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House BILL NO. 390

INTRODUCED BY Cobb

A BILL FOR AN ACT ENTITLED: "AN ACT ALLOWING VOLUNTARY POOLING OF IRRIGATION WATER RIGHTS; AMENDING SECTION 85-2-404, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

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

**NEW SECTION. Section 1. Voluntary pooling of irrigation water rights.** (1) Two or more persons

with an existing water right, permit, or certificate on a source of water, a person with multiple irrigation rights on the same source of water, or any combination of the listed persons whose irrigation rights may be admeasured and distributed pursuant to the provision of chapter 5 may enter into a water right pooling agreement for the pooling of irrigation rights.

(2) A water right pooling agreement is a written agreement covering all or a part of an irrigation season that provides for the pooling of irrigation rights so that the parties to the water right pooling agreement may use the pooled irrigation rights to more expeditiously and efficiently irrigate the lands appurtenant to the pooled irrigation rights. The pooling of irrigation water rights is a voluntary sharing of water rights that does not increase the total amount of water that would otherwise have been used.

(3) A water right pooling agreement must specify:

(a) for each irrigation right to be pooled, the owner of the right, the water right number according to the department's records, the flow amount of the right, the place of diversion, the place of use, the acreage irrigated with the right, the period of use, and the total volume of water currently authorized to be appropriated on an annual basis;

(b) a description of how and where the pooled water rights will be used during the irrigation season for which the water right pooling agreement has been entered;

(c) the term of the agreement if it is for less than a full irrigation season; otherwise the term is the full irrigation season as defined by the irrigation right with the shortest irrigation period; and

(d) the certifications required under subsection (5).

(4) A water right pooling agreement may not be entered into:

(a) to expand the acres irrigated under a water right;

1 (b) to expand the cumulative acres irrigated or cumulative volume of water appropriated, as  
2 determined on an annual basis; or

3 (c) that adversely affects the water rights or the delivery of water to other persons.

4 (5) When a water commissioner has been appointed on a source of supply pursuant to 85-5-101,  
5 a water right pooling agreement may be executed and filed with the district court. The water right pooling  
6 agreement filed with the district court must contain a certification that a copy of the water right pooling  
7 agreement has been delivered to the water commissioner, the department, and each person entitled to  
8 notice under this subsection at least 3 days prior to the filing of the water right pooling agreement. Prior  
9 to filing the water right pooling agreement with the district court, the parties to the agreement shall inspect  
10 the records of the department and serve a copy of the water right pooling agreement and a notice by  
11 first-class mail or personal delivery on each appropriator of water or applicant for or holder of a permit  
12 whose rights are on the source being regulated by the water commissioner. The notice must specify the  
13 date on which the water right pooling agreement will be filed with the district court and a statement that  
14 an objection to the implementation of the water right pooling agreement may be filed with the district court.

15 (6) An objection to a water right pooling agreement must be filed within 5 days of the filing of the  
16 water right pooling agreement to enjoin implementation of it without a hearing before the district court  
17 judge. If an objection is not filed with the district court within 5 days after the date of the filing of the  
18 water right pooling agreement, the water commissioner shall admeasure and distribute the water in  
19 accordance with the terms of the water right pooling agreement until directed otherwise by order of the  
20 district court judge. If an objection is filed with the district court within 5 days after the date of the filing  
21 of the water right pooling agreement, the water commissioner may not admeasure and distribute the water  
22 in accordance with the terms of the water right pooling agreement until directed by order of the district  
23 court judge. When relief is requested under this subsection pursuant to the filing of an objection, the  
24 matter must be set for hearing at the earliest possible time and takes precedence over all matters except  
25 prior matters of the same character. The district court judge may modify or nullify the water right pooling  
26 agreement if the objector's water rights have been or will be adversely affected.

27 (7) The liability of the parties to a water right pooling agreement that when implemented results  
28 in damages to a person who is not a party to the water right pooling agreement is not altered or modified  
29 by this section regardless of whether an objection is filed to the water right pooling agreement. A water  
30 commissioner may not be held liable for damages resulting from the water commissioner's furnishing or

1 performing of services under this section.

