

1 and parks commission if a person submits credible information to the commission demonstrating by a
2 preponderance of the evidence that the amounts established are not appropriate.

3

4 **NEW SECTION. Section 2. Emergency ground water use to benefit fishery resource -- limitations**

5 -- **criteria.** (1) In accordance with the provisions of 85-2-311 or 85-2-402, the department shall accept
6 and process an application for a permit to appropriate ground water for emergency instream use to benefit
7 the fishery resource if:

8 (a) the receiving stream reach has been identified as a critical stream reach under [section 1]; and

9 (b) the ground water to be used to benefit the fishery resource is not immediately or directly
10 connected to surface water.

11 (2) A permit granted under this section must state that the ground water may not be used unless
12 the department of fish, wildlife, and parks determines that the amount of water in the receiving stream has
13 reached the amount identified as critical for survival of a specific species under [section 1(3)(a)].

14

15 **Section 3.** 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) to 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) to use ground water in accordance with the provisions of [section 2].

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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

14 **85-2-102. (Effective July 1, 1999) Definitions.** Unless the context requires otherwise, in this
15 chapter the following definitions apply:

16 (1) "Appropriate" means:

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

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

19 (c) to use ground water in accordance with the provisions of [section 2].

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

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

24 (b) a use of water appropriated by the department for the state water leasing program under
25 85-2-141 and of water leased under a valid lease issued by the department under 85-2-141.

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

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

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

30 (6) "Correct and complete" means that the information required to be submitted conforms to the

1 standard of substantial credible information and that all of the necessary parts of the form requiring the
2 information have been filled in with the required information.

3 (7) "Declaration" means the declaration of an existing right filed with the department under section
4 8, Chapter 452, Laws of 1973.

5 (8) "Department" means the department of natural resources and conservation provided for in Title
6 2, chapter 15, part 33.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7

8 **Section 4.** Section 85-2-306, MCA, is amended to read:

9 **"85-2-306. Exceptions to permit requirements.** (1) ~~Ground~~ Except for emergency use of ground
10 water to benefit the fishery resource under [section 2], ground water may be appropriated only by a person
11 who has a possessory interest in the property where the water is to be put to beneficial use and exclusive
12 property rights in the ground water development works or, if another person has rights in the ground water
13 development works, the written consent of the person with those property rights. Outside the boundaries
14 of a controlled ground water area, a permit is not required before appropriating ground water by means of
15 a well or developed spring with a maximum appropriation of 35 gallons per minute or less, not to exceed
16 10 acre-feet per year, except that a combined appropriation from the same source from two or more wells
17 or developed springs exceeding this limitation requires a permit. Within 60 days of completion of the well
18 or developed spring and appropriation of the ground water for beneficial use, the appropriator shall file a
19 notice of completion with the department on a form provided by the department at its offices and at the
20 offices of the county clerk and recorders. Upon receipt of the notice, the department shall review the notice
21 and may, before issuing a certificate of water right, return a defective notice for correction or completion,
22 together with the reasons for returning it. A notice does not lose priority of filing because of defects if the
23 notice is corrected, completed, and refiled with the department within 30 days or within a further time as
24 the department may allow, not to exceed 6 months. If a notice is not corrected and completed within the
25 time allowed, the priority date of appropriation is the date of refiled a correct and complete notice with the
26 department. A certificate of water right may not be issued until a correct and complete notice has been filed
27 with the department. The original of the certificate must be sent to the appropriator. The department shall
28 keep a copy of the certificate in its office in Helena. The date of filing of the notice of completion is the date
29 of priority of the right.

30 (2) An appropriator of ground water by means of a well or developed spring first put to beneficial

1 use between January 1, 1962, and July 1, 1973, who did not file a notice of completion, as required by
2 laws in force prior to April 14, 1981, with the county clerk and recorder shall file a notice of completion,
3 as provided in subsection (1), with the department to perfect the water right. The filing of a claim pursuant
4 to 85-2-221 is sufficient notice of completion under this subsection. The priority date of the appropriation
5 is the date of the filing of a notice as provided in subsection (1) of this section or the date of the filing of
6 the claim of existing water right. An appropriation under this subsection is an existing right, and a permit
7 is not required; ~~however~~ However, the department shall acknowledge the receipt of a correct and complete
8 filing of a notice of completion, except that for an appropriation of 35 gallons per minute or less, not to
9 exceed 10 acre-feet per year, the department shall issue a certificate of water right. If a certificate is issued
10 under this section, a certificate need not be issued under the adjudication proceedings provided for in
11 85-2-236.

