

SENATE BILL NO. 144

INTRODUCED BY Brooks Beck Larson

Wayne L. Smith

A BILL FOR AN ACT ENTITLED: "AN ACT CLOSING THE UPPER CLARK FORK RIVER BASIN TO FURTHER APPROPRIATIONS; AMENDING THE DUTIES OF THE UPPER CLARK FORK RIVER BASIN STEERING COMMITTEE; PROVIDING FOR A 10-YEAR UPPER CLARK FORK RIVER BASIN INSTREAM FLOW PILOT PROGRAM; PROVIDING FOR THE AWARDING OF REASONABLE ATTORNEY FEES TO THE PREVAILING PARTY IN WATER USE PERMIT AND CHANGE APPROVAL PROCEEDINGS; AMENDING SECTIONS 85-2-102, 85-2-125, 85-2-335, 85-2-336, 85-2-338, 85-2-402, 85-2-404, AND 85-2-436, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE, AN APPLICABILITY DATE, AND A TERMINATION DATE."

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

Section 1. Section 85-2-335, MCA, is amended to read:

"85-2-335. Definitions. Unless the context requires otherwise, in 85-2-335 through 85-2-338, the following definitions apply:

(1) "Application" means an application for a beneficial water use permit pursuant to 85-2-302.

(2) "Domestic use" means use of water common to family homes, including use for culinary purposes, washing, drinking water for humans and domestic pets, and irrigation of a lawn or garden of less than 1 acre, not to exceed a total of 3.5 acre-feet per year. The term includes multiple domestic and municipal uses for expanded domestic use but does not include commercial or industrial use.

~~(3) "Ground water" means any water that is beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water and that is not a part of that surface water.~~

~~(4) "Upper Clark Fork River basin" means the drainage area of the Clark Fork River and its tributaries above Milltown dam but does not include the Blackfoot River, designated as subbasin 76F, or Roek Creek, designated as subbasin 76E."~~

Section 2. Section 85-2-336, MCA, is amended to read:

"85-2-336. Basin closure -- exception. (1) As provided in 85-2-319 and subject to the provisions of subsection (2) of this section, the department may not process or grant an application for a permit to

1 appropriate water within the Upper Clark Fork River basin ~~during the period from May 1, 1991, until June~~
 2 ~~30, 1995.~~

3 (2) The provisions of subsection (1) do not apply to:

4 (a) an application for a permit to appropriate ground water ~~or water~~ for domestic use; ~~and~~

5 (b) an application filed prior to January 1, 2000, for a permit to appropriate water to conduct
 6 response actions or remedial actions pursuant to the federal Comprehensive Environmental Response,
 7 Compensation, and Liability Act of 1980, as amended, or Title 75, chapter 10, part 7, at sites designated
 8 as of January 1, 1994. A permit issued to conduct response actions or remedial actions may not be used
 9 for dilution and must be limited to a term not to exceed the necessary time to complete the response or
 10 remedial action, and the permit may not be transferred to any person for any purpose other than the
 11 designated response or remedial action;

12 (c) an application for a permit to appropriate water for stock use;

13 (d) an application to store water; or

14 (e) an application for power generation at existing hydroelectric dams. The department may not
 15 approve a permit for power generation if approval results in additional consumption of water.

16 (3) Applications for water reservations in the Upper Clark Fork River basin filed pursuant to
 17 85-2-316 and pending as of May 1, 1991, have a priority date of May 1, 1991. ~~Reservation applicants have~~
 18 ~~no~~ The filing of a reservation application does not provide standing to object under 85-2-402 ~~during the~~
 19 ~~period of the basin closure provided in subsection (1).~~

20 (4) The board may not process or approve applications for reservations of water, ~~except ground~~
 21 ~~water,~~ in the Upper Clark Fork River basin filed pursuant to 85-2-316 ~~during the period of the basin closure~~
 22 ~~provided in subsection (1).~~"

23

24 **Section 3.** Section 85-2-338, MCA, is amended to read:

25 **"85-2-338. Upper Clark Fork River basin steering committee -- membership and duties --**
 26 **comprehensive management plan.** (1) There is an Upper Clark Fork River basin steering committee. The
 27 department director shall appoint the members of the committee, selecting them on the basis of their
 28 knowledge of water use, water management, fish, wildlife, recreation, water quality, and water
 29 conservation. Representation on the committee must include but is not limited to representatives from
 30 affected:

- 1 (a) agricultural organizations;
- 2 (b) conservation districts;
- 3 (c) departments of state government;
- 4 (d) environmental organizations;
- 5 (e) industries;
- 6 (f) local governments;
- 7 (g) reservation applicants;
- 8 (h) utilities; and
- 9 (i) water user organizations.
- 10 (2) The steering committee, consistent with the Upper Clark Fork River basin comprehensive
- 11 management plan, shall:
- 12 ~~complete an Upper Clark Fork River basin comprehensive management plan pursuant to 85-1-203. The plan~~
- 13 ~~must:~~
- 14 ~~(a) consider and balance all beneficial uses of the water in the Upper Clark Fork River basin;~~
- 15 ~~(b) include a description of the standards applied, the data relied upon, and the methodology used~~
- 16 ~~in preparing the plan;~~
- 17 ~~(c) contain recommendations regarding the Upper Clark Fork River basin closure as provided in~~
- 18 ~~85-2-336;~~
- 19 ~~(d) identify and make recommendations regarding the resolution of water related issues in the~~
- 20 ~~Upper Clark Fork River basin; and~~
- 21 ~~(e) include the Blackfoot River, designated as subbasin 76F, and Rock Creek, designated as~~
- 22 ~~subbasin 76E, in any considerations made under subsections (2)(a) through (2)(d)~~
- 23 (a) review the Upper Clark Fork River basin closure and exceptions as provided in 85-2-336 no less
- 24 than every 5 years after [the effective date of this act] and make recommendations to the legislature
- 25 regarding necessary changes;
- 26 (b) make recommendations to the 1997 legislature concerning representation, terms, and the
- 27 method of appointing members to the steering committee;
- 28 (c) prepare and submit a report evaluating the Upper Clark Fork River basin instream flow pilot
- 29 program as provided in [section 6];
- 30 (d) provide a forum for all interests to communicate about water issues;

1 (e) provide education about water law and water management issues;

2 (f) identify short-term and long-term water management issues and problems and identify
3 alternatives for resolving them;

4 (g) identify the potential beneficiaries of and a funding mechanism for new and expanded water
5 storage sites;

6 (h) assist in facilitating the resolution of water-related disputes;

7 (i) provide coordination with other basin management and planning efforts;

8 (j) advise government agencies about water management and permitting activities;

9 (k) consult with local governments within the Upper Clark Fork River basin; and

10 (l) report periodically to the legislature.

11 ~~(3) The steering committee shall complete and submit a management plan to the governor and the~~
12 ~~legislature by December 31, 1994."~~

13
14 **Section 4.** Section 85-2-102, MCA, is amended to read:

15 **"85-2-102. (Temporary) Definitions.** Unless the context requires otherwise, in this chapter, the
16 following definitions apply:

17 (1) "Appropriate" means to:

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

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

20 (c) in the case of the department of fish, wildlife, and parks, ~~to~~ lease water in accordance with
21 85-2-436; or

22 (d) in the Upper Clark Fork River basin, maintain and enhance streamflows in accordance with
23 [section 6].

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

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

28 (b) a use of water appropriated by the department for the state water leasing program under
29 85-2-141 and of water leased under a valid lease issued by the department under 85-2-141; ~~and~~

30 (c) a use of water by the department of fish, wildlife, and parks pursuant to a lease authorized

1 under 85-2-436; or

2 (d) a use of water to maintain and enhance streamflows in the Upper Clark Fork River basin as part
3 of the Upper Clark Fork River basin instream flow pilot program authorized under [section 6].

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

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

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

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

9 (7) "Correct and complete" means that the information required to be submitted conforms to the
10 standard of substantial credible information and that all of the necessary parts of the form requiring the
11 information have been filled in with the required information.

12 (8) "Declaration" means the declaration of an existing right filed with the department under section
13 8, Chapter 452, Laws of 1973.

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

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

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

19 (12) "Late claim" means a claim to an existing right forfeited pursuant to the conclusive
20 presumption of abandonment under 85-2-226.

21 (13) "Permit" means the permit to appropriate issued by the department under 85-2-301 through
22 85-2-303 and 85-2-306 through 85-2-314.

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

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

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

30 (17) "Substantial credible information" means probable believable facts sufficient to support a

1 reasonable legal theory upon which the department should proceed with the action requested by the person
2 providing the information.

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

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

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

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

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

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

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

16 **85-2-102. (Effective July 1, 1999) Definitions.** Unless the context requires otherwise, in this
17 chapter, the following definitions apply:

18 (1) "Appropriate" means:

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

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

21 (c) in the Upper Clark Fork River basin, to maintain and enhance streamflows in accordance with

22 [section 6].

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

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

27 (b) a use of water appropriated by the department for the state water leasing program under
28 85-2-141 and of water leased under a valid lease issued by the department under 85-2-141; or

29 (c) a use of water to maintain and enhance streamflows in the Upper Clark Fork River basin as part
30 of the Upper Clark Fork River basin instream flow pilot program authorized under [section 6].

- 1 (3) "Board" means the board of natural resources and conservation provided for in 2-15-3302.
- 2 (4) "Certificate" means a certificate of water right issued by the department.
- 3 (5) "Change in appropriation right" means a change in the place of diversion, the place of use, the
4 purpose of use, or the place of storage.
- 5 (6) "Correct and complete" means that the information required to be submitted conforms to the
6 standard of substantial credible information and that all of the necessary parts of the form requiring the
7 information have been filled in with the required information.
- 8 (7) "Declaration" means the declaration of an existing right filed with the department under section
9 8, Chapter 452, Laws of 1973.
- 10 (8) "Department" means the department of natural resources and conservation provided for in Title
11 2, chapter 15, part 33.
- 12 (9) "Existing right" means a right to the use of water ~~which~~ that would be protected under the law
13 as it existed prior to July 1, 1973.
- 14 (10) "Ground water" means any water that is beneath the ground surface.
- 15 (11) "Late claim" means a claim to an existing right forfeited pursuant to the conclusive
16 presumption of abandonment under 85-2-226.
- 17 (12) "Permit" means the permit to appropriate issued by the department under 85-2-301 through
18 85-2-303 and 85-2-306 through 85-2-314.
- 19 (13) "Person" means an individual, association, partnership, corporation, state agency, political
20 subdivision, the United States or any agency ~~thereof~~ of the United States, or any other entity.
- 21 (14) "Political subdivision" means any county, incorporated city or town, public corporation, or
22 district created pursuant to state law or other public body of the state empowered to appropriate water but
23 not a private corporation, association, or group.
- 24 (15) "Salvage" means to make water available for beneficial use from an existing valid
25 appropriation through application of water-saving methods.
- 26 (16) "Substantial credible information" means probable believable facts sufficient to support a
27 reasonable legal theory upon which the department should proceed with the action requested by the person
28 providing the information.
- 29 (17) "Waste" means the unreasonable loss of water through the design or negligent operation of
30 an appropriation or water distribution facility or the application of water to anything but a beneficial use.

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

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

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

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

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

9 (23) "Well" means any artificial opening or excavation in the ground, however made, by which
10 ground water is sought or can be obtained or through which it flows under natural pressures or is artificially
11 withdrawn."

12

13 **Section 5.** Section 85-2-125, MCA, is amended to read:

14 **"85-2-125. Recovery of attorney fees by prevailing party.** (1) The prevailing party in a hearing
15 under 85-2-309 on an application for a permit or change approval may bring an action in district court for
16 costs and attorney fees. The court shall award the prevailing party reasonable costs and attorney fees.
17 An action under this subsection must comply with the Montana Rules of Civil Procedure.

18 (2) If a final decision of the department on an application for a permit or change approval is
19 appealed to district court, the district court shall award the prevailing party reasonable attorney fees."

20

21 **NEW SECTION. Section 6. Upper Clark Fork River basin instream flow pilot program.** (1) The
22 department shall accept and process change applications from a person in accordance with 85-2-402 for
23 the purpose of leasing or converting existing water rights to maintain and enhance streamflows in the Upper
24 Clark Fork River basin, as defined in 85-2-335. The application must:

25 (a) include specific information on the length and location of the stream reach in which the
26 streamflow is to be maintained or enhanced; and

27 (b) provide a detailed streamflow measuring plan that describes the points where and the manner
28 in which the streamflow must be measured.

29 (2) The applicant shall pay all costs associated with installing measuring devices, measuring flows,
30 and providing measurement records according to the measurement plan required in subsection (1)..

