

HOUSE BILL NO. 516

INTRODUCED BY B. HARRIS

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4 A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING WATER LAWS; REVISING THE LAW
5 REGARDING WHO CAN APPLY FOR AND HOLD A WATER RIGHT IN MONTANA; PROVIDING THAT ALL
6 WATER RIGHT CLAIMS THAT WERE EXEMPT FROM THE CLAIMS FILING REQUIREMENTS ARE VESTED;
7 PROHIBITING CERTAIN NONSTATE ENTITIES FROM RECEIVING A RIGHT TO APPROPRIATE WATER IN
8 MONTANA; PROHIBITING THE CO-OWNERSHIP OF WATER RIGHTS BETWEEN THE STATE AND
9 NONSTATE ENTITIES; PROVIDING THAT THE UNITED STATES OR ANY AGENCY OF THE UNITED STATES
10 MAY NOT OBTAIN A STATE WATER RESERVATION; AMENDING SECTIONS 85-2-222, 85-2-228, 85-2-301,
11 AND 85-2-316, MCA; AND PROVIDING AN EFFECTIVE DATE."

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

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15 **Section 1.** Section 85-2-222, MCA, is amended to read:

16 **"85-2-222. Exemptions.** Claims for existing rights for livestock and individual as opposed to municipal
17 domestic uses based upon instream flow or ground water sources and claims for rights in the Powder River basin
18 included in a declaration filed pursuant to the order of the department or a district court issued under sections 8
19 and 9 of Chapter 452, Laws of 1973, or under sections 3 and 4 of Chapter 485, Laws of 1975, are exempt from
20 the filing requirements of 85-2-221(1) and are vested. ~~Such~~ However, these claims may, ~~however,~~ be voluntarily
21 filed with the department."

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23 **Section 2.** Section 85-2-228, MCA, is amended to read:

24 **"85-2-228. Federal reserved water rights with priority date of July 1, 1973, or later -- process and**
25 **adjudication -- purpose.** (1) The purpose of this section is to ensure that a federal reserved water right with a
26 priority date of on or after July 1, 1973, ~~or later~~ but before [the effective date of this act] is subject to the same
27 process and adjudication as a federal reserved water right with a priority date before July 1, 1973.

28 (2) Under authority granted to the states by 43 U.S.C. 666, a federal reserved water right that has a
29 priority date of on or after July 1, 1973, ~~or later~~ but before [the effective date of this act] and that is asserted by
30 a federal agency is subject to the claim filing requirements and all other applicable requirements of the state water

1 adjudication system provided for in Title 85, chapter 2, parts 2 and 7.

2 (3) At the request of a federal agency, the reserved water rights compact commission may negotiate to
3 conclude a compact under Title 85, chapter 2, part 7, for a federal reserved water right with a priority date ~~of~~ on
4 or after July 1, 1973, ~~or later~~ but before [the effective date of this act].

5 (4) Whenever necessary, a water judge may reopen any decree issued pursuant to Title 85, chapter 2,
6 to process the asserted or negotiated federal reserved water right."

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8 **Section 3.** Section 85-2-301, MCA, is amended to read:

9 **"85-2-301. Right to appropriate -- recognition and confirmation of permits issued after July 1,**

10 **1973.** (1) After July 1, 1973, a person may not appropriate water except as provided in this chapter. A person may
11 appropriate water only for a beneficial use.

12 (2) (a) Only the department may appropriate water by permit for transport outside the following river
13 basins:

- 14 (i) the Clark Fork River and its tributaries to its confluence with Lake Pend Oreille in Idaho;
15 (ii) the Kootenai River and its tributaries to its confluence with Kootenay Lake in British Columbia;
16 (iii) the St. Mary River and its tributaries to its confluence with the Oldman River in Alberta;
17 (iv) the Little Missouri River and its tributaries to its confluence with Lake Sakakawea in North Dakota;
18 (v) the Missouri River and its tributaries to its confluence with the Yellowstone River in North Dakota; and
19 (vi) the Yellowstone River and its tributaries to its confluence with the Missouri River in North Dakota.

20 (b) The department may lease water subject to this subsection (2) under the provisions of 85-2-141.

21 (3) A right to appropriate water may not be acquired by any other method, including by adverse use,
22 adverse possession, prescription, or estoppel. The method prescribed by this chapter is exclusive.

23 (4) (a) A right to appropriate water may not be granted after [the effective date of this act] to:

- 24 (i) another state, an agency of another state, or a political subdivision of another state;
25 (ii) an Indian tribe that is recognized by federal law or formally acknowledged by the state;
26 (iii) the United States or any agency of the United States; or
27 (iv) a foreign government.