12 (3) A (a) Subject to the provisions of subsection (3)(c), a permit is not required before
13 constructing an impoundment or pit and appropriating water for use by livestock if:

14 (i) the maximum capacity of the impoundment or pit is less than 15 acre-feet; and

15 (ii) the appropriation is less than 30 acre-feet per year and is from a source other than a perennial
16 flowing stream; and

17 (iii) the impoundment or pit is to be constructed on and will be accessible to a parcel of land that
18 is owned or under the control of the applicant and that is 40 acres or larger. As used in this subsection,
19 a perennial flowing stream means a stream that historically has flowed continuously during all seasons of
20 the year, during dry as well as wet years.

21 (b) Also subject to the provisions of subsection (3)(c), a permit is not required for an emergency
22 ground water use to benefit the fishery resource under [section 2].

23 (c) However, within 60 days after constructing the impoundment or pit ~~or using the ground water~~
24 under [section 2], the appropriator shall apply for a permit as prescribed by this part. Upon receipt of a
25 correct and complete application for a stockwater provisional permit ~~or an application for emergency ground~~
26 water use to benefit the fishery resource under [section 2], the department shall ~~then~~ automatically issue
27 a provisional permit. If, based on a valid objection filed under 85-2-308 pursuant to notice as required
28 under 85-2-307, the department determines after a hearing that the rights of other appropriators have been
29 or will be adversely affected, it may revoke the permit or require the permittee to modify the impoundment
30 or pit ~~or emergency ground water use~~ and may ~~then~~ make the permit subject to ~~such~~ the terms, conditions,

1 restrictions, or limitations that it considers necessary to protect the rights of other appropriators.

2 (4) A person may also appropriate water without applying for or prior to receiving a permit under
3 rules adopted by the board under 85-2-113."

4

5 **Section 5.** Section 85-2-319, MCA, is amended to read:

6 **"85-2-319. Permit action in highly appropriated basins or subbasins -- exceptions.** (1) The
7 legislature may by law preclude permit applications, or the department may by rule reject permit
8 applications or modify or condition permits issued in a highly appropriated basin or subbasin.

9 (2) A rule may be adopted under this section only upon a petition signed by at least 25% or 10,
10 whichever is less, of the users of water in the source of supply within a basin or subbasin or upon petition
11 of the department of health and environmental sciences alleging facts under subsection (2)(d). The petition
12 must be in a form ~~as~~ prescribed by the department and must allege facts showing that throughout or at
13 certain times of the year or for certain beneficial uses:

14 (a) there are no unappropriated waters in the source of supply;

15 (b) the rights of prior appropriators will be adversely affected;

16 (c) further uses will interfere unreasonably with other planned uses or developments for which a
17 permit has been issued or for which water has been reserved; or

18 (d) in the case of a petition filed by the department of health and environmental sciences:

19 (i) the water quality of an appropriator will be adversely affected by the issuance of permits;

20 (ii) further use will not be substantially in accordance with the classification of water set for the
21 source of supply pursuant to 75-5-301(1); or

22 (iii) the ability of a discharge permit holder to satisfy effluent limitations of a permit issued in
23 accordance with Title 75, chapter 5, part 4, will be adversely affected by the issuance of permits.

24 (3) Within 60 days after submission of a petition, the department shall:

25 (a) deny the petition in writing, stating its reasons for denial;

26 (b) inform the petitioners that the department ~~must~~ shall study the allegations further before
27 denying or proceeding further with the petition; or

28 (c) initiate rulemaking proceedings in accordance with 2-4-302 through 2-4-305.