1 (3) The maximum quantity of water that may be changed to maintain and enhance streamflows
2 is the amount historically diverted. However, only the amount historically consumed may be used to
3 maintain or enhance streamflows below the existing point of diversion.

4 (4) The department may modify or revoke a change approval if an appropriator other than an
5 appropriator described in subsection (5) proves by a preponderance of the evidence that the appropriator's
6 water right is adversely affected.

7 (5) A person issued a water use permit with a priority of appropriation after the date of filing an
8 application for change under this section may not object to the change approval, the use of the
9 appropriation right according to the terms of the change approval, or the reversion of the appropriation right
10 to its previous use.

11 (6) The priority of appropriation for a right to maintain and enhance streamflows under this section
12 is the same as the priority of appropriation of the right approved for change.

13 (7) Neither a change in appropriation right nor any other approval is required for the reversion of
14 the appropriation right to its previous use.

15 (8) The Upper Clark Fork River basin steering committee shall complete and submit to the governor
16 and the legislature by December 31, 2004, a report evaluating the effects of all change approvals issued
17 to maintain and enhance streamflows under this section. The report must:

18 (a) consider the effects upon other water right holders, tax values and revenue, fisheries,
19 recreation, water quality, and other economic, social, and environmental effects; and

20 (b) include recommendations to terminate, continue, enlarge, or otherwise modify the pilot
21 program.

22 (9) Nothing in this section authorizes the sale of an appropriation right to maintain or enhance
23 streamflows.

24
25 **Section 7.** Section 85-2-402, MCA, is amended to read:

26 **"85-2-402. (Temporary) Changes in appropriation rights.** (1) An appropriator may not make a
27 change in an appropriation right except, as permitted under this section, by applying for and receiving the
28 approval of the department or, if applicable, of the legislature. An applicant shall submit a correct and
29 complete application.

30 (2) Except as provided in subsections (4) through (6), the department shall approve a change in

1 appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are
2 met:

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

5 (b) Except for a lease authorization pursuant to 85-2-436 or water use pursuant to [section 6] that
6 does not require appropriation works, the proposed means of diversion, construction, and operation of the
7 appropriation works are adequate.

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

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

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

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

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

16 (3) The applicant is required to prove that the criteria in subsections (2)(f) and (2)(g) have been met
17 only if a valid objection is filed. A valid objection must contain substantial credible information establishing
18 to the satisfaction of the department that the criteria in subsection (2)(f) or (2)(g), as applicable, may not
19 be met.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

29 (c) In determining whether the appropriator has proved by clear and convincing evidence that the
30 requirements of subsections (6)(b)(ii) and (6)(b)(iii) will be met, the department and, if applicable, the

1 legislature shall consider the following factors:

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

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

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

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

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

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

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

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

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

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

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

6 (13) A change in appropriation right contrary to the provisions of this section is invalid. An officer,
7 agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an
8 unauthorized change in appropriation right. A person or corporation may not, directly or indirectly,
9 personally or through an agent, officer, or employee, attempt to change an appropriation right except in
10 accordance with this section.

11 (14) The department may adopt rules to implement the provisions of this section. (Terminates June
12 30, 1999--sec. 4, Ch. 740, L. 1991.)

13 **85-2-402. (Effective July 1, 1999) Changes in appropriation rights.** (1) An appropriator may not
14 make a change in an appropriation right except, as permitted under this section, by applying for and
15 receiving the approval of the department or, if applicable, of the legislature. An applicant shall submit a
16 correct and complete application.

17 (2) Except as provided in subsections (4) through (6), the department shall approve a change in
18 appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are
19 met:

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

22 (b) ~~The~~ Except for water use pursuant to [section 6] that does not require appropriation works, the
23 proposed means of diversion, construction, and operation of the appropriation works are adequate.

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

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

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

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

30 (g) The ability of a discharge permit holder to satisfy effluent limitations of a permit issued in

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

2 (3) The applicant is required to prove that the criteria in subsections (2)(f) and (2)(g) have been met
3 only if a valid objection is filed. A valid objection must contain substantial credible information establishing
4 to the satisfaction of the department that the criteria in subsection (2)(f) or (2)(g), as applicable, may not
5 be met.

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

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

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

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

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

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

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

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

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

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

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

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

29 (6) (a) The state of Montana has long recognized the importance of conserving its public waters
30 and the necessity to maintain adequate water supplies for the state's water requirements, including

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

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

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

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

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

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

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

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

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

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

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

28 (7) For any application for a change in appropriation right involving 4,000 or more acre-feet of
29 water a year and 5.5 or more cubic feet per second of water, the department shall give notice of the
30 proposed change in accordance with 85-2-307 and shall hold one or more hearings in accordance with

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

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

8 (9) Upon actual application of water to the proposed beneficial use within the time allowed, the
9 appropriator shall notify the department that the appropriation has been completed. The notification must
10 contain a certified statement by a person with experience in the design, construction, or operation of
11 appropriation works describing how the appropriation was completed.

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

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

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

22 (13) A change in appropriation right contrary to the provisions of this section is invalid. An officer,
23 agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an
24 unauthorized change in appropriation right. A person or corporation may not, directly or indirectly,
25 personally or through an agent, officer, or employee, attempt to change an appropriation right except in
26 accordance with this section.

27 (14) The department may adopt rules to implement the provisions of this section."
28

29 **Section 8.** Section 85-2-404, MCA, is amended to read:

30 **"85-2-404. (Temporary) Abandonment of appropriation right.** (1) If an appropriator ceases to use

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

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

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

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

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

18 (4) The lease of an existing right pursuant to 85-2-436, the use of water pursuant to [section 6],
 19 or ~~the~~ a temporary change pursuant to 85-2-407 does not constitute an abandonment or serve as evidence
 20 that could be used to establish an abandonment of any part of the right.

21 (5) Subsections (1) and (2) do not apply to existing rights until they have been determined in
 22 accordance with part 2 of this chapter. (Terminates June 30, 1999--sec. 4, Ch. 740, L. 1991.)

23 **85-2-404. (Effective July 1, 1999) Abandonment of appropriation right.** (1) If an appropriator
 24 ceases to use all or a part of an ~~his~~ appropriation right with the intention of wholly or partially abandoning
 25 the right or if ~~he~~ the appropriator ceases using ~~his~~ the appropriation right according to its terms and
 26 conditions with the intention of not complying with those terms and conditions, the appropriation right ~~shall~~
 27 is, to that extent, ~~be deemed~~ considered abandoned and ~~shall~~ must immediately expire.

28 (2) If an appropriator ceases to use all or part of ~~his~~ an appropriation right or ceases using ~~his~~ the
 29 appropriation right according to its terms and conditions for a period of 10 successive years and there was
 30 water available for ~~his~~ use, there ~~shall be~~ is a prima facie presumption that the appropriator has abandoned

1 ~~his~~ the right in whole or for the part not used.

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

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

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

11 (4) ~~A~~ The use of water pursuant to [section 6] or a temporary change pursuant to 85-2-407 does
12 not constitute an abandonment or serve as evidence that could be used to establish an abandonment of
13 any part of the right.

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

16

17 **Section 9.** Section 85-2-436, MCA, is amended to read:

18 "**85-2-436. (Temporary) Water leasing study.** (1) The department of fish, wildlife, and parks and
19 the department, in consultation with the water policy committee, shall conduct and coordinate a study that,
20 at a minimum:

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

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

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

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

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

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

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

3 (2) For purposes of undertaking the study described in subsection (1) and as authorized by law,
4 the department of fish, wildlife, and parks and the department may engage in the activities described in this
5 subsection. ~~For~~ Except as provided in [section 6], for purposes of this study, this section is the exclusive
6 means by which the department of fish, wildlife, and parks may seek to change an appropriation right to
7 an instream flow purpose.

8 (a) The department of fish, wildlife, and parks, with the consent of the commission, may lease
9 existing rights for the purpose of maintaining or enhancing streamflows for the benefit of fisheries in stream
10 reaches determined eligible by the board pursuant to 85-2-437.

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

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

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

26 (e) The lease may not be issued for a term of more than 10 years, but it may be renewed once for
27 up to 10 years, except that a lease of water made available from the development of a water conservation
28 or storage project is restricted to a term of not more than 20 years. Upon receiving notice of a lease
29 renewal, the department shall notify other appropriators potentially affected by the lease and shall allow
30 30 days for submission of new evidence of adverse effects to other water rights. A lease authorization is

1 not required for a renewal unless an appropriator other than an appropriator described in subsection (2)(i)
2 submits evidence of adverse effects to the appropriator's rights that has not been considered previously.
3 If new evidence is submitted, a lease authorization must be obtained according to the requirements of
4 85-2-402.

5 (f) During the term of the lease, the department may modify or revoke the lease authorization if
6 an appropriator other than an appropriator described in subsection (2)(i) proves by a preponderance of
7 evidence that the appropriator's water right is adversely affected.

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

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

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

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

18 (3) (a) The department of fish, wildlife, and parks shall complete and submit to the board,
19 commission, and water policy committee an annual study progress report by December 1 of each year. This
20 report must include the applicable information listed in subsection (1) for each lease, a summary of stream
21 reach designation activity under 85-2-437, and a summary of leasing activity on all designated streams.
22 If the department of fish, wildlife, and parks has not leased additional water rights under this section by
23 December 1 of any year, the department of fish, wildlife, and parks shall provide compelling justification
24 for that fact in the study progress report.

25 (b) A final study report must be adopted by the board and commission and submitted to the water
26 policy committee, which shall complete the final report by December 1, 1998.

27 (4) This section does not create the right for a person to bring suit to compel the renewal of a lease
28 that has expired. (Terminates June 30, 1999--sec. 4, Ch. 740, L. 1991.) "

29
30 **NEW SECTION. Section 10. Codification instruction.** [Section 6] is intended to be codified as an

1 integral part of Title 85, chapter 2, part 4, and the provisions of Title 85, chapter 2, part 4, apply to
2 [section 6].

3

4 NEW SECTION. **Section 11. Applicability.** [This act] applies to all applications for changes in
5 appropriation rights received by the department of natural resources and conservation after [the effective
6 date of this act].

7

8 NEW SECTION. **Section 12. Effective date.** [This act] is effective on passage and approval.

9

10 NEW SECTION. **Section 13. Termination.** [Sections 4 through 8] terminate June 30, 2005.

11

-END-

STATE OF MONTANA - FISCAL NOTE

Fiscal Note for SB0144, as introduced

DESCRIPTION OF PROPOSED LEGISLATION:

An act implementing recommendations of the Upper Clark Fork Basin Water Management Plan developed by the Upper Clark Fork Basin Steering Committee in accordance with the legislative mandate contained in SB434 passed by the 1991 legislature (MCA 85-2-335 to 338). Specifically, this act closes the upper Clark Fork Basin to new water rights appropriations (with exceptions), provides for a 10-year instream flow pilot program in this basin, provides for attorney fees to the prevailing party in water use permit and change proceedings, and amends the duties of the Upper Clark Fork Basin Steering Committee. Most elements of the plan are strictly voluntary in nature and do not impose additional regulations or requirements on the public, business or industry.

ASSUMPTIONS:

1. The Executive present law base serves as the point from which to calculate any fiscal impact due to this proposed legislation.
2. Department of Health and Environmental Sciences (DHES) staff time and operating expenses associated with implementation of the water management plan proposed by this bill can be absorbed in the present law base budget.
3. DHES participation in resolution of water use conflicts via this continuing planning process will fall within the existing responsibilities and goals of Water Quality Division programs.
4. Department of Natural Resources Conservation (DNRC) staff time and operating expenses associated with implementation of the water management plan proposed by this bill can be absorbed in the present law base budget.

FISCAL IMPACT:

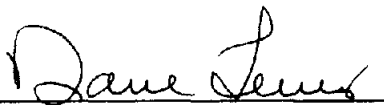
None.

EFFECT ON COUNTY OR OTHER LOCAL REVENUES OR EXPENDITURES:

Montana District Courts may experience an increase in case load, and the resultant costs, as a result of this legislation. Based on historical information, this increase would be minimal.

LONG-RANGE EFFECTS OF PROPOSED LEGISLATION:

This legislation will provide for more efficient use of existing resources through consensus-based, collaborative water resources planning. A positive impact on water quality and quantity in the Upper Clark Fork basin is expected to result.