2 (8) This section does not affect the rights or priority dates of any existing right, permit, or  
3 certificate. This section does not imply an intent to not comply with the terms and conditions attached to  
4 a pooled irrigation right.

5

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

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

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

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

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

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

25 (4) The lease of an existing right pursuant to 85-2-436, the use of water pursuant to 85-2-439,  
26 or a temporary change pursuant to 85-2-407 does not constitute an abandonment or serve as evidence that  
27 could be used to establish an abandonment of any part of the right.

28 (5) Participation in a water right pooling agreement under [section 1] does not represent an intent  
29 by an appropriator to wholly or partially abandon the appropriation right.

30 ~~(5)~~(6) Subsections (1) and (2) do not apply to existing rights until they have been determined in

1 accordance with part 2 of this chapter. (Terminates June 30, 1999--sec. 4, Ch. 740, L. 1991.)

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

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

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

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

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

20 (4) The use of water pursuant to 85-2-439 or a temporary change pursuant to 85-2-407 does not  
21 constitute an abandonment or serve as evidence that could be used to establish an abandonment of any  
22 part of the right.

23 (5) Participation in a water right pooling agreement under [section 1] does not represent an intent  
24 by an appropriator to wholly or partially abandon the appropriation right.

25 ~~(5)(6)~~ Subsections (1) and (2) do not apply to existing rights until they have been determined in  
26 accordance with part 2 of this chapter. (Terminates June 30, 2005--sec. 14, Ch. 487, L. 1995.)

27 **85-2-404. (Effective July 1, 2005) Abandonment of appropriation right.** (1) If an appropriator  
28 ceases to use all or a part of ~~his~~ an appropriation right with the intention of wholly or partially abandoning  
29 the right or if ~~he~~ the appropriator ceases using ~~his~~ the appropriation right according to its terms and  
30 conditions with the intention of not complying with those terms and conditions, the appropriation right ~~shall~~

1 is, to that extent, ~~be deemed~~ considered abandoned and ~~shall~~ must immediately expire.

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

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

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

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

15 (4) A temporary change pursuant to 85-2-407 does not constitute an abandonment or serve as  
16 evidence that could be used to establish an abandonment of any part of the right.

17 (5) Participation in a water right pooling agreement under [section 1] does not represent an intent  
18 by an appropriator to wholly or partially abandon the appropriation right.

19 ~~(5)(6)~~ Subsections (1) and (2) do not apply to existing rights until they have been determined in  
20 accordance with part 2 of this chapter."

21

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

25

26 NEW SECTION. Section 4. Effective date. [This act] is effective upon passage and approval.

27

-END-

STATE OF MONTANA - FISCAL NOTE

Fiscal Note for SB0390, as introduced

**DESCRIPTION OF PROPOSED LEGISLATION:** An act generally establishing restructuring requirements for Montana's electric utility industry; providing customer choice; generally revising the territorial integrity laws; removing certain rural electric cooperative properties from class seven property; including certain rural electric cooperative properties in class nine property; amending and repealing certain sections; and providing an immediate effective date.

**ASSUMPTIONS:**

**Legislative Branch:**

1. The Transition Advisory Committee (TAC) created in section 29 of the bill includes five legislators who are entitled to compensation and reimbursement as provided in 5-2-302, MCA.
2. The TAC will meet ten times between May 1997 and January 1999. Of the ten meetings, four meetings will be one-day meetings and six meetings will be two-day meetings. The quarterly meetings for the first and second quarters of calendar year 1999 will be held during the 56th legislative session.
3. TAC committee members and staff will be required to become knowledgeable about utility restructuring. Each committee member, two legislative services division staff members, two Public Service Commission staff members, and three staff members of other state agencies will attend one training seminar each year at a cost of \$1,250 per person per seminar including registration, travel and per diem.
4. The Revenue Oversight Committee (ROC) will extend three of the anticipated one-day meetings to two-day meetings and hold two additional two-day meetings at a cost of \$9,990 for legislator salary, per diem and mileage.
5. ROC committee members and staff will be required to become knowledgeable about utility restructuring. Each committee member, and two legislative branch staff will attend one training seminar each year at a cost of \$1,250 per seminar per person, including registration, travel and per diem.
6. The ROC will contract for services of utility experts in conducting the required analysis at a cost of \$10,000 for the services, travel and expenses.
7. A biennial appropriation for the Transition Advisory Committee will be provided in this bill. Additional biennial appropriation for the Revenue Oversight Committee will be placed in program 21, Legislative Branch, in House Bill 2.