29 (4) Title 2, chapter 4, parts 1 through 4, govern rulemaking proceedings conducted under this
30 section, except that in addition to the notice requirements of those parts, the department notice of the

1 rulemaking hearing must be published at least once in each week for 3 successive weeks, not less than 30
 2 days before the date of the hearing, in a newspaper of general circulation in the county or counties in which
 3 the source is located. The department shall serve by mail a copy of the notice, not less than 30 days before
 4 the hearing, upon each person or public agency known from the examination of the records of the
 5 department to be a claimant, appropriator, or permit holder of water in the source.

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

7 (6) Permit applications for the emergency use of ground water to benefit the fishery resource under
 8 [section 2] are not subject to the provisions of this section unless the law or rule adopted pursuant to
 9 subsection (1) specifically provides that a permit may not be issued under [section 2]."

10
 11 **Section 6.** Section 85-2-404, MCA, is amended to read:

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

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

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

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

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

30 (4) The lease of an existing right pursuant to 85-2-436 or the temporary change pursuant to

1 85-2-407 does not constitute an abandonment or serve as evidence that could be used to establish an
2 abandonment of all or any part of the right.

3 (5) The voluntary nonuse of an existing right to benefit the fishery resource does not constitute
4 an abandonment or serve as evidence that could be used to establish an abandonment of all or any part
5 of the right if:

6 (a) the stream reach has been identified as critical under [section 1]; and

7 (b) the department of fish, wildlife, and parks has determined that the amount of water in the
8 stream reach has reached the amount identified as critical for survival of a specific species under [section
9 1(3)(a)].

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

12 **85-2-404. (Effective July 1, 1999) Abandonment of appropriation right.** (1) If an appropriator
13 ceases to use all or a part of ~~his~~ an appropriation right with the intention of wholly or partially abandoning
14 the right or if he the appropriator ceases using ~~his~~ the appropriation right according to its terms and
15 conditions with the intention of not complying with those terms and conditions, the appropriation right ~~shall~~
16 must, to that extent, be ~~deemed~~ considered abandoned and ~~shall~~ must immediately expire.

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

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

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

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

30 (4) A temporary change pursuant to 85-2-407 does not constitute an abandonment or serve as

1 evidence that could be used to establish an abandonment of all or any part of the right.

2 (5) The voluntary nonuse of an existing right to benefit the fishery resource does not constitute
3 an abandonment or serve as evidence that could be used to establish an abandonment of all or any part
4 of the right if:

5 (a) the stream reach has been identified as critical under [section 1]; and

6 (b) the department of fish, wildlife, and parks has determined that the amount of water in the
7 stream reach has reached the amount identified as critical for survival of a specific species under [section
8 1(3)(a)].

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

11
12 **Section 7.** Section 85-2-436, MCA, is amended to read:

13 **"85-2-436. (Temporary) Water leasing study.** (1) The department of fish, wildlife, and parks and
14 the department, in consultation with the water policy committee, shall conduct and coordinate a study that,
15 at a minimum:

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

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

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

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

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

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

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

28 (2) For purposes of undertaking the study described in subsection (1) and as authorized by law,
29 the department of fish, wildlife, and parks ~~and the department~~ may engage in the activities described in this
30 subsection. For purposes of this study, this section is the exclusive means by which the department of fish,

1 wildlife, and parks may seek to change an appropriation right to an instream flow purpose.

2 (a) The department of fish, wildlife, and parks, ~~with the consent of the commission,~~ may lease
3 existing rights for the purpose of maintaining or enhancing streamflows for the benefit of fisheries in stream
4 reaches ~~determined eligible by the board pursuant to 85-2-437~~ identified in [section 1].

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

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

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

20 (e) The lease may not be issued for a term of more than 10 years, but it may be renewed once for
21 up to 10 years, except that a lease of water made available from the development of a water conservation
22 or storage project is restricted to a term of not more than 20 years. Upon receiving notice of a lease
23 renewal, the department shall notify other appropriators potentially affected by the lease and shall allow
24 30 days for submission of new evidence of adverse effects to other water rights. A lease authorization is
25 not required for a renewal unless an appropriator other than an appropriator described in subsection (2)(i)
26 submits evidence of adverse effects to the appropriator's rights that has not been considered previously.
27 If new evidence is submitted, a lease authorization must be obtained according to the requirements of
28 85-2-402.