 1-22-95

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



VIVIAN BROOKE, PRIMARY SPONSOR DATE

Fiscal Note for SB0144, as introduced

SB 144

APPROVED BY COM ON AGRICULTURE,
LIVESTOCK & IRRIGATION

SENATE BILL NO. 144

INTRODUCED BY BROOKE, BECK, LARSON, HARPER, L. SMITH

A BILL FOR AN ACT ENTITLED: "AN ACT CLOSING THE UPPER CLARK FORK RIVER BASIN TO FURTHER APPROPRIATIONS; AMENDING THE DUTIES OF THE UPPER CLARK FORK RIVER BASIN STEERING COMMITTEE; PROVIDING FOR A 10-YEAR UPPER CLARK FORK RIVER BASIN INSTREAM FLOW PILOT PROGRAM; PROVIDING FOR THE AWARDING OF REASONABLE ATTORNEY FEES TO THE PREVAILING PARTY IN WATER USE PERMIT AND CHANGE APPROVAL PROCEEDINGS; AMENDING SECTIONS 85-2-102, 85-2-125, 85-2-335, 85-2-336, 85-2-338, 85-2-402, 85-2-404, AND 85-2-436, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE, AN APPLICABILITY DATE, AND A TERMINATION DATE."

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

Section 1. Section 85-2-335, MCA, is amended to read:

"85-2-335. Definitions. Unless the context requires otherwise, in 85-2-335 through 85-2-338, the following definitions apply:

(1) "Application" means an application for a beneficial water use permit pursuant to 85-2-302.

~~(2) "Domestic use" means use of water common to family homes, including use for culinary purposes, washing, drinking water for humans and domestic pets, and irrigation of a lawn or garden of less than 1 acre, not to exceed a total of 3.5 acre feet per year. The term includes multiple domestic and municipal uses for expanded domestic use but does not include commercial or industrial use.~~

~~(3) "Ground water" means any water that is beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water and that is not a part of that surface water.~~

~~(4) "Upper Clark Fork River basin" means the drainage area of the Clark Fork River and its tributaries above Milltown dam but does not include the Blackfoot River, designated as subbasin 76F, or Reek Creek, designated as subbasin 76E."~~

Section 2. Section 85-2-336, MCA, is amended to read:

"85-2-336. Basin closure -- exception. (1) As provided in 85-2-319 and subject to the provisions of subsection (2) of this section, the department may not process or grant an application for a permit to

1 appropriate water within the Upper Clark Fork River basin ~~during the period from May 1, 1991, until June~~
 2 ~~30, 1995.~~

3 (2) The provisions of subsection (1) do not apply to:

4 (a) an application for a permit to appropriate ground water ~~or water for domestic use; and~~

5 (b) an application filed prior to January 1, 2000, for a permit to appropriate water to conduct
 6 response actions or remedial actions pursuant to the federal Comprehensive Environmental Response,
 7 Compensation, and Liability Act of 1980, as amended, or Title 75, chapter 10, part 7, at sites designated
 8 as of January 1, 1994. THE TOTAL FLOW RATES FOR ALL PERMITS ISSUED UNDER THIS SUBSECTION
 9 (2)(B) MAY NOT EXCEED 10 CUBIC FEET PER SECOND. A permit issued to conduct response actions or
 10 remedial actions may not be used for dilution and must be limited to a term not to exceed the necessary
 11 time to complete the response or remedial action, and the permit may not be transferred to any person for
 12 any purpose other than the designated response or remedial action;

13 (c) an application for a permit to appropriate water for stock use;

14 (d) an application to store water; or

15 (e) an application for power generation at existing hydroelectric dams. The department may not
 16 approve a permit for power generation if approval results in additional consumption of water.

17 (3) Applications for water reservations in the Upper Clark Fork River basin filed pursuant to
 18 85-2-316 and pending as of May 1, 1991, have a priority date of May 1, 1991. ~~Reservation applicants have~~
 19 ~~no~~ The filing of a reservation application does not provide standing to object under 85-2-402 ~~during the~~
 20 ~~period of the basin closure provided in subsection (1).~~

21 (4) The board may not process or approve applications for reservations of water, ~~except ground~~
 22 ~~water,~~ in the Upper Clark Fork River basin filed pursuant to 85-2-316 ~~during the period of the basin closure~~
 23 ~~provided in subsection (1)."~~

24

25 **Section 3.** Section 85-2-338, MCA, is amended to read:

26 **"85-2-338. Upper Clark Fork River basin steering committee -- membership and duties --**
 27 **comprehensive management plan.** (1) There is an Upper Clark Fork River basin steering committee. The
 28 department director shall appoint the members of the committee, selecting them on the basis of their
 29 knowledge of water use, water management, fish, wildlife, recreation, water quality, and water
 30 conservation. Representation on the committee must include but is not limited to representatives from

1 affected:

- 2 (a) agricultural organizations;
3 (b) conservation districts;
4 (c) departments of state government;
5 (d) environmental organizations;
6 (e) industries;
7 (f) local governments;
8 (g) reservation applicants;
9 (h) utilities; and
10 (i) water user organizations.

11 (2) The steering committee, consistent with the Upper Clark Fork River basin comprehensive
12 management plan, shall:

13 ~~complete an Upper Clark Fork River basin comprehensive management plan pursuant to 85-1-203. The plan~~
14 ~~must:~~

15 ~~(a) consider and balance all beneficial uses of the water in the Upper Clark Fork River basin;~~

16 ~~(b) include a description of the standards applied, the data relied upon, and the methodology used~~
17 ~~in preparing the plan;~~

18 ~~(c) contain recommendations regarding the Upper Clark Fork River basin closure as provided in~~
19 ~~85-2-336;~~

20 ~~(d) identify and make recommendations regarding the resolution of water related issues in the~~
21 ~~Upper Clark Fork River basin; and~~

22 ~~(e) include the Blackfoot River, designated as subbasin 76F, and Rock Creek, designated as~~
23 ~~subbasin 76E, in any considerations made under subsections (2)(a) through (2)(d)~~

24 (a) review the Upper Clark Fork River basin closure and exceptions as provided in 85-2-336 no less
25 than every 5 years after [the effective date of this act] and make recommendations to the legislature
26 regarding necessary changes;

27 (b) make recommendations to the 1997 legislature concerning representation, terms, and the
28 method of appointing members to the steering committee;

29 (c) prepare and submit a report evaluating the Upper Clark Fork River basin instream flow pilot
30 program as provided in [section 6];

- 1 (d) provide a forum for all interests to communicate about water issues;
 2 (e) provide education about water law and water management issues;
 3 (f) identify short-term and long-term water management issues and problems and identify
 4 alternatives for resolving them;
 5 (g) identify the potential beneficiaries of and a funding mechanism for new and expanded water
 6 storage sites;
 7 (h) assist in facilitating the resolution of water-related disputes;
 8 (i) provide coordination with other basin management and planning efforts;
 9 (j) advise government agencies about water management and permitting activities;
 10 (k) consult with local governments within the Upper Clark Fork River basin; and
 11 (l) report periodically to the legislature.
 12 ~~(3) The steering committee shall complete and submit a management plan to the governor and the~~
 13 ~~legislature by December 31, 1994."~~

14

15 **Section 4.** Section 85-2-102, MCA, is amended to read:

16 **"85-2-102. (Temporary) Definitions.** Unless the context requires otherwise, in this chapter, the
 17 following definitions apply:

18 (1) "Appropriate" means to:

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

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

21 (c) in the case of the department of fish, wildlife, and parks, ~~to~~ lease water in accordance with
 22 85-2-436; or

23 (d) in the Upper Clark Fork River basin, maintain and enhance streamflows in accordance with
 24 [section 6].

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

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

29 (b) a use of water appropriated by the department for the state water leasing program under
 30 85-2-141 and of water leased under a valid lease issued by the department under 85-2-141; ~~and~~

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

3 (d) a use of water to maintain and enhance streamflows in the Upper Clark Fork River basin as part
4 of the Upper Clark Fork River basin instream flow pilot program authorized under [section 6].

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

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

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

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

10 (7) "Correct and complete" means that the information required to be submitted conforms to the
11 standard of substantial credible information and that all of the necessary parts of the form requiring the
12 information have been filled in with the required information.

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

15 (9) "Department" means the department of natural resources and conservation provided for in Title
16 2, chapter 15, part 33.

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

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

20 (12) "Late claim" means a claim to an existing right forfeited pursuant to the conclusive
21 presumption of abandonment under 85-2-226.

22 (13) "Permit" means the permit to appropriate issued by the department under 85-2-301 through
23 85-2-303 and 85-2-306 through 85-2-314.

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

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

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

1 (17) "Substantial credible information" means probable believable facts sufficient to support a
 2 reasonable legal theory upon which the department should proceed with the action requested by the person
 3 providing the information.

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

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

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

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

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

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

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

17 **85-2-102. (Effective July 1, 1999) Definitions.** Unless the context requires otherwise, in this
 18 chapter, the following definitions apply:

19 (1) "Appropriate" means:

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

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

22 (c) in the Upper Clark Fork River basin, to maintain and enhance streamflows in accordance with
 23 [section 6].

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

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

28 (b) a use of water appropriated by the department for the state water leasing program under
 29 85-2-141 and of water leased under a valid lease issued by the department under 85-2-141; or

30 (c) a use of water to maintain and enhance streamflows in the Upper Clark Fork River basin as part

1 of the Upper Clark Fork River basin instream flow pilot program authorized under [section 6].

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

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

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

6 (6) "Correct and complete" means that the information required to be submitted conforms to the
7 standard of substantial credible information and that all of the necessary parts of the form requiring the
8 information have been filled in with the required information.

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

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

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

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

16 (11) "Late claim" means a claim to an existing right forfeited pursuant to the conclusive
17 presumption of abandonment under 85-2-226.

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

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

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

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

27 (16) "Substantial credible information" means probable believable facts sufficient to support a
28 reasonable legal theory upon which the department should proceed with the action requested by the person
29 providing the information.

30 (17) "Waste" means the unreasonable loss of water through the design or negligent operation of

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

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

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

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

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

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

10 (23) "Well" means any artificial opening or excavation in the ground, however made, by which
11 ground water is sought or can be obtained or through which it flows under natural pressures or is artificially
12 withdrawn."

13

14 **Section 5.** Section 85-2-125, MCA, is amended to read:

15 **"85-2-125. Recovery of attorney fees by prevailing party.** (1) The prevailing party in a hearing
16 under 85-2-309 on an application for a permit or change approval may bring an action in district court for
17 costs and attorney fees. The court shall award the prevailing party reasonable costs and attorney fees.
18 An action under this subsection must comply with the Montana Rules of Civil Procedure.

19 (2) If a final decision of the department on an application for a permit or change approval is
20 appealed to district court, the district court shall award the prevailing party reasonable attorney fees."

21

22 **NEW SECTION. Section 6. Upper Clark Fork River basin instream flow pilot program.** (1) The
23 department shall accept and process change applications from a person in accordance with 85-2-402 for
24 the purpose of leasing or converting existing water rights to maintain and enhance streamflows in the Upper
25 Clark Fork River basin, as defined in 85-2-335. The application must:

26 (a) include specific information on the length and location of the stream reach in which the
27 streamflow is to be maintained or enhanced; and

28 (b) provide a detailed streamflow measuring plan that describes the points where and the manner
29 in which the streamflow must be measured.

30 (2) The applicant shall pay all costs associated with installing measuring devices, measuring flows,

1 and providing measurement records according to the measurement plan required in subsection (1).

2 (3) The maximum quantity of water that may be changed to maintain and enhance streamflows
3 is the amount historically diverted. However, only the amount historically consumed may be used to
4 maintain or enhance streamflows below the existing point of diversion.

5 (4) The department may modify or revoke a change approval if an appropriator other than an
6 appropriator described in subsection (5) proves by a preponderance of the evidence that the appropriator's
7 water right is adversely affected.

8 (5) A person issued a water use permit with a priority of appropriation after the date of filing an
9 application for change under this section may not object to the change approval, the use of the
10 appropriation right according to the terms of the change approval, or the reversion of the appropriation right
11 to its previous use.

12 (6) The priority of appropriation for a right to maintain and enhance streamflows under this section
13 is the same as the priority of appropriation of the right approved for change.

14 (7) Neither a change in appropriation right nor any other approval is required for the reversion of
15 the appropriation right to its previous use.

16 (8) The Upper Clark Fork River basin steering committee shall complete and submit to the governor
17 and the legislature by December 31, 2004, a report evaluating the effects of all change approvals issued
18 to maintain and enhance streamflows under this section. The report must:

19 (a) consider the effects upon other water right holders, tax values and revenue, fisheries,
20 recreation, water quality, and other economic, social, and environmental effects; and

21 (b) include recommendations to terminate, continue, enlarge, or otherwise modify the pilot
22 program.

23 (9) Nothing in this section authorizes the sale of an appropriation right to maintain or enhance
24 streamflows.

