPECIFYING THAT THE DEPARTMENT BOARD OF NATURAL RESOURCES AND CONSERVATION SHALL MAKE A REPORT TO EACH REGULAR SESSION OF THE LEGISLATURE; 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; AMENDING SECTIONS 85-2-102, 85-2-402, AND 85-2-404, MCA; AND PROVIDING A TERMINATION DATE."

STATEMENT OF INTENT

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

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

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

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 ~~{14}~~(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 ~~{15}~~(16) "Water division" means a drainage basin as
9 defined in 3-7-102.

10 ~~{16}~~(17) "Water judge" means a judge as provided for in
11 Title 3, chapter 7.

12 ~~{17}~~(18) "Water master" means a master as provided for
13 in Title 3, chapter 7.

14 ~~{18}~~(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;

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

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.

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 **PROVIDE 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

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 FEE,--FOR--ANY--APPROPRIATOR--WHO--SUCCESSFULLY--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

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.

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

1 ~~maintain-or-enhance-fish,-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 fish,-wildlife,-or
22 recreation-purposes THE BENEFIT OF FISHERIES; OR

23 (B) DEVELOPING STORAGE FACILITIES TO MAINTAIN--OR
24 ENHANCE PROVIDE STREAMFLOWS FOR-FISH,-WILDLIFE,-RECREATION,
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--fish,-wildlife,-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 FISH,-WILDLIFE,-RECREATION,-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,

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

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].

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-1,-1999~~ JUNE 30, 1991.

-End-

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].

(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.

~~(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

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 sources of water available to the applicant in the state where the applicant intends to use the water; and

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

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

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

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

(8) 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. (1) 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

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.

~~+~~(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 under this section 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].

(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.

continued

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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.

(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.

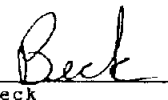
FOR THE HOUSE

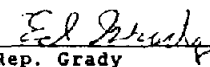
FOR THE SENATE


Rep. D. Keefe, Chairman


Sen. Galt, Chairman

Rep. Spaeth


Sen. Beck


Rep. Grady


Sen. Yellowtail

ADOPT

REJECT

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 FISH--WILDLIFE--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; PROVIDING FOR A THOROUGH STUDY

24 THAT INCLUDES A PILOT PROGRAM TO LEASE WATER RIGHTS FOR THE

25 PURPOSE OF MAINTAINING OR ENHANCING STREAMFLOWS FOR THE

1 BENEFIT OF FISHERIES IN STREAM REACHES DESIGNATED BY THE

2 BOARD OF NATURAL RESOURCES AND CONSERVATION; SPECIFYING THAT

3 THE DEPARTMENT OF FISH, WILDLIFE, AND PARKS IS THE LESSEE

4 AND ALLOWING THE DEPARTMENT TO ACCEPT CONTRIBUTIONS FROM

5 PUBLIC OR PRIVATE ENTITIES FOR THE PURPOSE OF ACQUIRING

6 LEASES; REQUIRING THE DEPARTMENT OF FISH, WILDLIFE, AND

7 PARKS AND THE DEPARTMENT OF NATURAL RESOURCES AND

8 CONSERVATION TO COMPLETE A STUDY REPORT BY DECEMBER 1, 1990,

9 THAT INCLUDES RECOMMENDATIONS ON WATER LEASING FOR

10 STREAMFLOWS UNDER THIS ACT; APPROPRIATING FEDERAL SPECIAL

11 REVENUE TO THE DEPARTMENT OF FISH, WILDLIFE, AND PARKS TO

12 UNDERTAKE A WATER LEASING STUDY; AMENDING SECTIONS 85-2-102,

13 85-2-402, AND 85-2-404, MCA; AND PROVIDING AN IMMEDIATE

14 EFFECTIVE DATE AND A TERMINATION DATE."

16 STATEMENT-OF-INTENT

17 A-statement-of-intent-is--provided--for--this--bill--in

18 order--to--give--additional--guidance--to--the--board--of--natural

19 resources--and--conservation--and--the--involved--state--agencies

20 concerning--the--review--and--processing--of--lease--applications

21 for--the--purpose--of--maintaining--or--enhancing PROVIDING stream

22 flows--for--fish--wildlife--or--recreation THE--BENEFIT--OF

23 FISHERIES;

24 The-legislature-intends-that-the-board-designate-stream

25 reaches-eligible-for-water-leasing-in-areas-where-leasing-is



necessary--or--likely-to-be-necessary-to-enhance-or-maintain
 fish, wildlife, or recreation PROVIDE--FOR--FISHERIES. Upon
 receipt--of--a-list-of-stream-reaches-from-the-department-of
 fish, wildlife, and parks THAT-HAVE-THE-APPROVAL-OF-THE-FISH
AND-GAME-COMMISSION, the board shall--act--expeditiously--to
 designate--eligible-stream-reaches. However, the legislature
 also encourages the board to--select--stream--reaches--where
 leasing has a good chance of success and where all interests
 may be satisfied.