29 (f) During the term of the lease, the department may modify or revoke the lease authorization if
30 an appropriator other than an appropriator described in subsection (2)(i) proves by a preponderance of

1 evidence that the appropriator's water right is adversely affected.

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

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

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

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

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

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

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

23

24 **Section 8.** Section 85-2-437, MCA, is amended to read:

25 "**85-2-437. (Temporary) ~~Board~~ Department of fish, wildlife, and parks designation of eligible stream**
26 **reaches.** ~~(1) The department of fish, wildlife, and parks, with the consent of the commission, may apply~~
27 ~~to the board for designation of stream reaches for which water leasing to maintain or enhance streamflows~~
28 ~~pursuant to 85-2-436 may occur.~~

29 ~~(2) The board~~ may declare a stream reach eligible for leasing pursuant to 85-2-436 only if it finds
30 that water leasing is necessary to maintain or enhance streamflows for fisheries under the provisions of

1 [section 1].

2 ~~(3) The board may designate no more than 20 stream reaches in the state where water leasing~~
3 ~~pursuant to 85-2-436 may occur. If the department of fish, wildlife, and parks determines that a water lease~~
4 ~~cannot be reasonably obtained on a designated stream reach, the board may remove the designation from~~
5 ~~that stream reach and designate another stream reach pursuant to this section. (Terminates June 30,~~
6 ~~1999--sec. 4, Ch. 740, L. 1991.)"~~

7

8 **NEW SECTION. Section 9. Codification instructions.** (1) [Section 1] is intended to be codified
9 as an integral part of Title 85, chapter 2, part 1, and the provisions of Title 85, chapter 2, part 1, apply to
10 [section 1].

11 (2) [Section 2] is intended to be codified as an integral part of Title 85, chapter 2, part 3, and the
12 provisions of Title 85, chapter 2, part 3, apply to [section 2].

13

14 **NEW SECTION. Section 10. Retroactive applicability.** [Section 5] applies retroactively, within the
15 meaning of 1-2-109, to all existing legislative and administrative basin closures.

16

17 **NEW SECTION. Section 11. Effective date.** [This act] is effective on passage and approval.

18

-END-

STATE OF MONTANA - FISCAL NOTE

Fiscal Note for SB0391, as introduced

DESCRIPTION OF PROPOSED LEGISLATION:

A act requiring the Department of Fish, Wildlife and Parks to identify critical low-water stream reaches for the fishery resource; allowing emergency groundwater use to benefit the fishery resource in critical low-water streams; granting abandonment protection for voluntary non-use of water in critical low-water streams; exempting emergency ground water use in critical low-water streams from the provisions of basin closures; revising the water leasing program; and providing an immediate effective date and a retroactive applicability date.

ASSUMPTIONS:

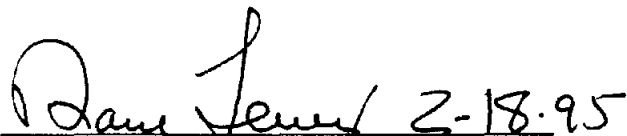
1. At least 450 streams could be determined to be critical to the fishery resource.
2. About 300 of those streams already have the "maintenance" flows determined from water reservation processes.
3. The identification of critical streams and the determination of flow levels will be done on a case-by-case basis as the need arises.
4. Approximately five streams will be completed each year.
5. Based on the assumption that the Department of Fish, Wildlife and Parks can identify critical streams and determine flow levels on a case by case basis, no additional expenditure of funds is required.
6. There may be some costs for installing stream gages to monitor "survival" flow levels and implement flow augmentation measures. Any additional costs will be absorbed within the current budget.

FISCAL IMPACT:

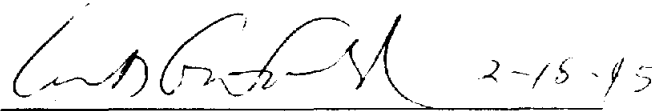
None

Long-Range Effects of Proposed Legislation:

Once critical stream reaches are identified and flow levels determined, the bill allows augmentation of stream flows in dewatered streams by introducing water from wells or by allowing water users to leave some water in the stream without fear of abandoning their water rights. The effect will be to help improve stream flows for fisheries during low flow or drought years.

