

1 HOUSE BILL NO. 427

2 INTRODUCED BY B. BROWN

3
4 A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR THE DEFENSE OF WATER RIGHTS
5 THROUGHOUT THE STATE OF MONTANA FROM COMPETING CLAIMS TO BE FILED IF THE
6 LEGISLATURE DOES NOT PASS THE CONFEDERATED SALISH AND KOOTENAI TRIBES WATER RIGHTS
7 COMPACT; PROVIDING AN APPROPRIATION FOR PROCESSING WATER RIGHTS CLAIMS FILED ON OR
8 OFF THE FLATHEAD INDIAN RESERVATION; EXPANDING THE DUTIES OF THE OFFICE OF PUBLIC
9 DEFENDER TO INCLUDE PROVIDING COUNSEL TO CERTAIN WATER RIGHTS CLAIMANTS ON OR OFF
10 THE FLATHEAD INDIAN RESERVATION; CREATING ACCOUNTS AND PROVIDING FUNDS TO THE
11 DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, THE WATER COURT, AND THE OFFICE
12 OF PUBLIC DEFENDER; AMENDING SECTIONS 17-7-502, 47-1-103, 47-1-104, AND 47-1-201, MCA; AND
13 PROVIDING AN IMMEDIATE EFFECTIVE DATE."
14

15 WHEREAS, the Montana Constitution states that members of the Legislature and all executive,
16 ministerial, and judicial officers have taken an oath to support, protect, and defend the constitutions of the United
17 States and of Montana, and the proposed Confederated Salish and Kootenai Tribes Water Compact may violate
18 these constitutions.

19 WHEREAS, the Montana Constitution states: "All surface, underground, flood, and atmospheric waters
20 within the boundaries of the state are the property of the state for the use of its people and are subject to
21 appropriation for beneficial uses as provided by law", and the proposed Confederated Salish and Kootenai Tribes
22 Water Compact may violate this section of the constitution.

23 WHEREAS, because the Montana Constitution states: "All existing rights to the use of any waters for any
24 useful or beneficial purpose are hereby recognized and confirmed", and some water rights are those from
25 territorial days with records kept locally, the proposed Confederated Salish and Kootenai Tribes Water Compact
26 may violate this section of the constitution.

27 WHEREAS, the Montana Constitution states: "The legislature shall provide for the administration, control,
28 and regulation of water rights and shall establish a system of centralized records," for which the State of Montana
29 created the Department of Natural Resources and Conservation. This state function of water administration may
30 not be delegated to a sovereign, foreign nation that has its own constitution and different laws without violating

1 Article IX of the Montana Constitution and the equal treatment of Montana citizens guaranteed under Article II,
2 section 4, of the Montana Constitution and under Amendment XIV to the United States Constitution.

3 WHEREAS, because the Montana Constitution states: "No person shall be deprived of life, liberty, or
4 property without due process of law", and the United States Constitution prohibits the taking of property without
5 compensation, the proposed Confederated Salish and Kootenai Tribes Water Compact may violate both
6 constitutions by taking Flathead Indian Reservation irrigators' water rights without compensation, transferring
7 these rights to the tribe, and reducing the amount of water available to the Flathead Indian Irrigation District, thus
8 violating due process and taking provisions.

9 WHEREAS, the Flathead joint board of control was not included during the reopening of negotiations
10 between the United States, the Confederated Salish and Kootenai Tribes, and the State of Montana, which may
11 violate open meetings laws.

12 WHEREAS, while the constitutions of the United States and Montana require equal treatment under law,
13 the unitary management ordinance and unitary management board proposed in the proposed Confederated
14 Salish and Kootenai Tribes Water Compact includes administration of all water rights on the Flathead Indian
15 Reservation, which may violate both constitutions. Additionally, Montana citizens may not be treated differently
16 based on where they live, the State of Montana cannot delegate its constitutional duties to a foreign, sovereign
17 government, and there may be no precedence in law or in judicial decisions to support the unitary management
18 ordinance or unitary management board.