**Public Service Commission:**

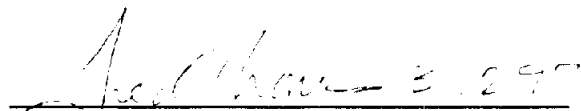
8. In order to be responsive to Transition Committee requests and to the direct PSC responsibilities under SB0390, an additional 0.5 Analyst FTE will be necessary. If work load is greater than expected, the PSC may request more personnel from the 1999 Legislature.

**Department of Environmental Quality:**

9. DEQ will provide the legislature with energy policy staff support and assistance consistent with its responsibilities under 90-4-1001, et. seq.
10. There will be about 1.50 FTE new workload required by this bill but it is unspecified as to which agency will incur these costs (.75 FTE @ grade 15/.75 FTE @ grade 16).

(Continued)

 3-12-97  
DAVE LEWIS, BUDGET DIRECTOR DATE  
Office of Budget and Program Planning

 3-2-97  
FRED THOMAS, PRIMARY SPONSOR DATE  
Fiscal Note for SB0390, as introduced  
SB 390

(continued)

**Department of Revenue:**

- 11. The department will require one additional appraiser (grade 15) at \$34,440 for FY98 and FY99.
- 12. The department will need to upgrade a current technician position from grade 11 to an appraisal position at grade 15 at a cost of \$9,070 in FY98 and in FY99 (MDOR).
- 13. Operating expenses and equipment costs are estimated to be \$7,726 in FY98 and \$1,316 in FY99 (MDOR).
- 14. The proposal requires vertically integrated electricity producers/suppliers to reorganize along functional lines. Such reorganizations may affect the property tax classification and tax rate

**State as Consumer:**

- 15. The executive budget includes \$7.8 million for electricity purchases in FY 99. An inflation rate of 5.8% is assumed. The proposed rate moratorium will freeze rates at FY 98 levels, resulting in a savings of \$437,000 (not shown below).

**FISCAL IMPACT:**

**Expenditures:**

	<u>FY98</u>	<u>FY99</u>
	<u>Difference</u>	<u>Difference</u>
<b>Legislative Branch -- Transition Advisory Committee:</b>		
Personal Services	1,972	1,972
Operating	<u>79,331</u>	<u>79,332</u>
Total	81,303	81,304

**Funding:**

General Fund	81,303	81,304
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**Legislative Branch -- Revenue Oversight Committee, House Bill 2:**

Personal Services	1,499	1,500
Operating	<u>25,999</u>	<u>26,000</u>
Total	27,498	27,500

**Funding:**

General Fund	27,498	27,500
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**Public Service Commission:**

FTE	.5	.5
Personal Services	<u>18,570</u>	<u>18,570</u>
Total	18,570	18,570

**Funding:**

PSC Special Revenue Fund (02)	18,570	18,570
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**Department of Environmental Quality:**

FTE	1.50	1.50
Personal Services	53,835	53,835
Operating Expenses	16,314	16,314
Equipment	<u>3,000</u>	<u>0</u>
Total	73,149	70,149

**Funding:**

General Fund (01)	73,149	70,149
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**Department of Revenue:**

FTE	1.00	1.00
Personal Services	43,510	53,835
<u>Operating Expenses</u>	<u>7,726</u>	<u>1,316</u>
Total	51,236	55,151

**Funding:**

General Fund (01)	51,236	55,151
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Revenues:

There could be some revenue impact due to the bill. This would be due to reclassification of electrical energy producing property. Property potentially being reclassified from class 5 to class 8 under current law could be classified in class 9 under the proposal. There could be property reclassified from class 9 to class 8 or class 5 under the proposal. The extent of the reclassification of property is not estimable.