 2-18-95

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

 2-18-95

LORENTS GROSFIELD, PRIMARY SPONSOR DATE

Fiscal Note for SB0391, as introduced

SB 391

APPROVED BY COM ON
NATURAL RESOURCES

SENATE BILL NO. 391

INTRODUCED BY GROSFIELD, KNOX

1
2
3
4 A BILL FOR AN ACT ENTITLED: "AN ACT REQUIRING THE DEPARTMENT OF FISH, WILDLIFE, AND PARKS
5 TO IDENTIFY CRITICAL LOW-WATER STREAM REACHES FOR THE FISHERY RESOURCE; ALLOWING
6 EMERGENCY GROUND WATER USE TO BENEFIT THE FISHERY RESOURCE IN CRITICAL LOW-WATER
7 STREAMS; GRANTING ABANDONMENT PROTECTION FOR VOLUNTARY NONUSE OF WATER IN CRITICAL
8 LOW-WATER STREAMS; EXEMPTING EMERGENCY GROUND WATER USE IN CRITICAL LOW-WATER
9 STREAMS FROM THE PROVISIONS OF BASIN CLOSURES; REVISING THE WATER LEASING PROGRAM;
10 AMENDING SECTIONS 85-2-102, 85-2-306, ~~85-2-319~~, 85-2-404, 85-2-436, AND 85-2-437, MCA; AND
11 PROVIDING AN IMMEDIATE EFFECTIVE DATE ~~AND A RETROACTIVE APPLICABILITY DATE.~~"

12

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

14

15 NEW SECTION. **Section 1. Critical stream reach identification -- criteria.** The department of fish,
16 wildlife, and parks shall identify stream reaches critical to the Montana fishery resource. The critical stream
17 reach identification must include:

18 (1) the specific hydrologic reach of a stream determined to be critical to the fishery resource;
19 (2) the specific fish species dependent on that stream reach; and
20 (3) subject to the criteria identified in subsection (4), the specific minimum amount of water needed
21 for that species for:

22 (a) species survival;
23 (b) species maintenance; and
24 (c) optimal species existence.
25 (4) To determine the specific minimum amount of water required under subsection (3), the
26 department of fish, wildlife, and parks shall:

27 (a) estimate the minimum flow needed, using a generally accepted streamflow methodology for the
28 benefit of the fishery resource; and

29 (b) estimate the different seasonal minimum amounts of water needed.

30 (5) Minimum water amounts established under subsection (3) may be modified by the fish, wildlife,

1 and parks commission if a person submits credible information to the commission demonstrating by a
2 preponderance of the evidence that the amounts established are not appropriate.

3 (6) THIS SECTION MAY NOT BE CONSTRUED TO IDENTIFY A MINIMUM IN STREAMFLOW FOR
4 ANY PURPOSE OTHER THAN FOR ENCOURAGING VOLUNTARY SOLUTIONS TO SEASON- SPECIFIC AND
5 SITE-SPECIFIC FISHERY RESOURCE PROBLEMS.

6 (7) THIS SECTION MAY NOT BE CONSTRUED IN ANY MANNER THAT WOULD ADVERSELY
7 AFFECT EXISTING WATER RIGHTS.

8
9 NEW SECTION. Section 2. Emergency ground water use to benefit fishery resource -- limitations
10 -- criteria. (1) ~~is~~ SUBJECT TO THE LIMITATIONS OF SUBSECTION (3) AND IN accordance with the
11 provisions of 85-2-311 or 85-2-402, the department shall accept and process an application for a permit
12 to appropriate ground water for emergency instream use to benefit the fishery resource if:

13 (a) the receiving stream reach has been identified as a critical stream reach under [section 1]; and

14 (b) the ground water to be used to benefit the fishery resource is not ~~immediately~~ SUBSTANTIALLY
15 or directly connected to surface water.

16 (2) A permit granted under this section must state that the ground water may not be used unless
17 the department of fish, wildlife, and parks determines that the amount of water in the receiving stream has
18 reached the amount identified as critical for survival of a specific species under [section 1(3)(a)].