19 WHEREAS, control of water in streams, rivers, and irrigation wells off the Flathead Indian Reservation
20 via water rights has never been given to a tribe in a Montana compact or judicial decision, which may degrade
21 property values, may violate the Hellgate Treaty, and may violate the laws and constitutions of Montana and the
22 United States.

23 WHEREAS, the purpose of the Flathead Indian Reservation and the quantity of water necessary to fulfill
24 this purpose are not stated in the proposed Confederated Salish and Kootenai Tribes Water Compact, which may
25 violate state water law and the minimum requirement of a compact for federal reserved water rights.

26 WHEREAS, because an environmental assessment has not been done to determine environmental and
27 economic impacts, legislators may not in good conscience vote to approve the proposed Confederated Salish
28 and Kootenai Tribes Water Compact.

29 WHEREAS, the impact of the proposed water compact will result in control of water on the Flathead
30 Indian Reservation going to the Confederated Salish and Kootenai tribal council and to the federal government,

1 which holds water rights in trust for the tribe. This action ultimately impacts 330,000 people in 11 counties and
2 23,000 nontribal members on the Flathead Indian Reservation.

3 WHEREAS, the impact of the proposed water compact will create a water market that restricts present
4 use of water off and on the reservation by taking the remaining available surface water in Hungry Horse
5 Reservoir, the Flathead River, and Flathead Lake and transferring it to the tribal government. The impact of the
6 proposed water compact may result in tribal control of water in western Montana and may result in the destruction
7 of the Flathead Indian irrigation project.

8 WHEREAS, although the Montana general stream adjudication is not a typical litigation, the process has
9 been underway since 1979, has processed more than 200,000 water rights claims for thousands of Montanans,
10 and is legally and administratively capable of confirming water rights of tribal, state, and federal water users.

11 WHEREAS, if the proposed Confederated Salish and Kootenai Tribes Water Compact does not pass the
12 64th Legislature, water users on and off the Flathead Indian Reservation need assurances their rights will be
13 protected and defended by the state.

14

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

16

17 NEW SECTION. **Section 1. Appropriation.** There is appropriated from the general fund:

18 (1) \$6 million to the state law-based water rights claims adjudication account provided for in [section 2]
19 for the department of natural resources and conservation for the purpose established in [section 2];

20 (2) \$2 million to the Montana water court caseload account provided for in [section 3] for the water court
21 for the purpose established in [section 3]; and

22 (3) \$5 million to the state law-based water rights claims defense account provided for in [section 4] for
23 the office of public defender for the purpose established in [section 4].

24

25 NEW SECTION. **Section 2. State law-based water rights claims adjudication account -- use.** There
26 is a state law-based water rights claims adjudication account in the state special revenue fund. The account is
27 administered by the department of natural resources and conservation and is statutorily appropriated, as provided
28 in 17-7-502, for the purpose of examining water rights claims filed on the Flathead Indian reservation or by the
29 Confederated Salish and Kootenai tribes. Any money in the account that is unspent or unencumbered at the end
30 of a fiscal year must remain in the account. Any money remaining in the account after all claims are processed

1 must be transferred to the general fund.

2

3 **NEW SECTION. Section 3. Montana water court caseload account -- use.** There is a Montana water
4 court caseload account in the state special revenue fund. The account is administered by the water court and is
5 statutorily appropriated, as provided in 17-7-502, for the purpose of any water court proceedings related to
6 adjudication of water rights claims filed on the Flathead Indian reservation or by the Confederated Salish and
7 Kootenai tribes. Any money in the account that is unspent or unencumbered at the end of a fiscal year must
8 remain in the account. Any money remaining in the account after all claims are processed must be transferred
9 to the general fund.