EFFECT ON COUNTY OR OTHER LOCAL REVENUES OR EXPENDITURES:

There could be revenue impact to local government revenues due to reclassification of property. The extent of the reclassification of property is not estimable.

LONG-RANGE EFFECTS OF PROPOSED LEGISLATION: The cost of supporting the legislative members of the Transition Advisory Committee may continue through December 31, 2004. Committee costs may be assumed to increase if either or both of HB74 or HB13 is passed and approved.

The proposal creates a universal services benefit charge/program with funding equalling 2.4% of billings. This program funds low-income assistance, weatherization and energy conservation activities for the 2001 biennium at levels that may be 50% greater than under current law.

Deregulation may result in further reductions in the cost of the state's purchases of electricity, in addition to the approximate \$437,000 in FY 00 from the second year of the price moratorium.

TECHNICAL NOTES:

The proposal is unclear as to what property of an electric cooperative should be included as class nine property. In some cases electric cooperatives have corporate headquarters within a city limit but service no customers in the city. It is unclear if the property of the headquarters should be in class 9 and if so, should all property of the electric cooperative, even that not located in the city, be included in class 9.



HOUSE BILL NO. 390

INTRODUCED BY COBB, HARPER

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A BILL FOR AN ACT ENTITLED: "AN ACT ALLOWING VOLUNTARY POOLING OF IRRIGATION WATER RIGHTS BETWEEN OWNERS OF CONTIGUOUS TRACTS ALONG A WATER SOURCE IF A WATER COMMISSIONER HAS BEEN APPOINTED; AMENDING SECTION 85-2-404, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND A TERMINATION DATE."

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

NEW SECTION. Section 1. Voluntary pooling of irrigation water rights. (1) Two or more persons with an existing water right, permit, or certificate on a source of water, a person with multiple irrigation rights on the same source of water, or any combination of the listed persons whose irrigation rights may be admeasured and distributed pursuant to the provision of chapter 5 may enter into a water right pooling agreement for the pooling of irrigation rights IF:

(A) THE LANDS APPURTENANT TO THE RIGHTS TO BE POOLED ARE CONTIGUOUS ALONG THE WATER SOURCE; AND

(B) A WATER COMMISSIONER HAS BEEN APPOINTED TO ADMEASURE AND DISTRIBUTE WATER FROM THE WATER SOURCE PURSUANT TO CHAPTER 5.

(2) A water right pooling agreement is a written agreement covering all or a part of an irrigation season that provides for the pooling of irrigation rights so that the parties to the water right pooling agreement may use the pooled irrigation rights to more expeditiously and efficiently irrigate the lands appurtenant to the pooled irrigation rights. The pooling of irrigation water rights is a voluntary sharing of water rights that does not increase the total amount of water that would otherwise have been used.

(3) A water right pooling agreement must specify:

(a) for each irrigation right to be pooled, the owner of the right, the water right number according to the department's records, the flow amount of the right, the place of diversion, the place of use, the acreage irrigated with the right, the period of use, and the total volume of water currently authorized to be appropriated on an annual basis;

(b) a description of how and where the pooled water rights will be used during the irrigation season

1 for which the water right pooling agreement has been entered;

2 (c) the term of the agreement if it is for less than a full irrigation season; otherwise the term is the  
3 full irrigation season as defined by the irrigation right with the shortest irrigation period; and

4 (d) the certifications required under subsection (5).

5 (4) A water right pooling agreement may not be entered into:

6 (a) to expand the acres irrigated under a water right;

7 (b) to expand the cumulative acres irrigated or cumulative volume of water appropriated, as  
8 determined on an annual basis; or

9 (c) that adversely affects the water rights or the delivery of water to other persons.