The legislature also intends that the review process
 for--lease--applications--be--thorough--and--provide--ample
 opportunity--for--consideration--and--input--by--concerned
 persons. As required in--{section--4}, the process should
 involve notice and opportunity for objections and hearing in
 the--same--manner--provided--for--proposed--changes--in
 appropriation rights. The legislature contemplates that the
 department--of--fish, wildlife, and parks will meet with
 appropriators along each designated stream reach to assess
 and consider any concerns before filing applications for
 lease authorizations. The legislature also encourages the
 department--of--fish, wildlife, and parks to assemble lease
 applications for filing at the same time to minimize costs
 to--potential--objectors. Moreover, the legislature
 anticipates that the department--of--natural--resources--and
 conservation will--WITH-THE-CONSENT-OF-THE-BOARD, SHALL

review the proposed leases for a single stream reach in--one
 proceeding, though the potential for another set of lease
 applications at a future date is recognized.

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

From a broad policy perspective, the legislature
 desires to emphasize that the department--of--natural
 resources and conservation should WITH-THE-CONSENT-OF-THE
BOARD, SHALL consider and, if potentially feasible,
 recommend supplemental or alternative strategies that

~~provide long-term solutions to problems that are not or probably will not be addressed adequately by water leasing in the board-designated stream reaches. These strategies may include storage enhancement or development and recharge from ground-water sources.~~

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

(Refer to Reference Bill)

Strike everything after the enacting clause and 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].

(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.

~~†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

1 prior to July 1, 1973.

2 ~~†9†~~(10) "Groundwater" means any water beneath the land
3 surface or beneath the bed of a stream, lake, reservoir, or
4 other body of surface water, and which is not a part of that
5 surface water.

6 ~~†10†~~(11) "Permit" means the permit to appropriate
7 issued by the department under 85-2-301 through 85-2-303 and
8 85-2-306 through 85-2-314.

9 ~~†11†~~(12) "Person" means an individual, association,
10 partnership, corporation, state agency, political
11 subdivision, the United States or any agency thereof, or any
12 other entity.

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

18 ~~†13†~~(14) "Waste" means the unreasonable loss of water
19 through the design or negligent operation of an
20 appropriation or water distribution facility or the
21 application of water to anything but a beneficial use.

22 ~~†14†~~(15) "Water" means all water of the state, surface
23 and subsurface, regardless of its character or manner of
24 occurrence, including but not limited to geothermal water,
25 diffuse surface water, and sewage effluent.

1 ~~†15†~~(16) "Water division" means a drainage basin as
2 defined in 3-7-102.

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

5 ~~†17†~~(18) "Water master" means a master as provided for
6 in Title 3, chapter 7.

7 ~~†18†~~(19) "Well" means any artificial opening or
8 excavation in the ground, however made, by which groundwater
9 is sought or can be obtained or through which it flows under
10 natural pressures or is artificially withdrawn."

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

12 "85-2-402. Changes in appropriation rights. (1) An
13 appropriator may not make a change in an appropriation right
14 except as permitted under this section and with the approval
15 of the department or, if applicable, of the legislature.

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

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

24 (b) The Except for a lease authorization pursuant to
25 [section 6] that does not require appropriation works, the

1 proposed means of diversion, construction, and operation of
2 the appropriation works are adequate.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 be met before out-of-state use may occur:

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

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

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

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

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

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

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

1 Montana;

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

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

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

12 (6) For any application for a change in appropriation
13 right involving 4,000 or more acre-feet of water a year and
14 5.5 or more cubic feet per second of water, the department
15 shall give notice of the proposed change in accordance with
16 85-2-307 and shall hold one or more hearings in accordance
17 with 85-2-309 prior to its approval or denial of the
18 proposed change. The department shall provide notice and may
19 hold one or more hearings upon any other proposed change if
20 it determines that such a change might adversely affect the
21 rights of other persons.

22 (7) The department or the legislature, if applicable,
23 may approve a change subject to such terms, conditions,
24 restrictions, and limitations as it considers necessary to
25 satisfy the criteria of this section, including limitations

1 on the time for completion of the change. The department
2 may extend time limits specified in the change approval
3 under the applicable criteria and procedures of 85-2-312(3).