10

11 **NEW SECTION. Section 4. State law-based water rights claims defense account -- use.** (1) There
12 is a state law-based water rights claims defense account in the state special revenue fund. The account is
13 administered by the office of public defender and is statutorily appropriated, as provided in 17-7-502, for the
14 purpose of providing effective assistance of counsel to any person subject to a water court proceeding related
15 to a water right filed by the Confederated Salish and Kootenai tribes, except as provided in subsection (2) of this
16 section. Any money in the account that is unspent or unencumbered at the end of a fiscal year must remain in
17 the account. Any money remaining in the account after all claims are processed must be transferred to the
18 general fund.

19 (2) Funds in this account may not be disbursed to any other subdivision or agency of the state, to the
20 federal government or any agency of the federal government, or to a tribal government or any agency of a tribal
21 government.

22

23 **Section 5.** Section 17-7-502, MCA, is amended to read:

24 **"17-7-502. Statutory appropriations -- definition -- requisites for validity.** (1) A statutory
25 appropriation is an appropriation made by permanent law that authorizes spending by a state agency without the
26 need for a biennial legislative appropriation or budget amendment.

27 (2) Except as provided in subsection (4), to be effective, a statutory appropriation must comply with both
28 of the following provisions:

29 (a) The law containing the statutory authority must be listed in subsection (3).

30 (b) The law or portion of the law making a statutory appropriation must specifically state that a statutory

1 appropriation is made as provided in this section.

2 (3) The following laws are the only laws containing statutory appropriations: 2-15-247; 2-17-105;
3 5-11-120; 5-11-407; 5-13-403; 7-4-2502; 10-1-108; 10-1-1202; 10-1-1303; 10-2-603; 10-3-203; 10-3-310;
4 10-3-312; 10-3-314; 10-4-301; 15-1-121; 15-1-218; 15-35-108; 15-36-332; 15-37-117; 15-39-110; 15-65-121;
5 15-70-101; 15-70-369; 15-70-601; 16-11-509; 17-3-106; 17-3-112; 17-3-212; 17-3-222; 17-3-241; 17-6-101;
6 18-11-112; 19-3-319; 19-6-404; 19-6-410; 19-9-702; 19-13-604; 19-17-301; 19-18-512; 19-19-305; 19-19-506;
7 19-20-604; 19-20-607; 19-21-203; 20-8-107; 20-9-534; 20-9-622; 20-26-1503; 22-1-327; 22-3-1004; 23-4-105;
8 23-5-306; 23-5-409; 23-5-612; 23-7-301; 23-7-402; 30-10-1004; 37-43-204; 37-51-501; 39-1-105; 39-71-503;
9 41-5-2011; 42-2-105; 44-4-1101; 44-12-206; 44-13-102; section 4; 53-1-109; 53-1-215; 53-2-208; 53-9-113;
10 53-24-108; 53-24-206; 60-11-115; 61-3-415; 69-3-870; 75-1-1101; 75-5-1108; 75-6-214; 75-11-313; 76-13-150;
11 76-13-416; 77-1-108; 77-2-362; 80-2-222; 80-4-416; 80-11-518; 81-1-112; 81-7-106; 81-10-103; 82-11-161;
12 sections 2 and 3; 85-20-1504; 85-20-1505; 87-1-603; 90-1-115; 90-1-205; 90-1-504; 90-3-1003; 90-6-331; and
13 90-9-306.