28 (b) Subsection (4)(a) applies to any co-ownership right in which the state shares an equal right to
29 appropriate water with a nonstate entity.

30 ~~(4)~~(5) All permit actions of the department after July 1, 1973, are recognized and confirmed subject to

1 this part and any terms, conditions, and limitations placed on a permit by the department."
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3 **Section 4.** Section 85-2-316, MCA, is amended to read:

4 **"85-2-316. State reservation of waters.** (1) Subject to 85-2-301, the ~~The state; or any political~~
5 ~~subdivision or agency of the state; or the United States or any agency of the United States~~ may apply to the
6 department to acquire a state water reservation for existing or future beneficial uses or to maintain a minimum
7 flow, level, or quality of water throughout the year or at periods or for a length of time that the department
8 designates.

9 (2) (a) Water may be reserved for existing or future beneficial uses in the basin where it is reserved, as
10 described by the following basins:

- 11 (i) the Clark Fork River and its tributaries to its confluence with Lake Pend Oreille in Idaho;
12 (ii) the Kootenai River and its tributaries to its confluence with Kootenay Lake in British Columbia;
13 (iii) the St. Mary River and its tributaries to its confluence with the Oldman River in Alberta;
14 (iv) the Little Missouri River and its tributaries to its confluence with Lake Sakakawea in North Dakota;
15 (v) the Missouri River and its tributaries to its confluence with the Yellowstone River in North Dakota; and
16 (vi) the Yellowstone River and its tributaries to its confluence with the Missouri River in North Dakota.

17 (b) A state water reservation may be made for an existing or future beneficial use outside the basin
18 where the diversion occurs only if stored water is not reasonably available for water leasing under 85-2-141 and
19 the proposed use would occur in a basin designated in subsection (2)(a).

20 (3) (a) The department shall adopt rules that are necessary to determine whether or not an application
21 is correct and complete based on the provisions applicable to issuance of a state water reservation. The rules
22 must be adopted in compliance with Title 2, chapter 4.

23 (b) An applicant shall submit a correct and complete application. The determination of whether an
24 application is correct and complete must be based on rules adopted under this subsection (3) that are in effect
25 at the time the application is submitted. The department shall proceed in accordance with 85-2-302 with regard
26 to any defects in the application.

27 (c) The application must be made on a form prescribed by the department. The department shall make
28 the forms available through its offices.

29 (d) Upon receiving a correct and complete application, the department shall proceed in accordance with
30 85-2-307 through 85-2-309. After the hearing provided for in 85-2-309, the department shall decide whether to

1 reserve the water for the applicant. The department's costs of giving notice, holding the hearing, conducting
2 investigations, and making records incurred in acting upon the application to reserve water, except the cost of
3 salaries of the department's personnel, must be paid by the applicant. In addition, a reasonable proportion of the
4 department's cost of preparing an environmental analysis must be paid by the applicant unless waived by the
5 department upon a showing of good cause by the applicant.

6 (4) (a) Except as provided in 85-20-1401, the department shall issue a state water reservation if the
7 applicant establishes to the department by a preponderance of evidence:

8 (i) the purpose of the reservation;

9 (ii) the need for the reservation;

10 (iii) the amount of water necessary for the purpose of the reservation;

11 (iv) that the reservation is in the public interest.

12 (b) In determining the public interest under subsection (4)(a)(iv), the department shall issue a water
13 reservation for withdrawal and transport for use outside the state if the applicant proves by clear and convincing
14 evidence that:

15 (i) the proposed out-of-state use of water is not contrary to water conservation in Montana; and

16 (ii) the proposed out-of-state use of water is not otherwise detrimental to the public welfare of the citizens
17 of Montana.

18 (c) In determining whether the applicant has proved by clear and convincing evidence that the
19 requirements of subsections (4)(b)(i) and (4)(b)(ii) are met, the department shall consider the following factors:

20 (i) whether there are present or projected water shortages within the state of Montana;

21 (ii) whether the water that is the subject of the application could feasibly be transported to alleviate water
22 shortages within the state of Montana;

23 (iii) the supply and sources of water available to the applicant in the state where the applicant intends to
24 use the water; and

25 (iv) the demands placed on the applicant's supply in the state where the applicant intends to use the
26 water.

27 (d) When applying for a state water reservation to withdraw and transport water for use outside the state,
28 the applicant shall submit to and comply with the laws of the state of Montana governing the appropriation, lease,
29 use, and reservation of water.