25

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

27 **"85-2-402. (Temporary) Changes in appropriation rights.** (1) An appropriator may not make a
28 change in an appropriation right except, as permitted under this section, by applying for and receiving the
29 approval of the department or, if applicable, of the legislature. An applicant shall submit a correct and
30 complete application.

1 (2) Except as provided in subsections (4) through (6), the department shall approve a change in
2 appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are
3 met:

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

6 (b) Except for a lease authorization pursuant to 85-2-436 or water use pursuant to [section 6] that
7 does not require appropriation works, the proposed means of diversion, construction, and operation of the
8 appropriation works are adequate.

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

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

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

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

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

17 (3) The applicant is required to prove that the criteria in subsections (2)(f) and (2)(g) have been met
18 only if a valid objection is filed. A valid objection must contain substantial credible information establishing
19 to the satisfaction of the department that the criteria in subsection (2)(f) or (2)(g), as applicable, may not
20 be met.

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

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

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

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

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

- 1 (iii) the effects on the quantity and quality of water for existing uses in the source of supply;
- 2 (iv) the availability and feasibility of using low-quality water for the purpose for which application
- 3 has been made;
- 4 (v) the effects on private property rights by any creation of or contribution to saline seep; and
- 5 (vi) the probable significant adverse environmental impacts of the proposed use of water as
- 6 determined by the department pursuant to Title 75, chapter 1, or Title 75, chapter 20.
- 7 (5) The department may not approve a change in purpose of use or place of use for a diversion that
- 8 results in 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water being
- 9 consumed unless:
- 10 (a) the applicant proves by clear and convincing evidence and the department finds that the criteria
- 11 in subsections (2) and (4) are met; and
- 12 (b) the department then petitions the legislature and the legislature affirms the decision of the
- 13 department after one or more public hearings.
- 14 (6) (a) The state of Montana has long recognized the importance of conserving its public waters
- 15 and the necessity to maintain adequate water supplies for the state's water requirements, including
- 16 requirements for reserved water rights held by the United States for federal reserved lands and in trust for
- 17 the various Indian tribes within the state's boundaries. Although the state of Montana also recognizes that,
- 18 under appropriate conditions, the out-of-state transportation and use of its public waters are not in conflict
- 19 with the public welfare of its citizens or the conservation of its waters, the following criteria must be met
- 20 before out-of-state use may occur:
- 21 (b) The department and, if applicable, the legislature may not approve a change in appropriation
- 22 right for the withdrawal and transportation of appropriated water for use outside the state unless the
- 23 appropriator proves by clear and convincing evidence and, if applicable, the legislature approves after one
- 24 or more public hearings that:
- 25 (i) depending on the volume of water diverted or consumed, the applicable criteria and procedures
- 26 of subsection (2) or (4) are met;
- 27 (ii) the proposed out-of-state use of water is not contrary to water conservation in Montana; and
- 28 (iii) the proposed out-of-state use of water is not otherwise detrimental to the public welfare of the
- 29 citizens of Montana.
- 30 (c) In determining whether the appropriator has proved by clear and convincing evidence that the

1 requirements of subsections (6)(b)(ii) and (6)(b)(iii) will be met, the department and, if applicable, the
2 legislature shall consider the following factors:

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

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

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

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

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

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

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

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

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

1 modify or revoke the change approval.

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

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

7 (13) A change in appropriation right contrary to the provisions of this section is invalid. An officer,
8 agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an
9 unauthorized change in appropriation right. A person or corporation may not, directly or indirectly,
10 personally or through an agent, officer, or employee, attempt to change an appropriation right except in
11 accordance with this section.

12 (14) The department may adopt rules to implement the provisions of this section. (Terminates June
13 30, 1999--sec. 4, Ch. 740, L. 1991.)

14 **85-2-402. (Effective July 1, 1999) Changes in appropriation rights.** (1) An appropriator may not
15 make a change in an appropriation right except, as permitted under this section, by applying for and
16 receiving the approval of the department or, if applicable, of the legislature. An applicant shall submit a
17 correct and complete application.

18 (2) Except as provided in subsections (4) through (6), the department shall approve a change in
19 appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are
20 met:

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

23 (b) ~~The~~ Except for water use pursuant to [section 6] that does not require appropriation works, the
24 proposed means of diversion, construction, and operation of the appropriation works are adequate.

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

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

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

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

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

3 (3) The applicant is required to prove that the criteria in subsections (2)(f) and (2)(g) have been met
4 only if a valid objection is filed. A valid objection must contain substantial credible information establishing
5 to the satisfaction of the department that the criteria in subsection (2)(f) or (2)(g), as applicable, may not
6 be met.

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

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

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

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

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

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

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

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

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

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

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

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

30 (6) (a) The state of Montana has long recognized the importance of conserving its public waters

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

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

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

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

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

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

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

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

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

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

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

29 (7) For any application for a change in appropriation right involving 4,000 or more acre-feet of
30 water a year and 5.5 or more cubic feet per second of water, the department shall give notice of the

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

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

9 (9) Upon actual application of water to the proposed beneficial use within the time allowed, the
10 appropriator shall notify the department that the appropriation has been completed. The notification must
11 contain a certified statement by a person with experience in the design, construction, or operation of
12 appropriation works describing how the appropriation was completed.

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

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

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

23 (13) A change in appropriation right contrary to the provisions of this section is invalid. An officer,
24 agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an
25 unauthorized change in appropriation right. A person or corporation may not, directly or indirectly,
26 personally or through an agent, officer, or employee, attempt to change an appropriation right except in
27 accordance with this section.

28 (14) The department may adopt rules to implement the provisions of this section."
29

30 **Section 8.** Section 85-2-404, MCA, is amended to read:

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

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

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

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

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

19 (4) The lease of an existing right pursuant to 85-2-436, the use of water pursuant to [section 6],
 20 or ~~the a~~ temporary change pursuant to 85-2-407 does not constitute an abandonment or serve as evidence
 21 that could be used to establish an abandonment of any part of the right.

22 (5) Subsections (1) and (2) do not apply to existing rights until they have been determined in
 23 accordance with part 2 of this chapter. (Terminates June 30, 1999--sec. 4, Ch. 740, L. 1991.)

24 **85-2-404. (Effective July 1, 1999) Abandonment of appropriation right.** (1) If an appropriator
 25 ceases to use all or a part of an ~~his~~ appropriation right with the intention of wholly or partially abandoning
 26 the right or if ~~he the appropriator~~ ceases using ~~his~~ the appropriation right according to its terms and
 27 conditions with the intention of not complying with those terms and conditions, the appropriation right ~~shall~~
 28 is, to that extent, ~~be deemed~~ considered abandoned and ~~shall~~ must immediately expire.

29 (2) If an appropriator ceases to use all or part of ~~his~~ an appropriation right or ceases using ~~his~~ the
 30 appropriation right according to its terms and conditions for a period of 10 successive years and there was

1 water available for his use, there ~~shall be~~ is a prima facie presumption that the appropriator has abandoned
2 ~~his~~ the right in whole or for the part not used.

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

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

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

12 (4) ~~A~~ The use of water pursuant to [section 6] or a temporary change pursuant to 85-2-407 does
13 not constitute an abandonment or serve as evidence that could be used to establish an abandonment of
14 any part of the right.

15 (5) Subsections (1) and (2) do not apply to existing rights until they have been determined in
16 accordance with part 2 of this chapter."
17

18 **Section 9.** Section 85-2-436, MCA, is amended to read:

19 **"85-2-436. (Temporary) Water leasing study.** (1) The department of fish, wildlife, and parks and
20 the department, in consultation with the water policy committee, shall conduct and coordinate a study that,
21 at a minimum:

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

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

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

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

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

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

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

4 (2) For purposes of undertaking the study described in subsection (1) and as authorized by law,
5 the department of fish, wildlife, and parks and the department may engage in the activities described in this
6 subsection. ~~For~~ Except as provided in [section 6], for purposes of this study, this section is the exclusive
7 means by which the department of fish, wildlife, and parks may seek to change an appropriation right to
8 an instream flow purpose.

9 (a) The department of fish, wildlife, and parks, with the consent of the commission, may lease
10 existing rights for the purpose of maintaining or enhancing streamflows for the benefit of fisheries in stream
11 reaches determined eligible by the board pursuant to 85-2-437.

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

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

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

27 (e) The lease may not be issued for a term of more than 10 years, but it may be renewed once for
28 up to 10 years, except that a lease of water made available from the development of a water conservation
29 or storage project is restricted to a term of not more than 20 years. Upon receiving notice of a lease
30 renewal, the department shall notify other appropriators potentially affected by the lease and shall allow

1 30 days for submission of new evidence of adverse effects to other water rights. A lease authorization is
2 not required for a renewal unless an appropriator other than an appropriator described in subsection (2)(i)
3 submits evidence of adverse effects to the appropriator's rights that has not been considered previously.
4 If new evidence is submitted, a lease authorization must be obtained according to the requirements of
5 85-2-402.

6 (f) During the term of the lease, the department may modify or revoke the lease authorization if
7 an appropriator other than an appropriator described in subsection (2)(i) proves by a preponderance of
8 evidence that the appropriator's water right is adversely affected.

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

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

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

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

19 (3) (a) The department of fish, wildlife, and parks shall complete and submit to the board,
20 commission, and water policy committee an annual study progress report by December 1 of each year. This
21 report must include the applicable information listed in subsection (1) for each lease, a summary of stream
22 reach designation activity under 85-2-437, and a summary of leasing activity on all designated streams.
23 If the department of fish, wildlife, and parks has not leased additional water rights under this section by
24 December 1 of any year, the department of fish, wildlife, and parks shall provide compelling justification
25 for that fact in the study progress report.

26 (b) A final study report must be adopted by the board and commission and submitted to the water
27 policy committee, which shall complete the final report by December 1, 1998.

28 (4) This section does not create the right for a person to bring suit to compel the renewal of a lease
29 that has expired. (Terminates June 30, 1999--sec. 4, Ch. 740, L. 1991.) "

30

1 **NEW SECTION.** **Section 10. Codification instruction.** [Section 6] is intended to be codified as an
2 integral part of Title 85, chapter 2, part 4, and the provisions of Title 85, chapter 2, part 4, apply to
3 [section 6].
4

5 **NEW SECTION.** **Section 11. Applicability.** [This act] applies to all applications for changes in
6 appropriation rights, PERMITS, AND WATER RESERVATIONS received by the department of natural
7 resources and conservation after [the effective date of this act].
8

9 **NEW SECTION.** **Section 12. Effective date.** [This act] is effective on passage and approval.
10

11 **NEW SECTION.** **Section 13. Termination.** [Sections 4 through 8] terminate June 30, 2005.
12

-END-

1 SENATE BILL NO. 144

2 INTRODUCED BY BROOKE, BECK, LARSON, HARPER, L. SMITH

3
4 A BILL FOR AN ACT ENTITLED: "AN ACT CLOSING THE UPPER CLARK FORK RIVER BASIN TO FURTHER
5 APPROPRIATIONS; AMENDING THE DUTIES OF THE UPPER CLARK FORK RIVER BASIN STEERING
6 COMMITTEE; PROVIDING FOR A 10-YEAR UPPER CLARK FORK RIVER BASIN INSTREAM FLOW PILOT
7 PROGRAM TO BENEFIT THE FISHERY RESOURCE; PROVIDING FOR THE AWARDING OF REASONABLE
8 ATTORNEY FEES TO THE PREVAILING PARTY IN WATER USE PERMIT AND CHANGE APPROVAL
9 PROCEEDINGS; AMENDING SECTIONS 85-2-102, 85-2-125, 85-2-335, 85-2-336, 85-2-338, 85-2-402,
10 85-2-404, AND 85-2-436, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE, AN APPLICABILITY
11 DATE, AND A TERMINATION DATE."
12

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

14
15 **Section 1.** Section 85-2-335, MCA, is amended to read:16 "85-2-335. **Definitions.** Unless the context requires otherwise, in 85-2-335 through 85-2-338, the
17 following definitions apply:

18 (1) "Application" means an application for a beneficial water use permit pursuant to 85-2-302.