14 (4) There is a statutory appropriation to pay the principal, interest, premiums, and costs of issuing,
15 paying, and securing all bonds, notes, or other obligations, as due, that have been authorized and issued
16 pursuant to the laws of Montana. Agencies that have entered into agreements authorized by the laws of Montana
17 to pay the state treasurer, for deposit in accordance with 17-2-101 through 17-2-107, as determined by the state
18 treasurer, an amount sufficient to pay the principal and interest as due on the bonds or notes have statutory
19 appropriation authority for the payments. (In subsection (3): pursuant to sec. 10, Ch. 360, L. 1999, the inclusion
20 of 19-20-604 terminates contingently when the amortization period for the teachers' retirement system's unfunded
21 liability is 10 years or less; pursuant to sec. 10, Ch. 10, Sp. L. May 2000, secs. 3 and 6, Ch. 481, L. 2003, and
22 sec. 2, Ch. 459, L. 2009, the inclusion of 15-35-108 terminates June 30, 2019; pursuant to sec. 73, Ch. 44, L.
23 2007, the inclusion of 19-6-410 terminates contingently upon the death of the last recipient eligible under
24 19-6-709(2) for the supplemental benefit provided by 19-6-709; pursuant to sec. 14, Ch. 374, L. 2009, the
25 inclusion of 53-9-113 terminates June 30, 2015; pursuant to sec. 5, Ch. 442, L. 2009, the inclusion of 90-6-331
26 terminates June 30, 2019; pursuant to sec. 16, Ch. 58, L. 2011, the inclusion of 30-10-1004 terminates June 30,
27 2017; pursuant to sec. 6, Ch. 61, L. 2011, the inclusion of 76-13-416 terminates June 30, 2019; pursuant to sec.
28 13, Ch. 339, L. 2011, the inclusion of 81-1-112 and 81-7-106 terminates June 30, 2017; pursuant to sec. 11(2),
29 Ch. 17, L. 2013, the inclusion of 17-3-112 terminates on occurrence of contingency; pursuant to secs. 3 and 5,
30 Ch. 244, L. 2013, the inclusion of 22-1-327 is effective July 1, 2015, and terminates July 1, 2017; and pursuant

1 to sec. 10, Ch. 413, L. 2013, the inclusion of 2-15-247, 39-1-105, 53-1-215, and 53-2-208 terminates June 30,
2 2015.)"

3

4 **Section 6.** Section 47-1-103, MCA, is amended to read:

5 **"47-1-103. Definitions.** As used in this chapter, the following definitions apply:

6 (1) "Commission" means the public defender commission established in 2-15-1028.

7 (2) "Court" means the supreme court, the water court, a district court, a youth court, a justice's court, a
8 municipal court, or a city court.

9 (3) "Indigent" means that a person has been determined under the provisions of 47-1-111 to be indigent
10 and financially unable to retain private counsel.

11 (4) "Office" means the office of state public defender established in 47-1-201.

12 (5) "Public defender" means an attorney employed by or under contract with the office and assigned to
13 provide legal counsel to a person under the provisions of this chapter, including attorneys employed by or under
14 contract with the office of appellate defender.

15 (6) "Statewide public defender system", "state system", or "system" means the system of public defender
16 services established pursuant to this chapter.

17 (7) "Water rights defender" means an attorney employed by or under contract with the office and assigned
18 to provide legal counsel to a person who is subject to a court proceeding related to a water rights claim filed by
19 the Confederated Salish and Kootenai tribes."

20

21 **Section 7.** Section 47-1-104, MCA, is amended to read:

22 **"47-1-104. Statewide system -- structure and scope of services -- assignment of counsel at public**

23 **expense.** (1) There is a statewide public defender system, which is required to deliver public defender services
24 in all courts in this state. The system is supervised by the commission and administered by the office.

25 (2) The commission shall approve a strategic plan for service delivery and divide the state into not more
26 than 11 public defender regions. The commission may establish a regional office to provide public defender
27 services in each region, as provided in 47-1-215, establish a contracted services program to provide services in
28 the region, or utilize other service delivery methods as appropriate and consistent with the purposes described
29 in 47-1-102.

30 (3) When a court orders the office or the office of appellate defender to assign counsel, the appropriate

1 office shall immediately assign a public defender qualified to provide the required services. The commission shall
2 establish protocols to ensure that the offices make appropriate assignments in a timely manner.