19 (3) NOTWITHSTANDING THE PROVISIONS OF 85-2-311(1)(F) AND 85-2-402(2)(D), AN
20 APPLICANT FOR A PERMIT UNDER THIS SECTION DOES NOT HAVE TO SHOW A POSSESSORY
21 INTEREST IN THE PROPERTY WHERE THE WATER IS TO BE PUT TO BENEFICIAL USE.

22
23 **Section 3.** Section 85-2-102, MCA, is amended to read:

24 **"85-2-102. (Temporary) Definitions.** Unless the context requires otherwise, in this chapter the
25 following definitions apply:

26 (1) "Appropriate" means ~~to~~:

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

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

29 (c) in the case of the department of fish, wildlife, and parks, to lease water in accordance with
30 85-2-436; or

1 (d) to use ground water in accordance with the provisions of [section 2].

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

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

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

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

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 would be protected under the law
23 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, 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) to use ground water in accordance with the provisions of [section 2].

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

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

1 municipal, power, and recreational uses; and

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

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

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

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

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

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

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

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

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

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

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

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

1 providing the information.

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

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

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

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

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

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

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

15

16 **Section 4.** Section 85-2-306, MCA, is amended to read:

17 **"85-2-306. Exceptions to permit requirements.** (1) ~~Ground~~ Except for emergency use of ground
18 water to benefit the fishery resource under [section 2], ground water may be appropriated only by a person
19 who has a possessory interest in the property where the water is to be put to beneficial use and exclusive
20 property rights in the ground water development works or, if another person has rights in the ground water
21 development works, the written consent of the person with those property rights. Outside the boundaries
22 of a controlled ground water area, a permit is not required before appropriating ground water by means of
23 a well or developed spring with a maximum appropriation of 35 gallons per minute or less, not to exceed
24 10 acre-feet per year, except that a combined appropriation from the same source from two or more wells
25 or developed springs exceeding this limitation requires a permit. Within 60 days of completion of the well
26 or developed spring and appropriation of the ground water for beneficial use, the appropriator shall file a
27 notice of completion with the department on a form provided by the department at its offices and at the
28 offices of the county clerk and recorders. Upon receipt of the notice, the department shall review the notice
29 and may, before issuing a certificate of water right, return a defective notice for correction or completion,
30 together with the reasons for returning it. A notice does not lose priority of filing because of defects if the

1 notice is corrected, completed, and refiled with the department within 30 days or within a further time as
2 the department may allow, not to exceed 6 months. If a notice is not corrected and completed within the
3 time allowed, the priority date of appropriation is the date of refileing a correct and complete notice with the
4 department. A certificate of water right may not be issued until a correct and complete notice has been filed
5 with the department. The original of the certificate must be sent to the appropriator. The department shall
6 keep a copy of the certificate in its office in Helena. The date of filing of the notice of completion is the date
7 of priority of the right.

8 (2) An appropriator of ground water by means of a well or developed spring first put to beneficial
9 use between January 1, 1962, and July 1, 1973, who did not file a notice of completion, as required by
10 laws in force prior to April 14, 1981, with the county clerk and recorder shall file a notice of completion,
11 as provided in subsection (1), with the department to perfect the water right. The filing of a claim pursuant
12 to 85-2-221 is sufficient notice of completion under this subsection. The priority date of the appropriation
13 is the date of the filing of a notice as provided in subsection (1) of this section or the date of the filing of
14 the claim of existing water right. An appropriation under this subsection is an existing right, and a permit
15 is not required; ~~however~~ However, the department shall acknowledge the receipt of a correct and complete
16 filing of a notice of completion, except that for an appropriation of 35 gallons per minute or less, not to
17 exceed 10 acre-feet per year, the department shall issue a certificate of water right. If a certificate is issued
18 under this section, a certificate need not be issued under the adjudication proceedings provided for in
19 85-2-236.

20 (3) A (a) ~~Subject to the provisions of subsection (3)(c),~~ a permit is not required before
21 constructing an impoundment or pit and appropriating water for use by livestock if:

22 (i) the maximum capacity of the impoundment or pit is less than 15 acre-feet; ~~and~~

23 (ii) the appropriation is less than 30 acre-feet per year and is from a source other than a perennial
24 flowing stream; and

25 (iii) the impoundment or pit is to be constructed on and will be accessible to a parcel of land that
26 is owned or under the control of the applicant and that is 40 acres or larger. As used in this subsection,
27 a perennial flowing stream means a stream that historically has flowed continuously during all seasons of
28 the year, during dry as well as wet years.

