

## 1 SENATE BILL NO. 263

2 INTRODUCED BY T. FACEY

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4 A BILL FOR AN ACT ENTITLED: "AN ACT REQUIRING MINIMUM STREAMFLOW FOR CERTAIN  
5 DEWATERED STREAMS THAT ARE IMPORTANT FISHERIES; PROVIDING RULEMAKING AUTHORITY;  
6 AMENDING SECTIONS 85-5-101, 85-7-305, AND 85-7-1911, MCA; AND PROVIDING AN IMMEDIATE  
7 EFFECTIVE DATE."

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9 WHEREAS, the Montana Constitution provides that the waters of the state are the property of the state  
10 for the use of its people and are subject to appropriation for beneficial uses as provided by law; and

11 WHEREAS, the uses of water for recreation, fish, and wildlife are beneficial uses as provided by law; and

12 WHEREAS, state waters must be used with some regard for the rights of the public, and all users of state  
13 waters must be assured that the resource is not destroyed by one user in favor of another; and

14 WHEREAS, all persons have a constitutional right to a clean and healthful environment, which includes  
15 the maintenance of minimum streamflows to protect fisheries and ensure adequate water quality; and

16 WHEREAS, the dewatering of a stream, even if the stream is dewatered by a user with a vested water  
17 right, may destroy the use of that water for recreation, fish, and wildlife and may degrade water quality to the point  
18 that the constitutional right to a clean and healthful environment is violated; and

19 WHEREAS, the state has inherent power to enact reasonable legislation for the health, safety, and  
20 welfare of the public, even if the legislation is an infringement of individual rights; and

21 WHEREAS, the police power of the state, which enables the state to pass laws for the health, safety, and  
22 welfare of the people, must be reasonably adapted to its purpose and may injure or impair property rights only  
23 to the extent reasonably necessary to preserve the public welfare; and

24 WHEREAS, the curtailment of water use to preserve minimum streamflow is a necessary impairment of  
25 existing water rights in order to achieve a balance between public and private water uses and to ensure that the  
26 constitutional right to a clean and healthful environment is protected.

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

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30 NEW SECTION. **Section 1. Dewatered streams -- rulemaking authority.** (1) The department shall

1 adopt rules to define streams or reaches of streams that are:

2 (a) important fisheries;

3 (b) chronically or periodically dewatered; and

4 (c) monitored by a streamflow gauge.

5 (2) The department shall produce a list of streams or reaches of streams pursuant to the rules adopted  
6 under subsection (1), make the list available to the public, and update the list annually before May 1.

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8 **NEW SECTION. Section 2. Curtailment of water use -- district court powers.** Upon request, a  
9 district court may determine average annual flow for streams or reaches of streams that are on the list provided  
10 for in [section 1] and that are located within the judicial district. The district court may curtail water use equally  
11 by percentage among appropriators to maintain at least 25% of the average annual flow for those streams or  
12 reaches of streams.

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14 **Section 3.** Section 85-5-101, MCA, is amended to read:

15 **"85-5-101. Appointment of water commissioners.** (1) (a) Whenever the rights of persons to use the  
16 waters of any stream, ditch or extension of ditch, watercourse, spring, lake, reservoir, or other source of supply  
17 have been determined by a decree of a court of competent jurisdiction, including temporary preliminary,  
18 preliminary, and final decrees issued by a water judge, it is the duty of the judge of the district court having  
19 jurisdiction of the subject matter, upon the application of the owners of at least 15% of the water rights affected  
20 by the decree, in the exercise of the judge's discretion, to appoint one or more commissioners.

21 (b) The commissioners have authority to ~~admeasure~~ determine the appropriate quantity and distribute  
22 to the parties owning water rights in the source affected by the decree the waters to which they are entitled,  
23 according to their rights as fixed by the decree and by any certificates, permits, and changes in appropriation right  
24 issued under chapter 2 of this title.

25 (c) When petitioners make proper showing that they are not able to obtain the application of the owners  
26 of at least 15% of the water rights affected and they are unable to obtain the water to which they are entitled, the  
27 judge of the district court having jurisdiction may appoint a water commissioner.

28 (2) When the existing rights of all appropriators from a source or in an area have been determined in a  
29 temporary preliminary decree, preliminary decree, or final decree issued under chapter 2 of this title, the judge  
30 of the district court may, upon application by both the department of natural resources and conservation and one

1 or more holders of valid water rights in the source, appoint a water commissioner. The water commissioner shall  
2 distribute to the appropriators, from the source or in the area, the water to which they are entitled.

3 (3) The department of natural resources and conservation or any person or corporation operating under  
4 contract with the department or any other owner of stored waters may petition the court to have stored waters  
5 distributed by the water commissioners appointed by the district court. The court may order the commissioner  
6 or commissioners appointed by the court to distribute stored water when and as released to water users entitled  
7 to the use of the water.