19 (2) "~~Domestic use~~" means ~~use of water common to family homes, including use for culinary~~
20 ~~purposes, washing, drinking water for humans and domestic pets, and irrigation of a lawn or garden of less~~
21 ~~than 1 acre, not to exceed a total of 3.5 acre feet per year. The term includes multiple domestic and~~
22 ~~municipal uses for expanded domestic use but does not include commercial or industrial use.~~23 (3) "~~Ground water~~" means ~~any water that is beneath the land surface or beneath the bed of a~~
24 ~~stream, lake, reservoir, or other body of surface water and that is not a part of that surface water.~~25 (4) "Upper Clark Fork River basin" means the drainage area of the Clark Fork River and its
26 tributaries above Milltown dam ~~but does not include the Blackfoot River, designated as subbasin 76F, or~~
27 ~~Roek Creek, designated as subbasin 76E."~~
2829 **Section 2.** Section 85-2-336, MCA, is amended to read:30 "85-2-336. **Basin closure -- exception.** (1) As provided in 85-2-319 and subject to the provisions

1 of subsection (2) of this section, the department may not process or grant an application for a permit to
 2 appropriate water within the Upper Clark Fork River basin ~~during the period from May 1, 1991, until June~~
 3 ~~30, 1995.~~

4 (2) The provisions of subsection (1) do not apply to:

5 (a) an application for a permit to appropriate ground water ~~or water for domestic use; and~~

6 (b) an application filed prior to January 1, 2000, for a permit to appropriate water to conduct
 7 response actions or remedial actions pursuant to the federal Comprehensive Environmental Response,
 8 Compensation, and Liability Act of 1980, as amended, or Title 75, chapter 10, part 7, at sites designated
 9 as of January 1, 1994. THE TOTAL FLOW RATES FOR ALL PERMITS ISSUED UNDER THIS SUBSECTION

10 (2)(B) MAY NOT EXCEED 10 CUBIC FEET PER SECOND. A permit issued to conduct response actions or
 11 remedial actions may not be used for dilution and must be limited to a term not to exceed the necessary
 12 time to complete the response or remedial action, and the permit may not be transferred to any person for
 13 any purpose other than the designated response or remedial action;

14 (c) an application for a permit to appropriate water for stock use;

15 (d) an application to store water; or

16 (e) an application for power generation at existing hydroelectric dams. The department may not
 17 approve a permit for power generation if approval results in additional consumption of water.

18 (3) Applications for water reservations in the Upper Clark Fork River basin filed pursuant to
 19 85-2-316 and pending as of May 1, 1991, have a priority date of May 1, 1991. ~~Reservation applicants have~~
 20 ~~no~~ The filing of a reservation application does not provide standing to object under 85-2-402 ~~during the~~
 21 ~~period of the basin closure provided in subsection (1).~~

22 (4) The board may not process or approve applications for reservations of water, ~~except ground~~
 23 ~~water,~~ in the Upper Clark Fork River basin filed pursuant to 85-2-316 ~~during the period of the basin closure~~
 24 ~~provided in subsection (1)."~~

25
 26 **Section 3.** Section 85-2-338, MCA, is amended to read:

27 **"85-2-338. Upper Clark Fork River basin steering committee -- membership and duties --**
 28 **comprehensive management plan.** (1) There is an Upper Clark Fork River basin steering committee. The
 29 department director shall appoint the members of the committee, selecting them on the basis of their
 30 knowledge of water use, water management, fish, wildlife, recreation, water quality, and water

1 conservation. Representation on the committee must include but is not limited to representatives from
2 affected:

- 3 (a) agricultural organizations;
- 4 (b) conservation districts;
- 5 (c) departments of state government;
- 6 (d) environmental organizations;
- 7 (e) industries;
- 8 (f) local governments;
- 9 (g) reservation applicants;
- 10 (h) utilities; and
- 11 (i) water user organizations.

12 (2) The steering committee, consistent with the Upper Clark Fork River basin comprehensive
13 management plan, shall:

14 ~~complete an Upper Clark Fork River basin comprehensive management plan pursuant to 85-1-203. The plan~~
15 ~~must:~~

- 16 ~~(a) consider and balance all beneficial uses of the water in the Upper Clark Fork River basin;~~
- 17 ~~(b) include a description of the standards applied, the data relied upon, and the methodology used~~
18 ~~in preparing the plan;~~
- 19 ~~(c) contain recommendations regarding the Upper Clark Fork River basin closure as provided in~~
20 ~~85-2-336;~~
- 21 ~~(d) identify and make recommendations regarding the resolution of water related issues in the~~
22 ~~Upper Clark Fork River basin; and~~
- 23 ~~(e) include the Blackfoot River, designated as subbasin 76F, and Rock Creek, designated as~~
24 ~~subbasin 76E, in any considerations made under subsections (2)(a) through (2)(d)~~

25 (a) review the Upper Clark Fork River basin closure and exceptions as provided in 85-2-336 no less
26 than every 5 years after [the effective date of this act] and make recommendations to the legislature
27 regarding necessary changes;

28 (b) make recommendations to the 1997 legislature concerning representation, terms, and the
29 method of appointing members to the steering committee;

30 (c) prepare and submit a report evaluating the Upper Clark Fork River basin instream flow pilot

1 program as provided in [section 6];

2 (d) provide a forum for all interests to communicate about water issues;

3 (e) provide education about water law and water management issues;

4 (f) identify short-term and long-term water management issues and problems and identify
5 alternatives for resolving them;

6 (g) identify the potential beneficiaries of and a funding mechanism for new and expanded water
7 storage sites;

8 (h) assist in facilitating the resolution of water-related disputes;

9 (i) provide coordination with other basin management and planning efforts;

10 (j) advise government agencies about water management and permitting activities;

11 (k) consult with local governments within the Upper Clark Fork River basin; and

12 (l) report periodically to the legislature.

13 ~~(3) The steering committee shall complete and submit a management plan to the governor and the~~
14 ~~legislature by December 31, 1994."~~

15
16 **Section 4.** Section 85-2-102, MCA, is amended to read:

17 **"85-2-102. (Temporary) Definitions.** Unless the context requires otherwise, in this chapter, the
18 following definitions apply:

19 (1) "Appropriate" means to:

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

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

22 (c) in the case of the department of fish, wildlife, and parks, ~~to~~ lease water in accordance with
23 85-2-436; or

24 (d) in the Upper Clark Fork River basin, maintain and enhance streamflows TO BENEFIT THE
25 FISHERY RESOURCE in accordance with [section 6].

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

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

30 (b) a use of water appropriated by the department for the state water leasing program under

- 1 85-2-141 and of water leased under a valid lease issued by the department under 85-2-141; ~~and~~
- 2 (c) a use of water by the department of fish, wildlife, and parks pursuant to a lease authorized
- 3 under 85-2-436; or
- 4 (d) a use of water to maintain and enhance streamflows TO BENEFIT THE FISHERY RESOURCE
- 5 in the Upper Clark Fork River basin as part of the Upper Clark Fork River basin instream flow pilot program
- 6 authorized under [section 6].
- 7 (3) "Board" means the board of natural resources and conservation provided for in 2-15-3302.
- 8 (4) "Certificate" means a certificate of water right issued by the department.
- 9 (5) "Change in appropriation right" means a change in the place of diversion, the place of use, the
- 10 purpose of use, or the place of storage.
- 11 (6) "Commission" means the fish, wildlife, and parks commission provided for in 2-15-3402.
- 12 (7) "Correct and complete" means that the information required to be submitted conforms to the
- 13 standard of substantial credible information and that all of the necessary parts of the form requiring the
- 14 information have been filled in with the required information.
- 15 (8) "Declaration" means the declaration of an existing right filed with the department under section
- 16 8, Chapter 452, Laws of 1973.
- 17 (9) "Department" means the department of natural resources and conservation provided for in Title
- 18 2, chapter 15, part 33.
- 19 (10) "Existing right" means a right to the use of water ~~which~~ that would be protected under the
- 20 law as it existed prior to July 1, 1973.
- 21 (11) "Ground water" means any water that is beneath the ground surface.
- 22 (12) "Late claim" means a claim to an existing right forfeited pursuant to the conclusive
- 23 presumption of abandonment under 85-2-226.
- 24 (13) "Permit" means the permit to appropriate issued by the department under 85-2-301 through
- 25 85-2-303 and 85-2-306 through 85-2-314.
- 26 (14) "Person" means an individual, association, partnership, corporation, state agency, political
- 27 subdivision, the United States or any agency ~~thereof~~ of the United States, or any other entity.
- 28 (15) "Political subdivision" means any county, incorporated city or town, public corporation, or
- 29 district created pursuant to state law or other public body of the state empowered to appropriate water but
- 30 not a private corporation, association, or group.

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

3 (17) "Substantial credible information" means probable believable facts sufficient to support a
4 reasonable legal theory upon which the department should proceed with the action requested by the person
5 providing the information.

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

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

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

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

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

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

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

19 **85-2-102. (Effective July 1, 1999) Definitions.** Unless the context requires otherwise, in this
20 chapter, the following definitions apply:

21 (1) "Appropriate" means:

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

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

24 (c) in the Upper Clark Fork River basin, to maintain and enhance streamflows TO BENEFIT THE
25 FISHERY RESOURCE in accordance with [section 6].

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

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

30 (b) a use of water appropriated by the department for the state water leasing program under

1 85-2-141 and of water leased under a valid lease issued by the department under 85-2-141; or
2 (c) a use of water to maintain and enhance streamflows TO BENEFIT THE FISHERY RESOURCE in
3 the Upper Clark Fork River basin as part of the Upper Clark Fork River basin instream flow pilot program
4 authorized under [section 6].

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

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

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

9 (6) "Correct and complete" means that the information required to be submitted conforms to the
10 standard of substantial credible information and that all of the necessary parts of the form requiring the
11 information have been filled in with the required information.

12 (7) "Declaration" means the declaration of an existing right filed with the department under section
13 8, Chapter 452, Laws of 1973.

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

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

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

19 (11) "Late claim" means a claim to an existing right forfeited pursuant to the conclusive
20 presumption of abandonment under 85-2-226.

21 (12) "Permit" means the permit to appropriate issued by the department under 85-2-301 through
22 85-2-303 and 85-2-306 through 85-2-314.

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

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

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

30 (16) "Substantial credible information" means probable believable facts sufficient to support a

1 reasonable legal theory upon which the department should proceed with the action requested by the person
2 providing the information.

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

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

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

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

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

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

13 (23) "Well" means any artificial opening or excavation in the ground, however made, by which
14 ground water is sought or can be obtained or through which it flows under natural pressures or is artificially
15 withdrawn."

16

17 **Section 5.** Section 85-2-125, MCA, is amended to read:

18 **"85-2-125. Recovery of attorney fees by prevailing party.** (1) The prevailing party in a hearing
19 under 85-2-309 on an application for a permit or change approval may bring an action in district court for
20 costs and attorney fees. The court shall award the prevailing party reasonable costs and attorney fees.
21 An action under this subsection must comply with the Montana Rules of Civil Procedure.

22 (2) If a final decision of the department on an application for a permit or change approval is
23 appealed to district court, the district court shall award the prevailing party reasonable attorney fees."

24

25 **NEW SECTION. Section 6. Upper Clark Fork River basin instream flow pilot program.** (1) The
26 department shall accept and process change applications from a person in accordance with 85-2-402 for
27 the purpose of leasing or converting existing water rights to maintain and enhance streamflows **TO BENEFIT**
28 **THE FISHERY RESOURCE** in the Upper Clark Fork River basin, as defined in 85-2-335. The application
29 must:

30 (a) include specific information on the length and location of the stream reach in which the

1 streamflow is to be maintained or enhanced; and

2 (b) provide a detailed streamflow measuring plan that describes the points where and the manner
3 in which the streamflow must be measured.

4 (2) The applicant shall pay all costs associated with installing measuring devices, measuring flows,
5 and providing measurement records according to the measurement plan required in subsection (1).

6 (3) The maximum quantity of water that may be changed to maintain and enhance streamflows
7 TO BENEFIT THE FISHERY RESOURCE is the amount historically diverted. However, only the amount
8 historically consumed may be used to maintain or enhance streamflows TO BENEFIT THE FISHERY
9 RESOURCE below the existing point of diversion.

10 (4) The department may modify or revoke a change approval if an appropriator other than an
11 appropriator described in subsection (5) proves by a preponderance of the evidence that the appropriator's
12 water right is adversely affected.

13 (5) A person issued a water use permit with a priority of appropriation after the date of filing an
14 application for change under this section may not object to the change approval, the use of the
15 appropriation right according to the terms of the change approval, or the reversion of the appropriation right
16 to its previous use.

17 (6) The priority of appropriation for a right to maintain and enhance streamflows TO BENEFIT THE
18 FISHERY RESOURCE under this section is the same as the priority of appropriation of the right approved
19 for change.

20 (7) Neither a change in appropriation right nor any other approval is required for the reversion of
21 the appropriation right to its previous use.

22 (8) The Upper Clark Fork River basin steering committee shall complete and submit to the governor
23 and the legislature by December 31, 2004, a report evaluating the effects of all change approvals issued
24 to maintain and enhance streamflows TO BENEFIT THE FISHERY RESOURCE under this section. The report
25 must:

26 (a) consider the effects upon other water right holders, tax values and revenue, fisheries,
27 recreation, water quality, and other economic, social, and environmental effects; and

28 (b) include recommendations to terminate, continue, enlarge, or otherwise modify the pilot
29 program.