3 (4) A court may order an office to assign counsel under this chapter in the following cases:

4 (a) in cases in which a person is entitled to assistance of counsel at public expense because of financial
5 inability to retain private counsel, subject to a determination of indigence pursuant to 47-1-111, as follows:

6 (i) for a person charged with a felony or charged with a misdemeanor for which there is a possibility of
7 incarceration, as provided in 46-8-101;

8 (ii) for a party in a proceeding to determine parentage under the Uniform Parentage Act, as provided in
9 40-6-119;

10 (iii) for a parent, guardian, or other person with physical or legal custody of a child or youth in any
11 removal, placement, or termination proceeding pursuant 41-3-422 and as required under the federal Indian Child
12 Welfare Act, as provided in 41-3-425;

13 (iv) for an applicant for sentence review pursuant to Title 46, chapter 18, part 9;

14 (v) for a petitioner in a proceeding for postconviction relief, as provided in 46-21-201;

15 (vi) for a petitioner in a habeas corpus proceeding pursuant to Title 46, chapter 22;

16 (vii) for a parent or guardian in a proceeding for the involuntary commitment of a developmentally
17 disabled person to a residential facility, as provided in 53-20-112;

18 (viii) for a respondent in a proceeding for involuntary commitment for a mental disorder, as provided in
19 53-21-116;

20 (ix) for a respondent in a proceeding for the involuntary commitment of a person for alcoholism, as
21 provided in 53-24-302; and

22 (x) for a witness in a criminal grand jury proceeding, as provided in 46-4-304.

23 (b) in cases in which a person is entitled by law to the assistance of counsel at public expense regardless
24 of the person's financial ability to retain private counsel, as follows:

25 (i) as provided for in 41-3-425;

26 (ii) for a youth in a proceeding under the Montana Youth Court Act alleging a youth is delinquent or in
27 need of intervention, as provided in 41-5-1413, and in a prosecution under the Extended Jurisdiction Prosecution
28 Act, as provided in 41-5-1607;

29 (iii) for a juvenile entitled to assigned counsel in a proceeding under the Interstate Compact on Juveniles,
30 as provided in 41-6-101;

- 1 (iv) for a minor who petitions for a waiver of parental consent requirements under the Parental Consent
 2 for Abortion Act of 2013, as provided in 50-20-509;
- 3 (v) for a respondent in a proceeding for the involuntary commitment of a developmentally disabled
 4 person to a residential facility, as provided in 53-20-112;
- 5 (vi) for a minor voluntarily committed to a mental health facility, as provided in 53-21-112;
- 6 (vii) for a person who is the subject of a petition for the appointment of a guardian or conservator in a
 7 proceeding under the provisions of the Uniform Probate Code in Title 72, chapter 5;
- 8 (viii) for a ward when the ward's guardian has filed a petition to require medical treatment for a mental
 9 disorder of the ward, as provided in 72-5-322; ~~and~~
- 10 (ix) for a person who is subject to a court proceeding related to water rights filed by the Confederated
 11 Salish and Kootenai tribes; and
- 12 (c) for an eligible appellant in an appeal of a proceeding listed in this subsection (4).
- 13 (5) (a) Except as provided in subsection (5)(b), a public defender may not be assigned to act as a
 14 court-appointed special advocate or guardian ad litem in a proceeding under the Montana Youth Court Act, Title
 15 41, chapter 5, or in an abuse and neglect proceeding under Title 41, chapter 3.
- 16 (b) A private attorney who is contracted with under the provisions of 47-1-216 to provide public defender
 17 services under this chapter may be appointed as a court-appointed special advocate or guardian ad litem in a
 18 proceeding described in subsection (5)(a) if the appointment is separate from the attorney's service for the
 19 statewide public defender system and does not result in a conflict of interest."

20

21 **Section 8.** Section 47-1-201, MCA, is amended to read:

22 **"47-1-201. Office of state public defender -- personnel -- compensation -- expenses -- reports.** (1)

23 There is an office of state public defender. The office must be located in Butte, Montana. The head of the office
 24 is the chief public defender, who is supervised by the commission.