10 (5) When a water commissioner has been appointed on a source of supply pursuant to 85-5-101,  
11 a water right pooling agreement may be executed and MUST BE FILED BY THE PARTIES TO THE  
12 AGREEMENT with the district court. The water right pooling agreement filed with the district court must  
13 contain a certification that a copy of the water right pooling agreement has been delivered to the water  
14 commissioner, AND the department, ~~and each person entitled to notice under this subsection at least 3~~  
15 ~~days prior to the filing of the water right pooling agreement. Prior to filing the water right pooling agreement~~  
16 ~~with the district court, the parties to the agreement shall inspect the records of the department and serve~~  
17 ~~a copy of the water right pooling agreement and a notice by first class mail or personal delivery on each~~  
18 ~~appropriator of water or applicant for or holder of a permit whose rights are on the source being regulated~~  
19 ~~by the water commissioner. The notice must specify the date on which the water right pooling agreement~~  
20 ~~will be filed with the district court and a statement that an objection to the implementation of the water~~  
21 ~~right pooling agreement may be filed with the district court~~ NO LATER THAN 30 DAYS BEFORE THE  
22 BEGINNING OF THE TERM OF THE AGREEMENT SPECIFIED IN SUBSECTION (3)(C).

23 (6) An objection to a water right pooling agreement must be filed ~~within 5 days of the filing of the~~  
24 ~~water right pooling agreement to enjoin implementation of it without a hearing before the district court~~  
25 ~~judge~~ IN ACCORDANCE WITH 85-5-301. If an objection is not filed with the district court ~~within 5 days~~  
26 ~~after the date of the filing of the water right pooling agreement~~, the water commissioner shall admeasure  
27 and distribute the water in accordance with the terms of the water right pooling agreement until directed  
28 otherwise by order of the district court judge. ~~If an objection is filed with the district court within 5 days~~  
29 ~~after the date of the filing of the water right pooling agreement, the water commissioner may not~~  
30 ~~admeasure and distribute the water in accordance with the terms of the water right pooling agreement until~~

1 ~~directed by order of the district court judge.~~ When relief is requested under this subsection pursuant to the  
 2 filing of an objection, the matter must be set for hearing at the earliest possible time and takes precedence  
 3 over all matters except prior matters of the same character. The district court judge may modify or nullify  
 4 the water right pooling agreement if the objector's water rights have been or will be adversely affected.  
 5 THE PARTIES TO THE AGREEMENT HAVE THE BURDEN TO PROVE THAT THE OBJECTOR'S RIGHTS WILL  
 6 NOT BE ADVERSELY AFFECTED.

7 (7) The liability of the parties to a water right pooling agreement that when implemented results  
 8 in damages to a person who is not a party to the water right pooling agreement is not altered or modified  
 9 by this section regardless of whether an objection is filed to the water right pooling agreement. ~~A water~~  
 10 ~~commissioner may not be held liable for damages resulting from the water commissioner's furnishing or~~  
 11 ~~performing of services under this section.~~

12 (8) This section does not affect the rights or priority dates of any existing right, permit, or  
 13 certificate OR THE RIGHTS OF A WATER USERS' ASSOCIATION OR IRRIGATION DISTRICT. This section  
 14 does not imply an intent to not comply with the terms and conditions attached to a pooled irrigation right.  
 15

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

17 **"85-2-404. (Temporary) Abandonment of appropriation right.** (1) If an appropriator ceases to use  
 18 all or a part of an appropriation right with the intention of wholly or partially abandoning the right or if the  
 19 appropriator ceases using the appropriation right according to its terms and conditions with the intention  
 20 of not complying with those terms and conditions, the appropriation right is, to that extent, considered  
 21 abandoned and must immediately expire.

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

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

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

1 terms and conditions attached to the right; and

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

5 (4) The lease of an existing right pursuant to 85-2-436, the use of water pursuant to 85-2-439,  
6 or a temporary change pursuant to 85-2-407 does not constitute an abandonment or serve as evidence that  
7 could be used to establish an abandonment of any part of the right.