29 (b) Also subject to the provisions of subsection (3)(c), a permit is not required for an emergency
30 ground water use to benefit the fishery resource under [section 2].

1 (c) However, within 60 days after constructing the impoundment or pit or using the ground water
 2 under [section 2], the appropriator shall apply for a permit as prescribed by this part. Upon receipt of a
 3 correct and complete application for a stockwater provisional permit or an application for emergency ground
 4 water use to benefit the fishery resource under [section 2], the department shall ~~then~~ automatically issue
 5 a provisional permit. If, based on a valid objection filed under 85-2-308 pursuant to notice as required
 6 under 85-2-307, the department determines after a hearing that the rights of other appropriators have been
 7 or will be adversely affected, it may revoke the permit or require the permittee to modify the impoundment
 8 or pit or emergency ground water use and may ~~then~~ make the permit subject to ~~such~~ the terms, conditions,
 9 restrictions, or limitations that it considers necessary to protect the rights of other appropriators.

10 (4) A person may also appropriate water without applying for or prior to receiving a permit under
 11 rules adopted by the board under 85-2-113."

12
 13 ~~Section 5. Section 85-2-319, MCA, is amended to read:~~

14 ~~"85-2-319. Permit action in highly appropriated basins or subbasins — exceptions. (1) The~~
 15 ~~legislature may by law preclude permit applications, or the department may by rule reject permit~~
 16 ~~applications or modify or condition permits issued in a highly appropriated basin or subbasin.~~

17 ~~(2) A rule may be adopted under this section only upon a petition signed by at least 25% or 10,~~
 18 ~~whichever is less, of the users of water in the source of supply within a basin or subbasin or upon petition~~
 19 ~~of the department of health and environmental sciences alleging facts under subsection (2)(d). The petition~~
 20 ~~must be in a form as prescribed by the department and must allege facts showing that throughout or at~~
 21 ~~certain times of the year or for certain beneficial uses:~~

22 ~~(a) there are no unappropriated waters in the source of supply;~~

23 ~~(b) the rights of prior appropriators will be adversely affected;~~

24 ~~(c) further uses will interfere unreasonably with other planned uses or developments for which a~~
 25 ~~permit has been issued or for which water has been reserved; or~~

26 ~~(d) in the case of a petition filed by the department of health and environmental sciences:~~

27 ~~(i) the water quality of an appropriator will be adversely affected by the issuance of permits;~~

28 ~~(ii) further use will not be substantially in accordance with the classification of water set for the~~
 29 ~~source of supply pursuant to 75-5-301(1); or~~

30 ~~(iii) 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 be adversely affected by the issuance of permits.~~

2 ~~(3) Within 60 days after submission of a petition, the department shall:~~

3 ~~(a) deny the petition in writing, stating its reasons for denial;~~

4 ~~(b) inform the petitioners that the department must shall study the allegations further before~~
5 ~~denying or proceeding further with the petition; or~~

6 ~~(c) initiate rulemaking proceedings in accordance with 2-4-302 through 2-4-305.~~

7 ~~(4) Title 2, chapter 4, parts 1 through 4, govern rulemaking proceedings conducted under this~~
8 ~~section, except that in addition to the notice requirements of those parts, the department notice of the~~
9 ~~rulemaking hearing must be published at least once in each week for 3 successive weeks, not less than 30~~
10 ~~days before the date of the hearing, in a newspaper of general circulation in the county or counties in which~~
11 ~~the source is located. The department shall serve by mail a copy of the notice, not less than 30 days before~~
12 ~~the hearing, upon each person or public agency known from the examination of the records of the~~
13 ~~department to be a claimant, appropriator, or permit holder of water in the source.~~

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

15 ~~(6) Permit applications for the emergency use of ground water to benefit the fishery resource under~~
16 ~~[section 2] are not subject to the provisions of this section unless the law or rule adopted pursuant to~~
17 ~~subsection (1) specifically provides that a permit may not be issued under [section 2]."~~

18

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

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

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

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

1 program:

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

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

8 (4) The lease of an existing right pursuant to 85-2-436 or the temporary change pursuant to
9 85-2-407 does not constitute an abandonment or serve as evidence that could be used to establish an
10 abandonment of all or any part of the right.