30 (5) If the purpose of the state water reservation requires construction of a storage or diversion facility,

1 the applicant shall establish to the department by a preponderance of evidence that there will be progress toward
2 completion of the facility and accomplishment of the purpose with reasonable diligence in accordance with an
3 established plan.

4 (6) The department shall limit any state water reservations after May 9, 1979, for maintenance of
5 minimum flow, level, or quality of water that it awards at any point on a stream or river to a maximum of 50% of
6 the average annual flow of record on gauged streams. Ungauged streams are not subject to the limit under this
7 subsection.

8 (7) A state water reservation issued under this section has a priority of appropriation dating from the filing
9 of a correct and complete application with the department.

10 (8) (a) A person desiring to use water reserved to a conservation district for agricultural purposes shall
11 make application for the use with the district, and the district, upon approval of the application, shall inform the
12 department of the approved use and issue the applicant an authorization for the use. The department shall
13 maintain records of all uses of water reserved to conservation districts and be responsible, when requested by
14 the districts, for rendering technical and administrative assistance within the department's staffing and budgeting
15 limitations in the preparation and processing of the applications for the conservation districts. The department
16 shall, within its staffing and budgeting limitations, complete any feasibility study requested by the districts within
17 12 months of the time that the request was made. The department shall extend the time allowed to develop a plan
18 identifying projects for using a district's reservation as long as the conservation district makes a good faith effort,
19 within its staffing and budget limitations, to develop a plan.

20 (b) Upon actual application of water to the proposed beneficial use, the authorized user shall notify the
21 conservation district. The notification must contain a certified statement by a person with experience in the design,
22 construction, or operation of project works for agricultural purposes describing how the reserved water was put
23 to use. The department or the district may then inspect the appropriation to determine if it has been completed
24 in substantial accordance with the authorization.

25 (9) A state water reservation issued under this section may not adversely affect any rights in existence
26 at that time. The department may issue a state water reservation subject to terms, conditions, restrictions, and
27 limitations it considers necessary to satisfy the criteria of this section.

28 (10) Upon issuing a state water reservation for the purpose of maintaining a minimum flow, level, or
29 quality of water, the appropriation of water is complete. Except as provided in 85-20-1401, the department shall,
30 periodically but at least once every 10 years, review existing state water reservations to ensure that the objectives

1 of the reservations are being met. When the objectives of a state water reservation are not being met, the
2 department may extend, revoke, or modify the reservation. Any undeveloped water made available as a result
3 of a revocation or modification under this subsection is available for appropriation by others pursuant to this part.

4 (11) Except as provided in 85-20-1401, the department may modify an existing or future order originally
5 adopted to reserve water for the purpose of maintaining minimum flow, level, or quality of water, so as to
6 reallocate the state water reservation or portion of the reservation to an applicant who is a qualified reservant
7 under this section. Reallocation of water reserved pursuant to a state water reservation may be made by the
8 department following notice and hearing if the department finds that all or part of the reservation is not required
9 for its purpose and that the need for the reallocation has been shown by the applicant to outweigh the need
10 shown by the original reservant. Reallocation of reserved water may not adversely affect the priority date of the
11 reservation, and the reservation retains its priority date despite reallocation to a different entity for a different use.
12 The department may not reallocate water reserved under this section on any stream or river more frequently than
13 once every 5 years.

14 (12) A reservant may not make a change in a state water reservation under this section, except as
15 permitted under 85-2-402 and this subsection. If the department approves a change, the department shall give
16 notice and require the reservant to establish that the criteria in subsection (4) will be met under the approved
17 change.

18 (13) A state water reservation may be transferred to another entity qualified to hold a reservation under
19 subsection (1). Only the entity holding the reservation may initiate a transfer. The transfer occurs upon the filing
20 of a water right ownership update form with the department, together with an affidavit from the entity receiving
21 the reservation establishing that the entity is a qualified reservant under subsection (1), that the entity agrees to
22 comply with the requirements of this section and the conditions of the reservation, and that the entity can meet
23 the objectives of the reservation as granted. If the transfer of a state water reservation involves a change in an
24 appropriation right, the necessary approvals must be acquired pursuant to subsection (12).

25 (14) This section does not vest the department with the authority to alter a water right that is not a state
26 water reservation.

27 (15) The department shall undertake a program to educate the public, other state agencies, and political
28 subdivisions of the state as to the benefits of the state water reservation process and the procedures to be
29 followed to secure the reservation of water. The department shall provide technical assistance to other state
30 agencies and political subdivisions in applying for reservations under this section.

1 (16) Water reserved under this section is not subject to the state water leasing program established under
2 85-2-141."

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4 NEW SECTION. **Section 5. Effective date.** [This act] is effective July 1, 2013.

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