8 (5) Participation in a water right pooling agreement under [section 1] does not represent an intent  
9 by an appropriator to wholly or partially abandon the appropriation right.

10 ~~(5)(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 an appropriation right with the intention of wholly or partially abandoning the  
14 right or if the appropriator ceases using the appropriation right according to its terms and conditions with  
15 the intention of not complying with those terms and conditions, the appropriation right is, to that extent,  
16 considered abandoned and must immediately expire.

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

21 (3) If an appropriator ceases to use all or part of an appropriation right because the land to which  
22 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 use of water pursuant to 85-2-439 or a temporary change pursuant to 85-2-407 does not

1 constitute an abandonment or serve as evidence that could be used to establish an abandonment of any  
2 part of the right.

3 (5) Participation in a water right pooling agreement under [section 1] does not represent an intent  
4 by an appropriator to wholly or partially abandon the appropriation right.

5 ~~(5)(6)~~ Subsections (1) and (2) do not apply to existing rights until they have been determined in  
6 accordance with part 2 of this chapter. (Terminates June 30, 2005--sec. 14, Ch. 487, L. 1995.)

7 **85-2-404. (Effective July 1, 2005) Abandonment of appropriation right.** (1) If an appropriator  
8 ceases to use all or a part of ~~his~~ an appropriation right with the intention of wholly or partially abandoning  
9 the right or if ~~he~~ the appropriator ceases using ~~his~~ the appropriation right according to its terms and  
10 conditions with the intention of not complying with those terms and conditions, the appropriation right ~~shall~~  
11 is, to that extent, ~~be deemed~~ considered abandoned and ~~shall~~ must immediately expire.

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

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

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

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

25 (4) A temporary change pursuant to 85-2-407 does not constitute an abandonment or serve as  
26 evidence that could be used to establish an abandonment of any part of the right.

27 (5) Participation in a water right pooling agreement under [section 1] does not represent an intent  
28 by an appropriator to wholly or partially abandon the appropriation right.

29 ~~(5)(6)~~ Subsections (1) and (2) do not apply to existing rights until they have been determined in  
30 accordance with part 2 of this chapter."

1           **NEW SECTION. Section 3. Codification instruction.** [Section 1] 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 1].

4

5           **NEW SECTION. Section 4. Effective date.** [This act] is effective upon passage and approval.

6

7           **NEW SECTION. SECTION 5. TERMINATION. [THIS ACT] TERMINATES OCTOBER 1, 2002.**

8

-END-

## 1 HOUSE BILL NO. 390

2 INTRODUCED BY COBB, HARPER

3  
4 A BILL FOR AN ACT ENTITLED: "AN ACT ALLOWING VOLUNTARY POOLING OF IRRIGATION WATER  
5 RIGHTS BETWEEN OWNERS OF CONTIGUOUS TRACTS ALONG A WATER SOURCE IF A WATER  
6 COMMISSIONER HAS BEEN APPOINTED; AMENDING SECTION 85-2-404, MCA; AND PROVIDING AN  
7 IMMEDIATE EFFECTIVE DATE AND A TERMINATION DATE."

8  
9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

10  
11 NEW SECTION. Section 1. Voluntary pooling of irrigation water rights. (1) Two or more persons  
12 with an existing water right, permit, or certificate on a source of water, a person with multiple irrigation  
13 rights on the same source of water, or any combination of the listed persons whose irrigation rights may  
14 be admeasured and distributed pursuant to the provision of chapter 5 may enter into a water right pooling  
15 agreement for the pooling of irrigation rights IF:

16 (A) THE LANDS APPURTENANT TO THE RIGHTS TO BE POOLED ARE CONTIGUOUS ALONG THE  
17 WATER SOURCE; AND

18 (B) A WATER COMMISSIONER HAS BEEN APPOINTED TO ADMEASURE AND DISTRIBUTE WATER  
19 FROM THE WATER SOURCE PURSUANT TO CHAPTER 5.

