

1 SENATE BILL NO. 304
2 INTRODUCED BY M. CUFFE

3
4 A BILL FOR AN ACT ENTITLED: "AN ACT REVISING LAWS RELATED TO INSTREAM FLOW
5 APPROPRIATIONS OF WATER OF THE DEPARTMENT OF FISH, WILDLIFE, AND PARKS; REQUIRING
6 THE DETERMINATION OF BIOLOGICAL NEED FOR INSTREAM CLAIMS BY THE DEPARTMENT;
7 AMENDING SECTION 85-2-436, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND A
8 RETROACTIVE APPLICABILITY DATE."

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10 WHEREAS, Montana's interpretation of the prior appropriation doctrine for water rights is generally
11 summed up as "first in time, first in right" and was traditionally achieved by diverting water and putting it to
12 beneficial use; and

13 WHEREAS, the Montana Supreme Court's 2002 decision known as the Bean Lake III decision, 2002
14 MT 216, 311 Mont. 327, 55 P.3d 396, upended this doctrine when it held that "Montana recognized fish, wildlife
15 and recreation uses as beneficial and that valid instream and inlake appropriations of water existed in Montana
16 prior to 1973 where the intended beneficial use did not require diversion"; and

17 WHEREAS, the Bean Lake III decision did not validate the amount of water claimed to justify the
18 beneficial use of that claim; and

19 WHEREAS, nonconsumptive instream water rights claims for fish, fisheries, and wildlife by the
20 Department of Fish, Wildlife, and Parks should be based on the determined biological need of specific species
21 in specific water bodies; and

22 WHEREAS, biological need should be determined using the most up-to-date science relevant to the
23 species of concern and biological community existing in individual water bodies; and

24 WHEREAS, the Department of Fish, Wildlife, and Parks should recalculate their instream water right
25 flow rate and annual volume for the claim based on the biological need of individual species in individual water
26 bodies and alter priority dates to the original filing date of the claim.

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

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Section 1. Section 85-2-436, MCA, is amended to read:

"85-2-436. Instream flow to protect, maintain, or enhance streamflows to benefit fishery resource -- change in appropriation rights -- determination of biological need. (1) The department of fish, wildlife, and parks may change an appropriation right, which it either holds in fee simple or leases, to an instream flow purpose of use and a defined place of use to protect, maintain, or enhance streamflows to benefit the fishery resource.

(2) The change in purpose of use or place of use must meet all of the criteria and process outlined in 85-2-307 through 85-2-309, 85-2-401, and 85-2-402 and the additional criteria and process described in subsection (3) of this section to protect the rights of other appropriators from adverse impacts.

(3) (a) The department of fish, wildlife, and parks, with the consent of the commission, may lease existing rights for the purpose of protecting, maintaining, or enhancing streamflows to benefit the fishery resource.

(b) The department may not approve a change in appropriation right until all objections are resolved.

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

(d) The maximum quantity of water that may be changed to instream flow is the ~~amount historically diverted. However, only the amount historically consumed, or a smaller amount if specified by the department in the change in appropriation right authorization, may be used to protect, maintain, or enhance streamflows below the point of diversion that existed prior to the change in appropriation right~~ flow rate and volume of water determined by biological need, subject to subsection (8).

(e) A lease for instream flow purposes may be entered for a term of up to 10 years, except that a lease of water made available from the development of a water conservation or storage project may be for a term equal to the expected life of the project but not more than 30 years. All leases may be renewed an indefinite number of times but not for more than 10 years for each term. Upon receiving notice of a lease

1 renewal, the department shall notify other appropriators potentially affected by the lease and shall allow 90
2 days for submission of new evidence of adverse effects to other water rights. A change in appropriation right
3 authorization is not required for a renewal unless an appropriator other than an appropriator described in
4 subsection (3)(i) submits evidence of adverse effects to the appropriator's rights that has not been considered
5 previously. If new evidence is submitted, a change in appropriation right authorization must be obtained
6 according to the requirements of 85-2-402.

7 (f) The department may modify or revoke the change in appropriation right authorization up to 10
8 years after it is approved if an appropriator other than an appropriator described in subsection (3)(i) submits
9 new evidence not available at the time the change in appropriation right was approved that proves by a
10 preponderance of evidence that the appropriator's water right is adversely affected.

11 (g) The priority of appropriation for a lease or change in appropriation right under this section is the
12 same as the priority of appropriation of the right that is changed to an instream flow purpose.

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

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

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

21 (4) (a) The department of fish, wildlife, and parks shall complete and submit to the department,
22 commission, and water policy interim committee a biennial progress report in accordance with 5-11-210. This
23 report must include a summary of all appropriation rights changed to an instream flow purpose in the last 2
24 years.

25 (b) For each change in appropriation right to an instream flow purpose, the report must include a
26 copy of the change authorization issued by the department and must address:

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

28 (ii) ~~critical streamflow or volume needed to protect, maintain, or enhance streamflow to benefit the~~

1 flow rate and volume of water necessary to meet the biological need subject to subsection (8) of the fishery
 2 resource;

3 (iii) the amount of water available for instream flow as a result of the change in appropriation right;

4 (iv) contractual parameters, conditions, and other steps taken to ensure that each change in
 5 appropriation right does not harm other appropriators, particularly if the stream is one that experiences natural
 6 dewatering; and

7 (v) methods used to monitor use of water under each change in appropriation right.

8 (5) This section does not create the right for a person to bring suit to compel the renewal of a lease
 9 that has expired.

10 (6) (a) From May 8, 2007, through June 30, 2029, the department of fish, wildlife, and parks may
 11 change, pursuant to this section, the appropriation rights that it holds in fee simple to instream flow purposes on
 12 no more than 12 stream reaches.

13 (b) After June 30, 2029, the department of fish, wildlife, and parks may not change the
 14 appropriation rights that it holds in fee simple to instream flow purposes on any stream reaches.

15 (7) After June 30, 2029, the department of fish, wildlife, and parks may not enter into any new
 16 lease agreements pursuant to this section or renew any leases that will expire after that date.

17 (8) All appropriation rights held solely by the department of fish, wildlife, and parks for instream
 18 flow purposes must have a flow rate and volume determined by biological need, which is derived from the
 19 biological relationships found in long-term data collected in drought years and normal and above-normal water
 20 years for an affected fish species. An instream flow appropriation pursuant to this subsection:

21 (a) may not exceed the amount of water legally unappropriated at the date of the instream flow
 22 claim; and

23 (b) must be assigned a priority date that reflects the date of application for a change in
 24 appropriation right."

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26 NEW SECTION. Section 2. Effective date. [This act] is effective on passage and approval.

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28 NEW SECTION. Section 3. Retroactive applicability. [This act] applies retroactively, within the

1 meaning of 1-2-109, to the claims, leasing, or application of appropriation rights claimed or changed by the
2 department of fish, wildlife, and parks since May 11, 1979.

3 - END -