30 (9) Nothing in this section authorizes the sale of an appropriation right to maintain or enhance

1 streamflows.

2

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

4 **"85-2-402. (Temporary) Changes in appropriation rights.** (1) An appropriator may not make a
5 change in an appropriation right except, as permitted under this section, by applying for and receiving the
6 approval of the department or, if applicable, of the legislature. An applicant shall submit a correct and
7 complete application.

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

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

13 (b) Except for a lease authorization pursuant to 85-2-436 or water use pursuant to [section 6] that
14 does not require appropriation works, the proposed means of diversion, construction, and operation of the
15 appropriation works are adequate.

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

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

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

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

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

24 (3) The applicant is required to prove that the criteria in subsections (2)(f) and (2)(g) have been met
25 only if a valid objection is filed. A valid objection must contain substantial credible information establishing
26 to the satisfaction of the department that the criteria in subsection (2)(f) or (2)(g), as applicable, may not
27 be met.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 or more public hearings that:

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

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

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

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

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

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

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

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

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

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

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

30 (9) Upon actual application of water to the proposed beneficial use within the time allowed, the

1 appropriator shall notify the department that the appropriation has been completed. The notification must
2 contain a certified statement by a person with experience in the design, construction, or operation of
3 appropriation works describing how the appropriation was completed.

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

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

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

14 (13) A change in appropriation right contrary to the provisions of this section is invalid. An officer,
15 agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an
16 unauthorized change in appropriation right. A person or corporation may not, directly or indirectly,
17 personally or through an agent, officer, or employee, attempt to change an appropriation right except in
18 accordance with this section.

19 (14) The department may adopt rules to implement the provisions of this section. (Terminates June
20 30, 1999--sec. 4, Ch. 740, L. 1991.)

21 **85-2-402. (Effective July 1, 1999) Changes in appropriation rights.** (1) An appropriator may not
22 make a change in an appropriation right except, as permitted under this section, by applying for and
23 receiving the approval of the department or, if applicable, of the legislature. An applicant shall submit a
24 correct and complete application.

25 (2) Except as provided in subsections (4) through (6), the department shall approve a change in
26 appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are
27 met:

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

30 (b) ~~The~~ Except for water use pursuant to [section 6] that does not require appropriation works, the

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

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

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

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

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

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

10 (3) The applicant is required to prove that the criteria in subsections (2)(f) and (2)(g) have been met
11 only if a valid objection is filed. A valid objection must contain substantial credible information establishing
12 to the satisfaction of the department that the criteria in subsection (2)(f) or (2)(g), as applicable, may not
13 be met.

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

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

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

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

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

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

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

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

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

30 (5) The department may not approve a change in purpose of use or place of use for a diversion that

1 results in 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water being
2 consumed unless:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

16 (9) Upon actual application of water to the proposed beneficial use within the time allowed, the
17 appropriator shall notify the department that the appropriation has been completed. The notification must
18 contain a certified statement by a person with experience in the design, construction, or operation of
19 appropriation works describing how the appropriation was completed.

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

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

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

30 (13) A change in appropriation right contrary to the provisions of this section is invalid. An officer,

1 agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an
 2 unauthorized change in appropriation right. A person or corporation may not, directly or indirectly,
 3 personally or through an agent, officer, or employee, attempt to change an appropriation right except in
 4 accordance with this section.

5 (14) The department may adopt rules to implement the provisions of this section."
 6

7 **Section 8.** Section 85-2-404, MCA, is amended to read:

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

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

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

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

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

26 (4) The lease of an existing right pursuant to 85-2-436, the use of water pursuant to [section 6],
 27 or ~~the~~ a temporary change pursuant to 85-2-407 does not constitute an abandonment or serve as evidence
 28 that could be used to establish an abandonment of any part of the right.

29 (5) Subsections (1) and (2) do not apply to existing rights until they have been determined in
 30 accordance with part 2 of this chapter. (Terminates June 30, 1999--sec. 4, Ch. 740, L. 1991.)

1 **85-2-404. (Effective July 1, 1999) Abandonment of appropriation right.** (1) If an appropriator
 2 ceases to use all or a part of ~~an his~~ appropriation right with the intention of wholly or partially abandoning
 3 the right or if ~~he~~ the appropriator ceases using ~~his~~ the appropriation right according to its terms and
 4 conditions with the intention of not complying with those terms and conditions, the appropriation right ~~shall~~
 5 is, to that extent, ~~be deemed~~ considered abandoned and ~~shall~~ must immediately expire.

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

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

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

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

19 (4) ~~A~~ The use of water pursuant to [section 6] or a temporary change pursuant to 85-2-407 does
 20 not constitute an abandonment or serve as evidence that could be used to establish an abandonment of
 21 any part of the right.

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

25 **Section 9.** Section 85-2-436, MCA, is amended to read:

26 **"85-2-436. (Temporary) Water leasing study.** (1) The department of fish, wildlife, and parks and
 27 the department, in consultation with the water policy committee, shall conduct and coordinate a study that,
 28 at a minimum:

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

- 1 (i) the length of the stream reach and how it is determined;
- 2 (ii) technical methods and data used to determine critical streamflow or volume needed to preserve
3 fisheries;
- 4 (iii) legal standards and technical data used to determine and substantiate the amount of water
5 available for instream flows through leasing of existing rights;
- 6 (iv) contractual parameters, conditions, and other steps taken to ensure that each lease in no way
7 harms other appropriators, particularly if the stream is one that experiences natural dewatering; and
- 8 (v) methods and technical means used to monitor use of water under each lease;
- 9 (b) based on the data provided under subsection (1)(a), develops a complete model of a water lease
10 and lease authorization that includes a step-by-step explanation of the process from initiation to completion.
- 11 (2) For purposes of undertaking the study described in subsection (1) and as authorized by law,
12 the department of fish, wildlife, and parks and the department may engage in the activities described in this
13 subsection. ~~For~~ Except as provided in [section 6], for purposes of this study, this section is the exclusive
14 means by which the department of fish, wildlife, and parks may seek to change an appropriation right to
15 an instream flow purpose.
- 16 (a) The department of fish, wildlife, and parks, with the consent of the commission, may lease
17 existing rights for the purpose of maintaining or enhancing streamflows for the benefit of fisheries in stream
18 reaches determined eligible by the board pursuant to 85-2-437.
- 19 (b) Upon receipt of a correct and complete application for a lease from the department of fish,
20 wildlife, and parks, the department shall publish notice of the application as provided in 85-2-307. Parties
21 who believe they may be adversely affected by the proposed lease may file an objection as provided in
22 85-2-308. A lease may not be approved until all objections are resolved. After resolving all objections filed
23 under 85-2-308, the department shall authorize a lease of an existing right for the purpose of maintaining
24 or enhancing streamflows for the benefit of fisheries if the applicant submits a correct and complete
25 application and meets the requirements of 85-2-402.
- 26 (c) The application for a lease authorization must include specific information on the length and
27 location of the stream reach in which the streamflow must be maintained or enhanced and must provide
28 a detailed streamflow measuring plan that describes the points where and the manner in which the
29 streamflow must be measured.
- 30 (d) The maximum quantity of water that may be leased is the amount historically diverted by the

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

4 (e) The lease may not be issued for a term of more than 10 years, but it may be renewed once for
5 up to 10 years, except that a lease of water made available from the development of a water conservation
6 or storage project is restricted to a term of not more than 20 years. Upon receiving notice of a lease
7 renewal, the department shall notify other appropriators potentially affected by the lease and shall allow
8 30 days for submission of new evidence of adverse effects to other water rights. A lease authorization is
9 not required for a renewal unless an appropriator other than an appropriator described in subsection (2)(i)
10 submits evidence of adverse effects to the appropriator's rights that has not been considered previously.
11 If new evidence is submitted, a lease authorization must be obtained according to the requirements of
12 85-2-402.

13 (f) During the term of the lease, the department may modify or revoke the lease authorization if
14 an appropriator other than an appropriator described in subsection (2)(i) proves by a preponderance of
15 evidence that the appropriator's water right is adversely affected.

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

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

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

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

26 (3) (a) The department of fish, wildlife, and parks shall complete and submit to the board,
27 commission, and water policy committee an annual study progress report by December 1 of each year. This
28 report must include the applicable information listed in subsection (1) for each lease, a summary of stream
29 reach designation activity under 85-2-437, and a summary of leasing activity on all designated streams.
30 If the department of fish, wildlife, and parks has not leased additional water rights under this section by

1 December 1 of any year, the department of fish, wildlife, and parks shall provide compelling justification
2 for that fact in the study progress report.

3 (b) A final study report must be adopted by the board and commission and submitted to the water
4 policy committee, which shall complete the final report by December 1, 1998.

5 (4) This section does not create the right for a person to bring suit to compel the renewal of a lease
6 that has expired. (Terminates June 30, 1999--sec. 4, Ch. 740, L. 1991.) "

7
8 **NEW SECTION. Section 10. Codification instruction.** [Section 6] is intended to be codified as an
9 integral part of Title 85, chapter 2, part 4, and the provisions of Title 85, chapter 2, part 4, apply to
10 [section 6].

11
12 **NEW SECTION. Section 11. Applicability.** [This act] applies to all applications for changes in
13 appropriation rights, PERMITS, AND WATER RESERVATIONS received by the department of natural
14 resources and conservation after [the effective date of this act].

15
16 **NEW SECTION. Section 12. Effective date.** [This act] is effective on passage and approval.

17
18 **NEW SECTION. Section 13. Termination.** [Sections 4 through 8] terminate June 30, 2005.

19 -END-



HOUSE STANDING COMMITTEE REPORT

March 24, 1995

Page 1 of 1

Mr. Speaker: We, the committee on Agriculture, Livestock, and Irrigation report that Senate Bill 144 (third reading copy -- blue) be concurred in as amended.

Signed: Joe Barnett
Joe Barnett, Chair

Carried by: Rep. Larson

And, that such amendments read:

1. Page 8, line 27.

Strike: "converting"

Insert: "temporarily changing"

2. Page 9.

Following: 21

Insert: "(8) Only the owner of the water right may seek enforcement of the change authorization or object under 85-2-308."

Renumber: subsequent subsections

-END-

Committee Vote:
Yes 18, No 0.

SB 144
HOUSE
681438SC.Hbk



HOUSE STANDING COMMITTEE REPORT

March 27, 1995

Page 1 of 2

Mr. Speaker: We, the committee on Agriculture, Livestock, and Irrigation report that Senate Bill 144 (third reading copy -- blue) be concurred in as amended.

Signed: Joe Barnett
Joe Barnett, Chair

Carried by: Rep. Larson

And, that such amendments read:

1. Page 4.

Following: Line 1

Insert: "(d) prepare and submit a report concerning the relationship between surface water and ground water and the cumulative impacts of ground water withdrawals in each subbasin;"

Renumber: subsequent subsections

2. Page 8, line 18.

Following: "(1)"

Insert: "(a)"

Strike: "The"

Insert: "In the Upper Clark Fork River basin as defined in 85-2-335, the"

3. Page 8, line 21.

Strike: line 21 in its entirety

Insert: "(b) If a final decision of the department on an application for a change approval in the Upper Clark Fork basin is appealed to a district court, the district court shall award the prevailing party reasonable attorney fees."

Committee Vote:
Yes 17, No 1.

SB 144

HOUSE

4. Page 8, line 22.

Strike: "or change approval"

5. Page 21.

Following: line 10

Insert: "NEW SECTION. Section 11. Severability. If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications."

Renumber: subsequent sections

-END-

1 SENATE BILL NO. 144

2 INTRODUCED BY BROOKE, BECK, LARSON, HARPER, L. SMITH

3
 4 A BILL FOR AN ACT ENTITLED: "AN ACT CLOSING THE UPPER CLARK FORK RIVER BASIN TO FURTHER
 5 APPROPRIATIONS; AMENDING THE DUTIES OF THE UPPER CLARK FORK RIVER BASIN STEERING
 6 COMMITTEE; PROVIDING FOR A 10-YEAR UPPER CLARK FORK RIVER BASIN INSTREAM FLOW PILOT
 7 PROGRAM TO BENEFIT THE FISHERY RESOURCE; PROVIDING FOR THE AWARDING OF REASONABLE
 8 ATTORNEY FEES TO THE PREVAILING PARTY IN WATER USE PERMIT AND CHANGE APPROVAL
 9 PROCEEDINGS; AMENDING SECTIONS 85-2-102, 85-2-125, 85-2-335, 85-2-336, 85-2-338, 85-2-402,
 10 85-2-404, AND 85-2-436, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE, AN APPLICABILITY
 11 DATE, AND A TERMINATION DATE."

