

HOUSE BILL NO. 629

INTRODUCED BY T. MANZELLA

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4 A BILL FOR AN ACT ENTITLED: "AN ACT LIMITING CERTAIN STATE AGENCY POWERS RELATED TO
5 WATER; LIMITING STATE AUTHORITY RELATED TO WATER RESOURCE AGREEMENTS WITH A LOCAL
6 GOVERNMENT UNIT, THE FEDERAL GOVERNMENT, OR A TRIBAL GOVERNMENT; PROHIBITING
7 AGENCY CO-OWNERSHIP OF WATER RIGHTS; PROVIDING FOR AN INTERIM STUDY OF COMPLIANCE
8 WITH THIS ACT; PROVIDING AN APPROPRIATION; AMENDING SECTIONS 2-1-404, 18-11-103, 23-1-111,
9 85-1-204, 87-1-209, AND 87-1-301, MCA; AND PROVIDING AN EFFECTIVE DATE AND AN APPLICABILITY
10 DATE."

11
12 WHEREAS, by the Public Land Laws of 1866 14 Stat. 253 and 1870 16 Stat. 218, ownership of the
13 United States in the nonnavigable waters was severed from the public domain and transferred to the states and
14 territories for their determination on appropriate administrative systems (California Oregon Power Co. v. Beaver
15 Portland Cement Co., 295 U.S. 142); and

16 WHEREAS, Montana retains plenary authority over nonnavigable streams, and all surplus water over
17 and above each actual appropriation and use, together with the water of all lakes, belongs to the citizens pursuant
18 to the Montana Constitution and laws of the state; and

19 WHEREAS, recently proposed federal rules, specifically the Waters of the United States rule, envision
20 that the states relinquish control over all nonnavigable streams and surplus waters occurring in lakes, ponds, and
21 ditches back to the federal government; and

22 WHEREAS, ongoing regional-based and watershed-based discussions propose that water management
23 objectives, administrative functions, and water management decisions be transferred to a quasi-jurisdictional,
24 multistate body or bodies; and

25 WHEREAS, such organizations and decisionmaking would violate the provisions of Article IX of the
26 Montana Constitution, could impact state water resources, and would violate the rights of Montana citizens to a
27 "republican form of government" (Article IV, section 4, United States Constitution); and

28 WHEREAS, it is reasonable to expect potential future federal reservations or federal withdrawals of
29 Montana lands from the public domain, such as the proposed central Montana bison reserve; and

30 WHEREAS, the Montana Constitution requires that the Legislature provide for the administration and



1 control of water pursuant to state statute; and

2 WHEREAS, cession and retrocession of state jurisdiction on lands purchased by the United States,
3 including parks and other reserves, require affirmative action by the Montana Legislature according to Title 2,
4 chapter 1, part 2; and

5 WHEREAS, the Clean Water Rule and regional decisionmaking may inadvertently require the state to
6 suspend or give up its constitutionally derived jurisdiction in a manner that prevents full legislative review and
7 acknowledgment of the cession of jurisdiction; and

8 WHEREAS, federal grants to state agencies to implement federal or state programs, or local government
9 agreements, may also inadvertently erode the sovereign and constitutional prerogatives of the state without
10 knowledge of the legislative branch; and

11 WHEREAS, the goal of this effort is to retain the state of Montana's constitutional mandates and
12 sovereign prerogatives for Montana's water resources.

13

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

15

16 NEW SECTION. **Section 1. Jurisdiction over water resources on lands purchased or reserved by**
17 **federal government -- reservation of rights to state.** (1) Pursuant to Article IX of the Montana constitution, all
18 waters of the state are owned by the state for the beneficial use of its citizens.

19 (2) Except as otherwise provided in this part, the state reserved the right to manage, administer, and
20 develop state-based water rights on private or state lands within the exterior boundaries of land purchased by
21 the federal government.

22 (3) The state reserved the right to manage, administer, and develop state-based water rights on private
23 or state lands within the exterior boundaries of a federal reservation.

