

Emergency Stream Flow For Important Fisheries Bill 2011

Part I

1. The goal of the “Emergency Stream Flow For Important Fisheries Bill 2011” is to share the stream flows with irrigators who dewater 4,739 miles of important fisheries in Montana each year, according to the Montana Department of Fish Wildlife & Parks (FWP) dewatered streams list.
2. The list is a result of research on 423 streams by fishery biologists. Additional research on 288 stream segments revealed that 25 percent of a dewatered stream’s Average Annual Flow (AAF) is sufficient to sustain a natural fishery.
3. Important fisheries that are dewatered shall require a superior water right of 25 percent of the AAF that will be retained in the stream to support its fishery.
4. The fishery gets 25 percent; irrigators get 75% of the AAF. Irrigators currently take 97.6 percent of diverted water in Montana, while 2.4 percent is used by industry, municipalities, power generators and rural subdivisions.
5. The legislation applies only to those important fisheries listed in the FWP dewatered streams list. FWP states: “Dewatering refers to a reduction in stream flow below the point where stream habitat is adequate for fish.” Fish either move out or die.
6. AAF is derived from stream gauge volume data in Cubic Feet Per Second (CFS) gathered for over the past 107 years by the U.S. Geological Survey (USGS), readily available to the public. AAF is measured on gauged streams and estimated on ungauged streams.
7. The Emergency Stream Flow For Important Fisheries Bill 2011 will be administered and enforced by the local, on-the-ground, existing water rights management system of District Judges, Water Courts, Water Commissioners, Water Masters, ditch corporations, ditch companies, ditch riders or the local legally elected or appointed water management system. They shall continue to control all water diversions and shall be responsible to retaining 25 percent of the dewatered streams’ AAF when the important fishery is dewatered below the mark of 25 percent of the AAF, during drought emergencies. The Department of Natural Resources & Conservation (DNRC) and FWP will have no responsibility for enforcement. The local, on-the-ground, water management system will have all the authority to manage this system.
8. No additional water management personnel will be needed to meet the requirements of this bill. No additional water measurement personnel or additional water diversion structures nor any new gauging stations need be installed to sustain 25 percent of the AAF, which is the important fishery superior water right managed by the local, on-the-ground system.
9. Neither DNRC or FWP shall be involved or responsible for any on-the-ground regulation or enforcement of the requirements of this bill.
10. No money shall be paid to irrigation permit holders if they are required to allow water to be retained in important fisheries to maintain a flow of 25 percent of the AAF during drought emergencies.
11. Dewatering a stream to the point of warming is a public health hazard, causing thermal pollution, huge algae growth and low levels of dissolved oxygen. Stagnant water kills beneficial aquatic life and increases the numbers of biting insects. It requires eight years for a fishery to be reestablished following severe dewatering while an irrigator will only lose part of his crop with dewatering for that year.
12. All irrigation water right holders shall be called upon to give equally in order to maintain 25 percent of the AAF to protect dewatered important fisheries.

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Part II

Public Trust Law

1. The bill is based on the public trust, which is the common law doctrine that established our North American Model of fish and wildlife management. The bill is a fair, efficient method of sharing water without seriously having an impact on irrigators. The model is a contract of scientific, ethical, economic and social values set into an operating code of principals that guide fisheries management.
2. There is a legal basis for protecting important fisheries in drought emergencies.
3. There is no statutory authority permitting the dewatering of Montana's important fisheries. Therefore, it is a violation of the states public trust responsibilities to tolerate dewatering of a stream.
4. The Montana legislature has a constitutional responsibility to legislate for a clean and healthful environment, protect water quality and to guard public trust principles.
5. Existing law recognizes fish have a valid beneficial need for instream appropriations of water, and important fisheries have a basic right to a shared adequate flow. A water right is a permit to use, but not to own as material property.
6. It is the duty of the legislature of 2011 to provide real legislative protection of important fisheries that mandates a sharing of 25 percent of the Average Annual Flow (AAF) with irrigators who would then receive 75 percent of the AAF instead of 100 percent.
7. The sweet, clean flowing waters of Montana are a public-owned resource—the same as clean air and must not be owned like private property.
8. The public trust interest and private property interest are constitutionally protected and, when in competition, must be reconciled to avoid the annual 4,739 miles of dewatered important fisheries, listed on Montana State Fish Wildlife & Parks (FWP) dewatered streams list.
9. On September 24, 2002, the Montana Supreme Court reached a majority opinion, saying, "Montana law prior to 1973 does not require a diversion for a valid appropriation of water." This means that State claims to water rights for instream flows can be considered equal with irrigation uses when adjudication water rights on a stream or lake. This reverses the destructive 1988 Bean Lake decision which wrongly said that the Montana Constitution did not recognize water rights for fish and wildlife. Justice William Leaphart said, "Montana recognizes fish, wildlife and recreation uses are beneficial and are valid instream appropriations of water."
10. Public Trust has been reaffirmed in the stream access laws, bridge access court suit decisions, handed down through legislation, supreme court actions and attorney generals rulings as it applies to Montana's public-owned streams.
11. Sport fishing adds \$730 billion to our national economy annually. Adequate stream flows are vital to maintain Montana's famous fishing industry and would protect water rights to assure legal delivery to crops and livestock.
12. If 25 percent of stream flows for important fisheries are not reserved at this time, there is a danger when federal takings of our water is diverted to arid southwestern urban centers, there will be very little water left for irrigation, fish and wildlife, and we will all be the losers.
13. Many of Montana's streams are public thoroughfares for float or wade fishing and scientific research all affirming the public trust as it applies to the streams and rivers.
14. The Montana Constitution in Article IX states, "All surface, underground, flood and atmospheric waters are the property of the State for the use of its people."

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