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

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

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

20 (11) A change in appropriation right contrary to the
21 provisions of this section is invalid. No An officer,
22 agent, agency, or employee of the state may not knowingly
23 permit, aid, or assist in any manner such an unauthorized
24 change in appropriation right. No A person or corporation
25 may not, directly or indirectly, personally or through an

1 agent, officer, or employee, attempt to change an
2 appropriation right except in accordance with this section."

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

4 "85-2-404. Abandonment of appropriation right. (1) If
5 an appropriator ceases to use all or a part of his
6 appropriation right with the intention of wholly or
7 partially abandoning the right or if he ceases using his
8 appropriation right according to its terms and conditions
9 with the intention of not complying with those terms and
10 conditions, the appropriation right shall, to that extent,
11 be ~~deemed~~ considered abandoned and shall immediately expire.

12 (2) If an appropriator ceases to use all or part of
13 his appropriation right or ceases using his appropriation
14 right according to its terms and conditions for a period of
15 10 successive years and there was water available for his
16 use, there ~~shall--be~~ is a prima facie presumption that the
17 appropriator has abandoned his right in whole or for the
18 part not used.

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

23 (a) the set-aside and resulting reduction in use of
24 the appropriation right does not represent an intent by the
25 appropriator to wholly or partially abandon the

1 appropriation right or to not comply with the terms and
2 conditions attached to the right; and

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

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

11 ~~(4)~~(5) Subsections (1) and (2) do not apply to
12 existing rights until they have been determined in
13 accordance with part 2 of this chapter."

14 NEW SECTION. Section 4. Board designation of eligible
15 stream reaches. (1) The department of fish, wildlife, and
16 parks, with the consent of the commission, may apply to the
17 board for designation of stream reaches for which water
18 leasing to maintain or enhance streamflows pursuant to
19 [section 6] may occur.

20 (2) The board may declare a stream reach eligible for
21 leasing pursuant to [section 6] only if it finds that water
22 leasing is necessary to maintain or enhance streamflows for
23 fisheries.

24 (3) The board may designate no more than five stream
25 reaches in the state where water leasing pursuant to

1 [section 6] may occur.

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

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

11 (b) The department shall expend money obtained under
12 this section and deposited in the fish and wildlife
13 mitigation trust fund exclusively to lease existing rights
14 for the purpose of maintaining or enhancing instream flows
15 for fisheries.

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

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

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

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

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

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

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

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

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

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

25 (a) The department of fish, wildlife, and parks, with

1 the consent of the commission, may lease existing rights for
2 the purpose of maintaining or enhancing streamflows for the
3 benefit of fisheries in stream reaches determined eligible
4 by the board pursuant to [section 4].

5 (b) Upon receipt of an application for a lease from
6 the department of fish, wildlife, and parks, the department
7 shall publish notice of the application as provided in
8 85-2-307. Parties who believe they may be adversely affected
9 by the proposed lease may file an objection as provided in
10 85-2-308. A lease may not be approved until all objections
11 are resolved. After resolving all objections filed under
12 85-2-308, the department shall authorize a lease of an
13 existing right for the purpose of maintaining or enhancing
14 streamflows for the benefit of fisheries if the applicant
15 submits a complete application and meets the requirements of
16 85-2-402.

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

23 (d) The maximum quantity of water that may be leased
24 is the amount historically diverted by the lessor. However,
25 only the amount historically consumed, or a smaller amount

1 if specified by the department in the lease authorization,
2 may be used to maintain or enhance streamflows below the
3 lessor's point of diversion.

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

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

25 (g) The priority of appropriation for a lease under

1 this section is the same as the priority of appropriation of
2 the right that is leased.

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

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

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

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

19 NEW SECTION. **Section 7. Appropriation of federal**
20 **revenue for water leasing study.** For the biennium ending
21 June 30, 1991, the department of fish, wildlife, and parks
22 may expend up to \$60,000 of federal special revenue to
23 undertake the water leasing study required under [section
24 6].

25 NEW SECTION. **Section 8. Extension of authority.** Any

1 existing authority to make rules on the subject of the
2 provisions of [this act] is extended to the provisions of
3 [this act].

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

9 (2) [Section 5] is intended to be codified as an
10 integral part of Title 87, chapter 1, part 6, and the
11 provisions of Title 87, chapter 1, part 6, apply to [section
12 5].

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

15 NEW SECTION. **Section 11.** Termination. [This act]
16 terminates June 30, 1993.

-End-