

HOUSE BILL NO. 584

INTRODUCED BY B. HAMLETT

A BILL FOR AN ACT ENTITLED: "AN ACT EXTENDING ELIGIBILITY FOR A STATE RESERVATION OF WATERS; PROVIDING A FILING FEE; AND AMENDING SECTIONS 85-2-307 AND 85-2-316, MCA."

WHEREAS, the 1967 Montana Legislature declared "the public policy of the state is to promote the conservation, development, and beneficial use of the state's water resources to secure maximum economic and social prosperity for its citizens"; and

WHEREAS, it is in Montana's interest to put its water to beneficial use in order to establish a claim that downstream states cannot supersede; and

WHEREAS, water storage is an important tool for meeting future demands and responding to a changing climate, according to the 2015 State Water Plan; and

WHEREAS, water storage allows flexibility while meeting the demands of agriculture, cities, industry, hydropower, fisheries, recreation, and water quality; and

WHEREAS, water reservations allow gradual development of a water right for the benefit of Montana's future.

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

Section 1. Section 85-2-307, MCA, is amended to read:

"85-2-307. Notice of application for permit or change in appropriation right. (1) Upon receipt of an application for a permit or a change in appropriation right, the department shall publish notice of receipt of the application on the department's website.

(2) (a) Within 120 days of the receipt of a correct and complete application for a permit or change in appropriation right, the department:

(i) may meet informally with the applicant, the persons listed in subsection (2)(d), and persons who may claim standing pursuant to 85-2-308 to discuss the application;

(ii) shall make a written preliminary determination as to whether or not the application satisfies the applicable criteria for issuance of a permit or change in appropriation right; and



1 (iii) may include conditions in the written preliminary determination to satisfy applicable criteria for
2 issuance of a permit or change in appropriation right.

3 (b) If the preliminary determination proposes to grant an application, the department shall prepare a
4 notice containing the facts pertinent to the application, including the summary of the preliminary determination
5 and any conditions, and shall publish the notice once in a newspaper of general circulation in the area of the
6 source.

7 (c) If the preliminary determination proposes to deny an application, the process provided in 85-2-310
8 must be followed.

9 (d) Before the date of publication, the department shall also serve the notice by first-class mail upon:

10 (i) an appropriator of water or applicant for or holder of a permit who, according to the records of the
11 department, may be affected by the proposed appropriation;

12 (ii) any purchaser under contract for deed, as defined in 70-20-115, of property that, according to the
13 records of the department, may be affected by the proposed appropriation; and

14 (iii) any public agency or corporation that has reserved waters in the source under 85-2-316.

15 (e) The department may, in its discretion, also serve notice upon any state agency or other person the
16 department feels may be interested in or affected by the proposed appropriation.

17 (f) The department shall file in its records proof of service by affidavit of the publisher in the case of
18 notice by publication and by its own affidavit in the case of service by mail.

19 (3) The notice must state that by a date set by the department, not less than 15 days or more than 60
20 days after the date of publication, persons may file with the department written objections to the application."

21

22 **Section 2.** Section 85-2-316, MCA, is amended to read:

23 **"85-2-316. State reservation of waters.** (1) ~~The~~ A corporation, the state, any a political subdivision or
24 agency of the state, or the United States or ~~any an~~ agency of the United States may apply to the department to
25 acquire a state water reservation for existing or future beneficial uses or to maintain a minimum flow, level, or
26 quality of water throughout the year or at periods or for a length of time that the department designates.

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

29 (i) the Clark Fork River and its tributaries to its confluence with Lake Pend Oreille in Idaho;

30 (ii) the Kootenai River and its tributaries to its confluence with Kootenay Lake in British Columbia;