12
 13 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

14
 15 **Section 1.** Section 85-2-335, MCA, is amended to read:

16 "85-2-335. **Definitions.** Unless the context requires otherwise, in 85-2-335 through 85-2-338, the
 17 following definitions apply:

18 (1) "Application" means an application for a beneficial water use permit pursuant to 85-2-302.

19 (2) ~~"Domestic use" means use of water common to family homes, including use for culinary~~
 20 ~~purposes, washing, drinking water for humans and domestic pets, and irrigation of a lawn or garden of less~~
 21 ~~than 1 acre, not to exceed a total of 3.5 acre feet per year. The term includes multiple domestic and~~
 22 ~~municipal uses for expanded domestic use but does not include commercial or industrial use.~~

23 (3) ~~"Ground water" means any water that is beneath the land surface or beneath the bed of a~~
 24 ~~stream, lake, reservoir, or other body of surface water and that is not a part of that surface water.~~

25 (4) "Upper Clark Fork River basin" means the drainage area of the Clark Fork River and its
 26 tributaries above Milltown dam ~~but does not include the Blackfoot River, designated as subbasin 76F, or~~
 27 ~~Rock Creek, designated as subbasin 76E."~~

28
 29 **Section 2.** Section 85-2-336, MCA, is amended to read:

30 "85-2-336. **Basin closure -- exception.** (1) As provided in 85-2-319 and subject to the provisions

1 of subsection (2) of this section, the department may not process or grant an application for a permit to
 2 appropriate water within the Upper Clark Fork River basin ~~during the period from May 1, 1991, until June~~
 3 ~~30, 1995.~~

4 (2) The provisions of subsection (1) do not apply to:

5 (a) an application for a permit to appropriate ground water ~~or water for domestic use; and~~

6 (b) an application filed prior to January 1, 2000, for a permit to appropriate water to conduct
 7 response actions or remedial actions pursuant to the federal Comprehensive Environmental Response,
 8 Compensation, and Liability Act of 1980, as amended, or Title 75, chapter 10, part 7, at sites designated
 9 as of January 1, 1994. THE TOTAL FLOW RATES FOR ALL PERMITS ISSUED UNDER THIS SUBSECTION
 10 (2)(B) MAY NOT EXCEED 10 CUBIC FEET PER SECOND. A permit issued to conduct response actions or
 11 remedial actions may not be used for dilution and must be limited to a term not to exceed the necessary
 12 time to complete the response or remedial action, and the permit may not be transferred to any person for
 13 any purpose other than the designated response or remedial action;

14 (c) an application for a permit to appropriate water for stock use;

15 (d) an application to store water; or

16 (e) an application for power generation at existing hydroelectric dams. The department may not
 17 approve a permit for power generation if approval results in additional consumption of water.

18 (3) Applications for water reservations in the Upper Clark Fork River basin filed pursuant to
 19 85-2-316 and pending as of May 1, 1991, have a priority date of May 1, 1991. ~~Reservation applicants have~~
 20 ~~no~~ The filing of a reservation application does not provide standing to object under 85-2-402 ~~during the~~
 21 ~~period of the basin closure provided in subsection (1).~~

22 (4) The board may not process or approve applications for reservations of water, ~~except ground~~
 23 ~~water,~~ in the Upper Clark Fork River basin filed pursuant to 85-2-316 ~~during the period of the basin closure~~
 24 ~~provided in subsection (1).~~"

25
 26 **Section 3.** Section 85-2-338, MCA, is amended to read:

27 **"85-2-338. Upper Clark Fork River basin steering committee -- membership and duties --**
 28 **comprehensive management plan.** (1) There is an Upper Clark Fork River basin steering committee. The
 29 department director shall appoint the members of the committee, selecting them on the basis of their
 30 knowledge of water use, water management, fish, wildlife, recreation, water quality, and water

1 conservation. Representation on the committee must include but is not limited to representatives from
2 affected:

- 3 (a) agricultural organizations;
- 4 (b) conservation districts;
- 5 (c) departments of state government;
- 6 (d) environmental organizations;
- 7 (e) industries;
- 8 (f) local governments;
- 9 (g) reservation applicants;
- 10 (h) utilities; and
- 11 (i) water user organizations.

12 (2) The steering committee, consistent with the Upper Clark Fork River basin comprehensive
13 management plan, shall:

14 ~~complete an Upper Clark Fork River basin comprehensive management plan pursuant to 85-1-203. The plan~~
15 ~~must:~~

- 16 ~~(a) consider and balance all beneficial uses of the water in the Upper Clark Fork River basin;~~
- 17 ~~(b) include a description of the standards applied, the data relied upon, and the methodology used~~
18 ~~in preparing the plan;~~
- 19 ~~(c) contain recommendations regarding the Upper Clark Fork River basin closure as provided in~~
20 ~~85-2-336;~~
- 21 ~~(d) identify and make recommendations regarding the resolution of water related issues in the~~
22 ~~Upper Clark Fork River basin; and~~

23 ~~(e) include the Blackfoot River, designated as subbasin 76F, and Rock Creek, designated as~~
24 ~~subbasin 76E, in any considerations made under subsections (2)(a) through (2)(d)~~

25 (a) review the Upper Clark Fork River basin closure and exceptions as provided in 85-2-336 no less
26 than every 5 years after [the effective date of this act] and make recommendations to the legislature
27 regarding necessary changes;

28 (b) make recommendations to the 1997 legislature concerning representation, terms, and the
29 method of appointing members to the steering committee;

30 (c) prepare and submit a report evaluating the Upper Clark Fork River basin instream flow pilot

1 program as provided in [section 6];

2 (D) PREPARE AND SUBMIT A REPORT CONCERNING THE RELATIONSHIP BETWEEN SURFACE
 3 WATER AND GROUND WATER AND THE CUMULATIVE IMPACTS OF GROUND WATER WITHDRAWALS
 4 IN EACH SUBBASIN;

5 ~~(e)~~(E) provide a forum for all interests to communicate about water issues;

6 ~~(e)~~(F) provide education about water law and water management issues;

7 ~~(f)~~(G) identify short-term and long-term water management issues and problems and identify
 8 alternatives for resolving them;

9 ~~(g)~~(H) identify the potential beneficiaries of and a funding mechanism for new and expanded water
 10 storage sites;

11 ~~(h)~~(I) assist in facilitating the resolution of water-related disputes;

12 ~~(i)~~(J) provide coordination with other basin management and planning efforts;

13 ~~(j)~~(K) advise government agencies about water management and permitting activities;

14 ~~(k)~~(L) consult with local governments within the Upper Clark Fork River basin; and

15 ~~(l)~~(M) report periodically to the legislature.

16 ~~(3) The steering committee shall complete and submit a management plan to the governor and the~~
 17 legislature by December 31, 1994."

18

19 **Section 4.** Section 85-2-102, MCA, is amended to read:

20 **"85-2-102. (Temporary) Definitions.** Unless the context requires otherwise, in this chapter, the
 21 following definitions apply:

22 (1) "Appropriate" means to:

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

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

25 (c) in the case of the department of fish, wildlife, and parks, ~~to~~ lease water in accordance with
 26 85-2-436; or

27 (d) in the Upper Clark Fork River basin, maintain and enhance streamflows TO BENEFIT THE
 28 FISHERY RESOURCE in accordance with [section 6].

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

30 (a) a use of water for the benefit of the appropriator, other persons, or the public, including but

1 not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining,
2 municipal, power, and recreational uses;

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

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

7 (d) a use of water to maintain and enhance streamflows TO BENEFIT THE FISHERY RESOURCE
8 in the Upper Clark Fork River basin as part of the Upper Clark Fork River basin instream flow pilot program
9 authorized under [section 6].

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

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

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

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

15 (7) "Correct and complete" means that the information required to be submitted conforms to the
16 standard of substantial credible information and that all of the necessary parts of the form requiring the
17 information have been filled in with the required information.

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

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

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

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

25 (12) "Late claim" means a claim to an existing right forfeited pursuant to the conclusive
26 presumption of abandonment under 85-2-226.

27 (13) "Permit" means the permit to appropriate issued by the department under 85-2-301 through
28 85-2-303 and 85-2-306 through 85-2-314.

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

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

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

6 (17) "Substantial credible information" means probable believable facts sufficient to support a
 7 reasonable legal theory upon which the department should proceed with the action requested by the person
 8 providing the information.

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

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

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

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

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

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

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

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

24 (1) "Appropriate" means:

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

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

27 (c) in the Upper Clark Fork River basin, to maintain and enhance streamflows TO BENEFIT THE
 28 FISHERY RESOURCE in accordance with [section 6].

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

30 (a) a use of water for the benefit of the appropriator, other persons, or the public, including but

1 not limited to agricultural (including stock water), 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 the state water leasing program under
4 85-2-141 and of water leased under a valid lease issued by the department under 85-2-141; or

5 (c) a use of water to maintain and enhance streamflows TO BENEFIT THE FISHERY RESOURCE in
6 the Upper Clark Fork River basin as part of the Upper Clark Fork River basin instream flow pilot program
7 authorized under [section 6].

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

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

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

12 (6) "Correct and complete" means that the information required to be submitted conforms to the
13 standard of substantial credible information and that all of the necessary parts of the form requiring the
14 information have been filled in with the required information.

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

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

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

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

22 (11) "Late claim" means a claim to an existing right forfeited pursuant to the conclusive
23 presumption of abandonment under 85-2-226.

24 (12) "Permit" means the permit to appropriate issued by the department under 85-2-301 through
25 85-2-303 and 85-2-306 through 85-2-314.

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

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

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

3 (16) "Substantial credible information" means probable believable facts sufficient to support a
4 reasonable legal theory upon which the department should proceed with the action requested by the person
5 providing the information.

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

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

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

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

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

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

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

19
20 **Section 5.** Section 85-2-125, MCA, is amended to read:

21 **"85-2-125. Recovery of attorney fees by prevailing party.** ~~(1) (A) The IN THE UPPER CLARK FORK~~
22 ~~RIVER BASIN, AS DEFINED IN 85-2-335, THE prevailing party in a hearing under 85-2-309 on an~~
23 ~~application for a permit or change approval may bring an action in district court for costs and attorney fees.~~
24 ~~The court shall award the prevailing party reasonable costs and attorney fees. An action under this~~
25 ~~subsection must comply with the Montana Rules of Civil Procedure.~~

26 (B) IF A FINAL DECISION OF THE DEPARTMENT ON AN APPLICATION FOR A CHANGE
27 APPROVAL IN THE UPPER CLARK FORK RIVER BASIN IS APPEALED TO A DISTRICT COURT, THE
28 DISTRICT COURT SHALL AWARD THE PREVAILING PARTY REASONABLE ATTORNEY FEES.

29 (2) If a final decision of the department on an application for a permit ~~or change approval~~ is
30 appealed to district court, the district court shall award the prevailing party reasonable attorney fees."

1 **NEW SECTION.** **Section 6. Upper Clark Fork River basin instream flow pilot program.** (1) The
2 department shall accept and process change applications from a person in accordance with 85-2-402 for
3 the purpose of leasing or ~~converting~~ **TEMPORARILY CHANGING** existing water rights to maintain and
4 enhance streamflows **TO BENEFIT THE FISHERY RESOURCE** in the Upper Clark Fork River basin, as defined
5 in 85-2-335. The application must:

6 (a) include specific information on the length and location of the stream reach in which the
7 streamflow is to be maintained or enhanced; and

8 (b) provide a detailed streamflow measuring plan that describes the points where and the manner
9 in which the streamflow must be measured.

10 (2) The applicant shall pay all costs associated with installing measuring devices, measuring flows,
11 and providing measurement records according to the measurement plan required in subsection (1).

12 (3) The maximum quantity of water that may be changed to maintain and enhance streamflows
13 **TO BENEFIT THE FISHERY RESOURCE** is the amount historically diverted. However, only the amount
14 historically consumed may be used to maintain or enhance streamflows **TO BENEFIT THE FISHERY**
15 **RESOURCE** below the existing point of diversion.

16 (4) The department may modify or revoke a change approval if an appropriator other than an
17 appropriator described in subsection (5) proves by a preponderance of the evidence that the appropriator's
18 water right is adversely affected.

19 (5) A person issued a water use permit with a priority of appropriation after the date of filing an
20 application for change under this section may not object to the change approval, the use of the
21 appropriation right according to the terms of the change approval, or the reversion of the appropriation right
22 to its previous use.