20 (2) A water right pooling agreement is a written agreement covering all or a part of an irrigation  
21 season that provides for the pooling of irrigation rights so that the parties to the water right pooling  
22 agreement may use the pooled irrigation rights to more expeditiously and efficiently irrigate the lands  
23 appurtenant to the pooled irrigation rights. The pooling of irrigation water rights is a voluntary sharing of  
24 water rights that does not increase the total amount of water that would otherwise have been used.

25 (3) A water right pooling agreement must specify:

26 (a) for each irrigation right to be pooled, the owner of the right, the water right number according  
27 to the department's records, the flow amount of the right, the place of diversion, the place of use, the  
28 acreage irrigated with the right, the period of use, and the total volume of water currently authorized to be  
29 appropriated on an annual basis;

30 (b) a description of how and where the pooled water rights will be used during the irrigation season

1 for which the water right pooling agreement has been entered;

2 (c) the term of the agreement if it is for less than a full irrigation season; otherwise the term is the  
3 full irrigation season as defined by the irrigation right with the shortest irrigation period; and

4 (d) the certifications required under subsection (5).

5 (4) A water right pooling agreement may not be entered into:

6 (a) to expand the acres irrigated under a water right;

7 (b) to expand the cumulative acres irrigated or cumulative volume of water appropriated, as  
8 determined on an annual basis; or

9 (c) that adversely affects the water rights or the delivery of water to other persons.

10 (5) When a water commissioner has been appointed on a source of supply pursuant to 85-5-101,  
11 a water right pooling agreement may be executed and MUST BE FILED BY THE PARTIES TO THE  
12 AGREEMENT with the district court. The water right pooling agreement filed with the district court must  
13 contain a certification that a copy of the water right pooling agreement has been delivered to the water  
14 commissioner, AND the department, ~~and each person entitled to notice under this subsection at least 3~~  
15 ~~days prior to the filing of the water right pooling agreement. Prior to filing the water right pooling agreement~~  
16 ~~with the district court, the parties to the agreement shall inspect the records of the department and serve~~  
17 ~~a copy of the water right pooling agreement and a notice by first class mail or personal delivery on each~~  
18 ~~appropriator of water or applicant for or holder of a permit whose rights are on the source being regulated~~  
19 ~~by the water commissioner. The notice must specify the date on which the water right pooling agreement~~  
20 ~~will be filed with the district court and a statement that an objection to the implementation of the water~~  
21 ~~right pooling agreement may be filed with the district court~~ NO LATER THAN 30 DAYS BEFORE THE  
22 BEGINNING OF THE TERM OF THE AGREEMENT SPECIFIED IN SUBSECTION (3)(C).

23 (6) An objection to a water right pooling agreement must be filed ~~within 5 days of the filing of the~~  
24 ~~water right pooling agreement to enjoin implementation of it without a hearing before the district court~~  
25 ~~judge~~ IN ACCORDANCE WITH 85-5-301. If an objection is not filed with the district court ~~within 5 days~~  
26 ~~after the date of the filing of the water right pooling agreement~~, the water commissioner shall admeasure  
27 and distribute the water in accordance with the terms of the water right pooling agreement until directed  
28 otherwise by order of the district court judge. ~~If an objection is filed with the district court within 5 days~~  
29 ~~after the date of the filing of the water right pooling agreement, the water commissioner may not~~  
30 ~~admeasure and distribute the water in accordance with the terms of the water right pooling agreement until~~



1 ~~directed by order of the district court judge.~~ When relief is requested under this subsection pursuant to the  
 2 filing of an objection, the matter must be set for hearing at the earliest possible time and takes precedence  
 3 over all matters except prior matters of the same character. The district court judge may modify or nullify  
 4 the water right pooling agreement if the objector's water rights have been or will be adversely affected.  
 5 THE PARTIES TO THE AGREEMENT HAVE THE BURDEN TO PROVE THAT THE OBJECTOR'S RIGHTS WILL  
 6 NOT BE ADVERSELY AFFECTED.

