



Montana River Action
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Part I

Senate Bill 263 An Act Requiring Minimum Stream Flow for Dewatered Important Fisheries

This bill is a remedy for the dewatering of 4,734 miles of Important Fisheries where over 3,000 miles are chronically dewatered each year and 1,681 miles of important fisheries are periodically dewatered.

SB 263 only applies to important fisheries listed on MT ST Dept. of Fish, Wildlife and Parks "Dewatered Concern Areas List". "Dewatering refers to a reduction in stream flow below the point where there is not enough water to maintain fish." Fish either move out or die.

The fiscal impacts of administering and managing SB 263 will be the on-the-ground, established water rights system of irrigators, ditch riders, ditch companies, ditch corporations, and water commissioners appointed by district judges or the legally elected or appointed water rights management system. They shall continue to control all water diversions and shall be responsible to retain 25% of the average annual flow when the important fishery is dewatered below that measure.

The MT ST. Dept. of Natural Resources and Conservation and the MT St. Dept. of Fish, Wildlife and Parks will have no responsibility for on the ground field work. No additional management personnel will be needed to administer this law. No water diversion structures or new gauging stations need be installed. The objective is to maintain 25% of the AAF to maintain important fisheries. The local water diversion and irrigation system will be responsible to assure the gauged stream flow is not reduced below 25% of the AAF. This 25% represents a critical flow that is necessary so that our citizens can continue to enjoy healthy fish populations in Montana's dewatered important fisheries. This "public trust" is guaranteed by our own Montana constitution in Article IX Environmental and Natural Resources Section 3-
"(3) All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law."

Part II

Senate Bill 263, Constitutionality Within The Public Trust

Certain things are common to all Montanans. The air we breathe and flowing water. Since the beginning of of written law the protection of air and flowing water became widely known as the Public Trust Doctrine. This doctrine developed into rule which evolved and was written into law. SB 263 is based on public trust law which is the common law that established our North American model of fish and wildlife management. The model is a contract of scientific, ethical,

economic, and social values set into an operating code of principles that guide fisheries management.

The objective is to maintain 25% of the Average Annual Flow(AAF) in order to maintain important fisheries. It is the responsibility of the 2011 legislature to provide real legislative assurance to important fisheries that mandates a sharing of 25% of the AAF with irrigators who would then receive 75% of the AAF instead of 100%.

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.

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 in stream flows can be considered equal with irrigation uses when considering adjudicating water rights. This reversed 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 in stream appropriations of water".

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. 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.

There is a legal constitutional basis for protecting important natural fisheries. There is no statutory authority that permits the dewatering of Montana's important fisheries. Tolerating this dewatering, year after year, is a violation of Montana's public trust responsibilities. This legislature has a constitutional responsibility to legislate law for the protection of natural fisheries.

Existing law recognizes important fisheries valid beneficial need for sharing in stream appropriations of water. A decreed water right is a permit to use flowing water but not to own as material property. The sweet flowing waters of Montana are a public trust resource the same as clean air and must not be owned like private property.

Article II, sec. 3 and Article IX of the MT constitution protect the fundamental right to a clean and healthful environment for present and future generations. These fundamental constitutional rights apply to streams in Montana and require the state to protect healthy flowing streams unpolluted by low flows, high temperatures, biting insects, rotting fish and unsanitary stagnant water.

Article 9 Sec.3(3) provides for the use of the waters of the state for it's people and to hunt and fish.

Article 9 Sec.7 describes our "harvest heritage" to harvest fish and game.

Article 9 states "All surface, underground floods and atmospheric waters are the property of the state."