23 (6) The priority of appropriation for a right to maintain and enhance streamflows **TO BENEFIT THE**
24 **FISHERY RESOURCE** under this section is the same as the priority of appropriation of the right approved
25 for change.

26 (7) Neither a change in appropriation right nor any other approval is required for the reversion of
27 the appropriation right to its previous use.

28 **(8) ONLY THE OWNER OF THE WATER RIGHT MAY SEEK ENFORCEMENT OF THE CHANGE**
29 **AUTHORIZATION OR OBJECT UNDER 85-2-308.**

30 ~~(8)~~(9) The Upper Clark Fork River basin steering committee shall complete and submit to the

1 governor and the legislature by December 31, 2004, a report evaluating the effects of all change approvals
 2 issued to maintain and enhance streamflows TO BENEFIT THE FISHERY RESOURCE under this section. The
 3 report must:

4 (a) consider the effects upon other water right holders, tax values and revenue, fisheries,
 5 recreation, water quality, and other economic, social, and environmental effects; and

6 (b) include recommendations to terminate, continue, enlarge, or otherwise modify the pilot
 7 program.

8 ~~(9)~~(10) Nothing in this section authorizes the sale of an appropriation right to maintain or enhance
 9 streamflows.

10
 11 **Section 7.** Section 85-2-402, MCA, is amended to read:

12 **"85-2-402. (Temporary) Changes in appropriation rights.** (1) An appropriator may not make a
 13 change in an appropriation right except, as permitted under this section, by applying for and receiving the
 14 approval of the department or, if applicable, of the legislature. An applicant shall submit a correct and
 15 complete application.

16 (2) Except as provided in subsections (4) through (6), the department shall approve a change in
 17 appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are
 18 met:

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

21 (b) Except for a lease authorization pursuant to 85-2-436 or water use pursuant to [section 6] that
 22 does not require appropriation works, the proposed means of diversion, construction, and operation of the
 23 appropriation works are adequate.

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

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

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

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

30 (g) The ability of a discharge permitholder to satisfy effluent limitations of a permit issued in

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

2 (3) The applicant is required to prove that the criteria in subsections (2)(f) and (2)(g) have been met
3 only if a valid objection is filed. A valid objection must contain substantial credible information establishing
4 to the satisfaction of the department that the criteria in subsection (2)(f) or (2)(g), as applicable, may not
5 be met.

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

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

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

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

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

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

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

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

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

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

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

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

29 (6) (a) The state of Montana has long recognized the importance of conserving its public waters
30 and the necessity to maintain adequate water supplies for the state's water requirements, including

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

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

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

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

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

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

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

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

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

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

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

28 (7) For any application for a change in appropriation right involving 4,000 or more acre-feet of
 29 water a year and 5.5 or more cubic feet per second of water, the department shall give notice of the
 30 proposed change in accordance with 85-2-307 and shall hold one or more hearings in accordance with

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

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

8 (9) Upon actual application of water to the proposed beneficial use within the time allowed, the
9 appropriator shall notify the department that the appropriation has been completed. The notification must
10 contain a certified statement by a person with experience in the design, construction, or operation of
11 appropriation works describing how the appropriation was completed.

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

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

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

22 (13) A change in appropriation right contrary to the provisions of this section is invalid. An officer,
23 agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an
24 unauthorized change in appropriation right. A person or corporation may not, directly or indirectly,
25 personally or through an agent, officer, or employee, attempt to change an appropriation right except in
26 accordance with this section.

27 (14) The department may adopt rules to implement the provisions of this section. (Terminates June
28 30, 1999--sec. 4, Ch. 740, L. 1991.)

29 **85-2-402. (Effective July 1, 1999) Changes in appropriation rights.** (1) An appropriator may not
30 make a change in an appropriation right except, as permitted under this section, by applying for and

1 receiving the approval of the department or, if applicable, of the legislature. An applicant shall submit a
2 correct and complete application.

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

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

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

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

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

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

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

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

18 (3) The applicant is required to prove that the criteria in subsections (2)(f) and (2)(g) have been met
19 only if a valid objection is filed. A valid objection must contain substantial credible information establishing
20 to the satisfaction of the department that the criteria in subsection (2)(f) or (2)(g), as applicable, may not
21 be met.

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

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

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

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

- 1 (ii) the benefits to the applicant and the state;
- 2 (iii) the effects on the quantity and quality of water for existing uses in the source of supply;
- 3 (iv) the availability and feasibility of using low-quality water for the purpose for which application
4 has been made;
- 5 (v) the effects on private property rights by any creation of or contribution to saline seep; and
- 6 (vi) the probable significant adverse environmental impacts of the proposed use of water as
7 determined by the department pursuant to Title 75, chapter 1, or Title 75, chapter 20.
- 8 (5) The department may not approve a change in purpose of use or place of use for a diversion that
9 results in 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water being
10 consumed unless:
- 11 (a) the applicant proves by clear and convincing evidence and the department finds that the criteria
12 in subsections (2) and (4) are met; and
- 13 (b) the department then petitions the legislature and the legislature affirms the decision of the
14 department after one or more public hearings.
- 15 (6) (a) The state of Montana has long recognized the importance of conserving its public waters
16 and the necessity to maintain adequate water supplies for the state's water requirements, including
17 requirements for reserved water rights held by the United States for federal reserved lands and in trust for
18 the various Indian tribes within the state's boundaries. Although the state of Montana also recognizes that,
19 under appropriate conditions, the out-of-state transportation and use of its public waters are not in conflict
20 with the public welfare of its citizens or the conservation of its waters, the following criteria must be met
21 before out-of-state use may occur:
- 22 (b) The department and, if applicable, the legislature may not approve a change in appropriation
23 right for the withdrawal and transportation of appropriated water for use outside the state unless the
24 appropriator proves by clear and convincing evidence and, if applicable, the legislature approves after one
25 or more public hearings that:
- 26 (i) depending on the volume of water diverted or consumed, the applicable criteria and procedures
27 of subsection (2) or (4) are met;
- 28 (ii) the proposed out-of-state use of water is not contrary to water conservation in Montana; and
- 29 (iii) the proposed out-of-state use of water is not otherwise detrimental to the public welfare of the
30 citizens of Montana.

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

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

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

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

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

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

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

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

24 (9) Upon actual application of water to the proposed beneficial use within the time allowed, the
25 appropriator shall notify the department that the appropriation has been completed. The notification must
26 contain a certified statement by a person with experience in the design, construction, or operation of
27 appropriation works describing how the appropriation was completed.

28 (10) If a change is not completed as approved by the department or legislature or if the terms,
29 conditions, restrictions, and limitations of the change approval are not complied with, the department may,
30 after notice and opportunity for hearing, require the appropriator to show cause why the change approval

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

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

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

8 (13) A change in appropriation right contrary to the provisions of this section is invalid. An officer,
 9 agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an
 10 unauthorized change in appropriation right. A person or corporation may not, directly or indirectly,
 11 personally or through an agent, officer, or employee, attempt to change an appropriation right except in
 12 accordance with this section.

13 (14) The department may adopt rules to implement the provisions of this section."
 14

15 **Section 8.** Section 85-2-404, MCA, is amended to read:

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

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

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

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

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

4 (4) The lease of an existing right pursuant to 85-2-436, the use of water pursuant to [section 6],
5 or ~~the a~~ temporary change pursuant to 85-2-407 does not constitute an abandonment or serve as evidence
6 that could be used to establish an abandonment of any part of the right.

7 (5) Subsections (1) and (2) do not apply to existing rights until they have been determined in
8 accordance with part 2 of this chapter. (Terminates June 30, 1999--sec. 4, Ch. 740, L. 1991.)

9 **85-2-404. (Effective July 1, 1999) Abandonment of appropriation right.** (1) If an appropriator
10 ceases to use all or a part of an ~~his~~ appropriation right with the intention of wholly or partially abandoning
11 the right or if ~~he~~ the appropriator ceases using ~~his~~ the appropriation right according to its terms and
12 conditions with the intention of not complying with those terms and conditions, the appropriation right ~~shall~~
13 is, to that extent, ~~be deemed~~ considered abandoned and ~~shall~~ must immediately expire.

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

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

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

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

27 (4) ~~A~~ The use of water pursuant to [section 6] or a temporary change pursuant to 85-2-407 does
28 not constitute an abandonment or serve as evidence that could be used to establish an abandonment of
29 any part of the right.

30 (5) Subsections (1) and (2) do not apply to existing rights until they have been determined in

1 accordance with part 2 of this chapter."
2

3 **Section 9.** Section 85-2-436, MCA, is amended to read:

4 **"85-2-436. (Temporary) Water leasing study.** (1) The department of fish, wildlife, and parks and
5 the department, in consultation with the water policy committee, shall conduct and coordinate a study that,
6 at a minimum:

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

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

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

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

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

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

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

19 (2) For purposes of undertaking the study described in subsection (1) and as authorized by law,
20 the department of fish, wildlife, and parks and the department may engage in the activities described in this
21 subsection. ~~For~~ Except as provided in [section 6], for purposes of this study, this section is the exclusive
22 means by which the department of fish, wildlife, and parks may seek to change an appropriation right to
23 an instream flow purpose.

24 (a) The department of fish, wildlife, and parks, with the consent of the commission, may lease
25 existing rights for the purpose of maintaining or enhancing streamflows for the benefit of fisheries in stream
26 reaches determined eligible by the board pursuant to 85-2-437.

27 (b) Upon receipt of a correct and complete application for a lease from the department of fish,
28 wildlife, and parks, the department shall publish notice of the application as provided in 85-2-307. Parties
29 who believe they may be adversely affected by the proposed lease may file an objection as provided in
30 85-2-308. A lease may not be approved until all objections are resolved. After resolving all objections filed

1 under 85-2-308, the department shall authorize a lease of an existing right for the purpose of maintaining
2 or enhancing streamflows for the benefit of fisheries if the applicant submits a correct and complete
3 application and meets the requirements of 85-2-402.

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

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

12 (e) The lease may not be issued for a term of more than 10 years, but it may be renewed once for
13 up to 10 years, except that a lease of water made available from the development of a water conservation
14 or storage project is restricted to a term of not more than 20 years. Upon receiving notice of a lease
15 renewal, the department shall notify other appropriators potentially affected by the lease and shall allow
16 30 days for submission of new evidence of adverse effects to other water rights. A lease authorization is
17 not required for a renewal unless an appropriator other than an appropriator described in subsection (2)(i)
18 submits evidence of adverse effects to the appropriator's rights that has not been considered previously.
19 If new evidence is submitted, a lease authorization must be obtained according to the requirements of
20 85-2-402.

21 (f) During the term of the lease, the department may modify or revoke the lease authorization if
22 an appropriator other than an appropriator described in subsection (2)(i) proves by a preponderance of
23 evidence that the appropriator's water right is adversely affected.

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

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

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

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

4 (3) (a) The department of fish, wildlife, and parks shall complete and submit to the board,
 5 commission, and water policy committee an annual study progress report by December 1 of each year. This
 6 report must include the applicable information listed in subsection (1) for each lease, a summary of stream
 7 reach designation activity under 85-2-437, and a summary of leasing activity on all designated streams.
 8 If the department of fish, wildlife, and parks has not leased additional water rights under this section by
 9 December 1 of any year, the department of fish, wildlife, and parks shall provide compelling justification
 10 for that fact in the study progress report.

11 (b) A final study report must be adopted by the board and commission and submitted to the water
 12 policy committee, which shall complete the final report by December 1, 1998.

13 (4) This section does not create the right for a person to bring suit to compel the renewal of a lease
 14 that has expired. (Terminates June 30, 1999--sec. 4, Ch. 740, L. 1991.) "

15

16 **NEW SECTION. Section 10. Codification instruction.** [Section 6] is intended to be codified as an
 17 integral part of Title 85, chapter 2, part 4, and the provisions of Title 85, chapter 2, part 4, apply to
 18 [section 6].

19

20 **NEW SECTION. SECTION 11. SEVERABILITY. IF A PART OF [THIS ACT] IS INVALID, ALL VALID**
 21 **PARTS THAT ARE SEVERABLE FROM THE INVALID PART REMAIN IN EFFECT. IF A PART OF [THIS ACT]**
 22 **IS INVALID IN ONE OR MORE OF ITS APPLICATIONS, THE PART REMAINS IN EFFECT IN ALL VALID**
 23 **APPLICATIONS THAT ARE SEVERABLE FROM THE INVALID APPLICATIONS.**

24

25 **NEW SECTION. Section 12. Applicability.** [This act] applies to all applications for changes in
 26 appropriation rights, **PERMITS, AND WATER RESERVATIONS** received by the department of natural
 27 resources and conservation after [the effective date of this act].

28

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

30