8 (4) At the time of the appointment of a water commissioner or commissioners, the district court shall fix  
9 their compensation, require a commissioner or commissioners to purchase a workers' compensation insurance  
10 policy and elect coverage on themselves, and require the owners and users of the distributed waters, including  
11 permittees, certificate holders, and holders of a change in appropriation right, to pay their proportionate share of  
12 fees and compensation, including the cost of workers' compensation insurance purchased by a water  
13 commissioner or commissioners. The judge may include the department in the apportionment of costs if it applied  
14 for the appointment of a water commissioner under subsection (2).

15 (5) Upon the application of the board or boards of one or more irrigation districts entitled to the use of  
16 water stored in a reservoir that is turned into the natural channel of any stream and withdrawn or diverted at a  
17 point downstream for beneficial use, the district court of the judicial district where the most irrigable acres of the  
18 irrigation district or districts are situated may appoint a water commissioner to equitably ~~admeasure~~ determine  
19 the appropriate quantity and distribute stored water to the irrigation district or districts from the channel of the  
20 stream into which it has been turned. A commissioner appointed under this subsection has the powers of any  
21 commissioner appointed under this chapter, limited only by the purposes of this subsection. A commissioner's  
22 compensation is set by the appointing judge and paid by each district and other users of stored water affected  
23 by the ~~admeasurement~~ quantity determination and distribution of the stored water. In all other matters, the  
24 provisions of this chapter apply so long as they are consistent with this subsection.

25 (6) A water commissioner appointed by a district court is not an employee of the judicial branch, a local  
26 government, or a water user.

27 (7) A water commissioner who fails to obtain workers' compensation insurance coverage required by  
28 subsection (4) is precluded from receiving benefits under Title 39, chapter 71, as a result of the performance of  
29 duties as a water commissioner.

30 (8) A water commissioner shall determine average annual flow for streams or reaches of streams that

1 are on the list provided for in [section 1] and within the water commissioner's jurisdiction. The water commissioner  
2 shall curtail water use equally by percentage among appropriators to maintain at least 25% of the average annual  
3 flow for those streams or reaches of streams."

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5 **Section 4.** Section 85-7-305, MCA, is amended to read:

6 **"85-7-305. Apportionment of water by commissioners.** (1) The board of commissioners shall  
7 apportion the water for irrigation among the lands of the district in a just and equitable manner and in compliance  
8 with the decree adjudicating the water rights ~~thereto~~, but the maximum amount apportioned to any land ~~shall~~ may  
9 be only the amount that can be beneficially used ~~thereon~~ on the land.

10 (2) The board of commissioners shall determine average annual flow for streams or reaches of streams  
11 that are on the list provided for in [section 1] and within the board's jurisdiction. The board of commissioners shall  
12 curtail water use equally by percentage among appropriators to maintain at least 25% of the average annual flow  
13 for those streams or reaches of streams."

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15 **Section 5.** Section 85-7-1911, MCA, is amended to read:

16 **"85-7-1911. Apportionment of water by board.** (1) The board of commissioners shall apportion the  
17 water for irrigation among the lands in the district or a subdistrict in the district in a just and equitable manner, and  
18 the maximum amount apportioned to any land shall be the amount that can be beneficially used on the land. The  
19 amount of water is appurtenant to the land and inseparable from it but subject to reduction as provided in this  
20 chapter.

21 (2) In the event of a shortage of water, the amount of water delivered to each particular tract or piece  
22 of land shall be reduced proportionately.

23 (3) All surplus water belonging to the district may be sold or disposed of by the board for the benefit of  
24 the district or for the benefit of a subdistrict if the surplus water is derived from water that attaches to the  
25 substantial benefit of the subdistrict.

26 (4) All water, the right to the use of which is acquired by the district under any contract with the United  
27 States, shall be distributed and apportioned by the district in accordance with the acts of congress, the rules and  
28 regulations of the secretary of the interior, and the provisions of the contract.

29 (5) The board of commissioners shall determine average annual flow for streams or reaches of streams  
30 that are on the list provided for in [section 1] and within the board's jurisdiction. The board of commissioners shall

1 curtail water use equally by percentage among appropriators to maintain at least 25% of the average annual flow  
2 for those streams or reaches of streams."

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4 NEW SECTION. Section 6. Notification to tribal governments. The secretary of state shall send a  
5 copy of [this act] to each tribal government located on the seven Montana reservations and to the Little Shell  
6 Chippewa tribe.

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8 NEW SECTION. Section 7. Codification instruction. (1) [Section 1] is intended to be codified as an  
9 integral part of Title 87, chapter 1, part 2, and the provisions of Title 87, chapter 1, part 2, apply to [section 1].  
10 (2) [Section 2] is intended to be codified as an integral part of Title 85, chapter 1, part 1, and the  
11 provisions of Title 85, chapter 1, part 1, apply to [section 2].

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

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