25 (2) The chief public defender must be an attorney licensed to practice law in the state. The chief public
 26 defender is appointed by and serves at the pleasure of the commission. The position of chief public defender is
 27 exempt from the state classification and pay plan as provided in 2-18-103. The commission shall establish
 28 compensation for the position commensurate with the position's duties and responsibilities, taking into account
 29 the compensation paid to prosecutors with similar responsibilities.

30 (3) The chief public defender shall hire or contract for and supervise other personnel necessary to

1 perform the function of the office of state public defender and to implement the provisions of this chapter,
2 including but not limited to:

3 (a) the following personnel who are exempt from the state classification and pay plan as provided in
4 2-18-103:

5 (i) an administrative director, who must be experienced in business management and contract
6 management;

7 (ii) a chief contract manager to oversee and enforce the contracting program;

8 (iii) a training coordinator, appointed as provided in 47-1-210;

9 (iv) deputy public defenders, as provided in 47-1-215;

10 (v) water rights defenders, as defined in 47-1-103;

11 (b) assistant public defenders; and

12 (c) other necessary administrative and professional support staff for the office.

13 (4) Positions established pursuant to subsections (3)(b) and (3)(c) are classified positions, and persons
14 in those positions are entitled to salaries, wages, benefits, and expenses as provided in Title 2, chapter 18.

15 (5) The following expenses are payable by the office if the expense is incurred at the request of a public
16 defender:

17 (a) witness and interpreter fees and expenses provided in Title 26, chapter 2, part 5, and 46-15-116; and

18 (b) transcript fees, as provided in 3-5-604.

19 (6) If the costs to be paid pursuant to this section are not paid directly, reimbursement must be made
20 within 30 days of the receipt of a claim.

21 (7) The office may accept gifts, grants, or donations, which must be deposited in the account provided
22 for in 47-1-110.

23 (8) The office shall provide assistance with the budgeting, reporting, and related administrative functions
24 of the office of appellate defender as provided in 47-1-205.

25 (9) The chief public defender shall establish procedures to provide for the approval, payment, recording,
26 reporting, and management of defense expenses paid pursuant to this section, including defense expenses paid
27 for work performed by or for the office of appellate defender.

28 (10) (a) The office of public defender is required to report data for each fiscal year by September 30 of
29 the subsequent fiscal year representing the caseload for the entire public defender system to the legislative fiscal
30 analyst. The report must be provided in an electronic format and include unduplicated count data for all cases

1 for which representation is paid for by the office of public defender, the number of new cases opened, the number
2 of cases closed, the number of cases that remain open and active, the number of cases that remain open but are
3 inactive, and the average number of days between case opening and closure for each case type.

4 (b) The office of public defender is required to report to the legislative fiscal analyst for each fiscal year
5 by September 30 of the subsequent fiscal year on the amount of funds collected as reimbursement for services
6 rendered, including the number of cases for which a collection is made, the number of cases for which an amount
7 is owed, the amount collected, and the amount remaining unpaid. The report must be provided in an electronic
8 format."

9

10 NEW SECTION. **Section 9. Notification to tribal governments.** The secretary of state shall send a
11 copy of [this act] to each tribal government located on the seven Montana reservations and to the Little Shell
12 Chippewa tribe.

13

14 NEW SECTION. **Section 10. Codification instruction.** (1) [Sections 2 and 3] are intended to be
15 codified as an integral part of Title 85, chapter 2, part 2, and the provisions of Title 85, chapter 2, part 2, apply
16 to [sections 2 and 3].

17 (2) [Section 4] is intended to be codified as an integral part of Title 47, chapter 1, part 1, and the
18 provisions of Title 47, chapter 1, part 1, apply to [section 4].

19

20 NEW SECTION. **Section 11. Effective date.** [This act] is effective on passage and approval.

21

- END -