- 1 (iii) the St. Mary River and its tributaries to its confluence with the Oldman River in Alberta;
- 2 (iv) the Little Missouri River and its tributaries to its confluence with Lake Sakakawea in North Dakota;
- 3 (v) the Missouri River and its tributaries to its confluence with the Yellowstone River in North Dakota; and
- 4 (vi) the Yellowstone River and its tributaries to its confluence with the Missouri River in North Dakota.
- 5 (b) A state water reservation may be made for an existing or future beneficial use outside the basin
- 6 where the diversion occurs only if stored water is not reasonably available for water leasing under 85-2-141 and
- 7 the proposed use would occur in a basin designated in subsection (2)(a).
- 8 (3) (a) The department shall adopt rules that are necessary to determine whether or not an application
- 9 is correct and complete based on the provisions applicable to issuance of a state water reservation. The rules
- 10 must be adopted in compliance with Title 2, chapter 4.
- 11 (b) An applicant shall submit a correct and complete application. The determination of whether an
- 12 application is correct and complete must be based on rules adopted under this subsection (3) that are in effect
- 13 at the time the application is submitted. The department shall proceed in accordance with 85-2-302 with regard
- 14 to any defects in the application.
- 15 (c) The application must be made on a form prescribed by the department. The department shall make
- 16 the forms available through its offices. The application must be accompanied by a filing fee in the amount of \$40.
- 17 (d) Upon receiving a correct and complete application, the department shall proceed in accordance with
- 18 85-2-307 through 85-2-309. After the hearing provided for in 85-2-309, the department shall decide whether to
- 19 reserve the water for the applicant. The department's costs of giving notice, holding the hearing, conducting
- 20 investigations, and making records incurred in acting upon the application to reserve water, except the cost of
- 21 salaries of the department's personnel, must be paid by the applicant. In addition, a reasonable proportion of the
- 22 department's cost of preparing an environmental analysis must be paid by the applicant unless waived by the
- 23 department upon a showing of good cause by the applicant.
- 24 (4) (a) Except as provided in 85-20-1401, the department shall issue a state water reservation if the
- 25 applicant establishes to the department by a preponderance of evidence:
- 26 (i) the purpose of the reservation;
- 27 (ii) the need for the reservation;
- 28 (iii) the amount of water necessary for the purpose of the reservation;
- 29 (iv) that the reservation is in the public interest.
- 30 (b) In determining the public interest under subsection (4)(a)(iv), the department shall issue a water

1 reservation for withdrawal and transport for use outside the state if the applicant proves by clear and convincing
2 evidence that:

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

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

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

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

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

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

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

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

18 (5) If the purpose of the state water reservation requires construction of a storage or diversion facility,
19 the applicant shall establish to the department by a preponderance of evidence that there will be progress toward
20 completion of the facility and accomplishment of the purpose with reasonable diligence in accordance with an
21 established plan.

22 (6) (a) Upon issuing a state water reservation for the purpose of maintaining a minimum flow, level, or
23 quality of water, the appropriation of water is complete.

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

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

30 (8) (a) A person desiring to use water reserved to a conservation district for agricultural purposes shall

1 make application for the use with the district, and the district, upon approval of the application, shall inform the
2 department of the approved use and issue the applicant an authorization for the use. The department shall
3 maintain records of all uses of water reserved to conservation districts and be responsible, when requested by
4 the districts, for rendering technical and administrative assistance within the department's staffing and budgeting
5 limitations in the preparation and processing of the applications for the conservation districts. The department
6 shall, within its staffing and budgeting limitations, complete any feasibility study requested by the districts within
7 12 months of the time that the request was made. The department shall extend the time allowed to develop a plan
8 identifying projects for using a district's reservation as long as the conservation district makes a good faith effort,
9 within its staffing and budget limitations, to develop a plan.

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

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

18 (10) (a) Except for a reservation provided in subsection (6) or a reservation provided in 85-20-1401, the
19 department shall, at least once every 10 years, review existing state water reservations to ensure that the
20 objectives of the reservations are being met.

21 (b) An existing state water reservation subject to the review in subsection (10)(a) that was not reviewed
22 in the 10 years prior to April 23, 2015, must be reviewed by July 1, 2016. The department shall provide the water
23 policy interim committee, established in 5-5-231, a summary of the reviews before September 15, 2016.

24 (c) Following a review pursuant to this subsection (10), at the request of the entity holding a water
25 reservation or when the objectives of a state water reservation are not being met, the department may:

26 (i) extend the time period to complete the appropriation of water;

27 (ii) modify the reservation; or

28 (iii) revoke the reservation.

29 (d) Any undeveloped water made available as a result of a revocation or modification under this
30 subsection (10) is available for appropriation by others pursuant to this part.

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

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

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

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

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

28 (16) Water reserved under this section is not subject to the state water leasing program established under
29 85-2-141."

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