7 (7) The liability of the parties to a water right pooling agreement that when implemented results  
 8 in damages to a person who is not a party to the water right pooling agreement is not altered or modified  
 9 by this section regardless of whether an objection is filed to the water right pooling agreement. ~~A water~~  
 10 ~~commissioner may not be held liable for damages resulting from the water commissioner's furnishing or~~  
 11 ~~performing of services under this section.~~

12 (8) This section does not affect the rights or priority dates of any existing right, permit, or  
 13 certificate OR THE RIGHTS OF A WATER USERS' ASSOCIATION OR IRRIGATION DISTRICT. This section  
 14 does not imply an intent to not comply with the terms and conditions attached to a pooled irrigation right.  
 15

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

17 **"85-2-404. (Temporary) Abandonment of appropriation right.** (1) If an appropriator ceases to use  
 18 all or a part of an appropriation right with the intention of wholly or partially abandoning the right or if the  
 19 appropriator ceases using the appropriation right according to its terms and conditions with the intention  
 20 of not complying with those terms and conditions, the appropriation right is, to that extent, considered  
 21 abandoned and must immediately expire.

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

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

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

1 terms and conditions attached to the right; and

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

5 (4) The lease of an existing right pursuant to 85-2-436, the use of water pursuant to 85-2-439,  
6 or a temporary change pursuant to 85-2-407 does not constitute an abandonment or serve as evidence that  
7 could be used to establish an abandonment of any part of the right.

8 (5) Participation in a water right pooling agreement under [section 1] does not represent an intent  
9 by an appropriator to wholly or partially abandon the appropriation right.

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 an appropriation right with the intention of wholly or partially abandoning the  
14 right or if the appropriator ceases using the appropriation right according to its terms and conditions with  
15 the intention of not complying with those terms and conditions, the appropriation right is, to that extent,  
16 considered abandoned and must immediately expire.

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

21 (3) If an appropriator ceases to use all or part of an appropriation right because the land to which  
22 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 use of water pursuant to 85-2-439 or a temporary change pursuant to 85-2-407 does not

1 constitute an abandonment or serve as evidence that could be used to establish an abandonment of any  
2 part of the right.

3 (5) Participation in a water right pooling agreement under [section 1] does not represent an intent  
4 by an appropriator to wholly or partially abandon the appropriation right.

5 ~~(5)(6)~~ Subsections (1) and (2) do not apply to existing rights until they have been determined in  
6 accordance with part 2 of this chapter. (Terminates June 30, 2005--sec. 14, Ch. 487, L. 1995.)

7 **85-2-404. (Effective July 1, 2005) Abandonment of appropriation right.** (1) If an appropriator  
8 ceases to use all or a part of ~~his~~ an appropriation right with the intention of wholly or partially abandoning  
9 the right or if ~~he~~ the appropriator ceases using ~~his~~ the appropriation right according to its terms and  
10 conditions with the intention of not complying with those terms and conditions, the appropriation right ~~shall~~  
11 is, to that extent, ~~be deemed~~ considered abandoned and ~~shall~~ must immediately expire.

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

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

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

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

25 (4) A temporary change pursuant to 85-2-407 does not constitute an abandonment or serve as  
26 evidence that could be used to establish an abandonment of any part of the right.

27 (5) Participation in a water right pooling agreement under [section 1] does not represent an intent  
28 by an appropriator to wholly or partially abandon the appropriation right.

29 ~~(5)(6)~~ Subsections (1) and (2) do not apply to existing rights until they have been determined in  
30 accordance with part 2 of this chapter."

1            NEW SECTION. Section 3. Codification instruction. [Section 1] 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 1].

4

5            NEW SECTION. Section 4. Effective date. [This act] is effective upon passage and approval.

6

7            NEW SECTION. SECTION 5. TERMINATION. [THIS ACT] TERMINATES OCTOBER 1, 2002.

8

-END-