11 (5) The voluntary nonuse of an existing right to benefit the fishery resource does not constitute
12 an abandonment or serve as evidence that could be used to establish an abandonment of all or any part
13 of the right if:

14 (a) the stream reach has been identified as critical under [section 1]; and

15 (b) the department of fish, wildlife, and parks has determined that the amount of water in the
16 stream reach has reached the amount identified as critical for survival of a specific species under [section
17 1(3)(a)].

18 (6) SUBSECTION (5) IS SPECIFICALLY AND EXCLUSIVELY INTENDED TO ENCOURAGE NONUSE
19 OF EXISTING WATER RIGHTS DURING SPECIFIC SEASONS AND AT SPECIFIC SITES FOR THE BENEFIT
20 OF THE FISHERY RESOURCE.

21 ~~(6)(7)~~ 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 ~~his~~ an 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 must, 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 temporary change pursuant to 85-2-407 does not constitute an abandonment or serve as
12 evidence that could be used to establish an abandonment of all or any part of the right.

13 (5) The voluntary nonuse of an existing right to benefit the fishery resource does not constitute
14 an abandonment or serve as evidence that could be used to establish an abandonment of all or any part
15 of the right if:

16 (a) the stream reach has been identified as critical under [section 1]; and

17 (b) the department of fish, wildlife, and parks has determined that the amount of water in the
18 stream reach has reached the amount identified as critical for survival of a specific species under [section
19 1(3)(a)].

20 (6) SUBSECTION (5) IS SPECIFICALLY AND EXCLUSIVELY INTENDED TO ENCOURAGE NONUSE
21 OF EXISTING WATER RIGHTS DURING SPECIFIC SEASONS AND AT SPECIFIC SITES FOR THE BENEFIT
22 OF THE FISHERY RESOURCE.

23 ~~(6)(7)~~ Subsections (1) and (2) do not apply to existing rights until they have been determined in
24 accordance with part 2 of this chapter."

25

26 **Section 6.** Section 85-2-436, MCA, is amended to read:

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

30 (a) provides the following data for each designated stream reach and each pilot lease entered into

1 under subsection (2):

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

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

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

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

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

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

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

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 **Section 7.** Section 85-2-437, MCA, is amended to read:

9 **"85-2-437. (Temporary) Board Department of fish, wildlife, and parks designation of eligible stream**
10 **reaches.** ~~{1} The department of fish, wildlife, and parks, with the consent of the commission, may apply~~
11 ~~to the board for designation of stream reaches for which water leasing to maintain or enhance streamflows~~
12 ~~pursuant to 85-2-436 may occur.~~

13 ~~{2} The board may declare a stream reach eligible for leasing pursuant to 85-2-436 only if it finds~~
14 ~~that water leasing is necessary to maintain or enhance streamflows for fisheries under the provisions of~~
15 ~~[section 1].~~

16 ~~{3} The board may designate no more than 20 stream reaches in the state where water leasing~~
17 ~~pursuant to 85-2-436 may occur. If the department of fish, wildlife, and parks determines that a water lease~~
18 ~~cannot be reasonably obtained on a designated stream reach, the board may remove the designation from~~
19 ~~that stream reach and designate another stream reach pursuant to this section. (Terminates June 30,~~
20 ~~1999--sec. 4, Ch. 740, L. 1991.)"~~

21

22 **NEW SECTION. Section 8. Codification instructions.** (1) [Section 1] is intended to be codified
23 as an integral part of Title 85, chapter 2, part 1, and the provisions of Title 85, chapter 2, part 1, apply to
24 [section 1].

25 (2) [Section 2] is intended to be codified as an integral part of Title 85, chapter 2, part 3, and the
26 provisions of Title 85, chapter 2, part 3, apply to [section 2].

27

28 **NEW SECTION. Section 9. Retroactive applicability.** ~~[Section 5] applies retroactively, within the~~
29 ~~meaning of 1-2-109, to all existing legislative and administrative basin closures.~~

30