24

25 NEW SECTION. **Section 2. State agreements with local government units.** A state official or an
26 agency of this state, as defined in 2-18-101, may not enter into an agreement with a local government unit, as
27 defined in 2-11-103, that diminishes the authority of the state to own, manage, administer, or protect its water
28 resources for the benefit of its citizens.

29

30 NEW SECTION. **Section 3. Limits on water right ownership.** The department of environmental quality

1 may not co-own a water right with the federal government, a tribal government or corporation, a nongovernmental
2 organization, or a corporation.

3
4 **NEW SECTION. Section 4. Interim study.** (1) The water policy interim committee, as provided for in
5 5-5-231, shall conduct a study of issues related to the provisions of [this act], including agency authorities,
6 procedures, and existing agreements, to ensure compliance with [this act].

7 (2) The water policy interim committee shall prepare a final report of its findings, conclusions, and
8 recommendations and submit the final report to the 66th legislature by September 15, 2018, as provided in
9 5-11-210.

10
11 **Section 5.** Section 2-1-404, MCA, is amended to read:

12 **"2-1-404. State programs to implement federal statutes.** (1) A state official or employee charged with
13 the duty of implementing a federal statute shall implement the law as required by the federal statute in good faith
14 and with a critical view toward the provisions of any federal regulation, guideline, or policy in order to identify
15 those provisions of any federal regulation, guideline, or policy that are inconsistent with Montana policy or do not
16 advance Montana policy in a cost-effective manner.

17 (2) An executive branch agency of state government that is authorized to develop a state program to
18 respond to any mandates contained in a federal statute shall develop the state program and promulgate any
19 necessary rules, using the following criteria:

20 (a) State programs should be developed by the state agency to meet the requirements of federal statutes
21 in good faith and with a critical view toward any federal regulations, guidelines, or policies.

22 (b) State programs should be developed with due consideration of the financial restraints of local
23 governments, the citizens of Montana, and the state, including the limitation imposed by Article VIII, section 9,
24 of the Montana constitution.

25 (c) A state program that implements the goals of the federal statute should provide for the most efficient
26 method possible, with careful consideration given to the cost of the program and the impact of the program on
27 local governments and Montana citizens and on the long-range public health, safety, and welfare of citizens of
28 the state.

29 **(3) A state official or an agency of this state, as defined in 2-18-101, may not enter into an agreement**
30 **with a federal entity that diminishes the authority of the state to own, manage, administer, or protect its water**

1 resources for the benefit of its citizens."

2

3 **Section 6.** Section 18-11-103, MCA, is amended to read:

4 **"18-11-103. Authorization to enter agreement -- general contents.** (1) Any Except as provided in
5 subsection (5), any one or more public agencies may enter into an agreement with any one or more tribal
6 governments to:

7 (a) perform any administrative service, activity, or undertaking that a public agency or a tribal government
8 entering into the contract is authorized by law to perform; and

9 (b) assess and collect or refund any tax or license or permit fee lawfully imposed by the state or a public
10 agency and a tribal government and to share or refund the revenue from the assessment and collection.

11 (2) The agreement must be authorized and approved by the governing body of each party to the
12 agreement. If a state agency is a party to an agreement, the governor or the governor's designee is the governing
13 body.

14 (3) The agreement must set forth fully the powers, rights, obligations, and responsibilities of the parties
15 to the agreement.

16 (4) (a) Prior to entering into an agreement on taxation with a tribal government, a public agency shall
17 provide public notice and hold a public meeting on the reservation whose government is a party to the proposed
18 agreement for the purpose of receiving comments from and providing written and other information to interested
19 persons with respect to the proposed agreement.

20 (b) At least 14 days but not more than 30 days prior to the date scheduled for the public meeting, a notice
21 of the proposed agreement and public meeting must be published in a newspaper of general circulation in the
22 county or counties in which the reservation is located.

23 (c) At the time the notice of the meeting is published, a synopsis of the proposed agreement must be
24 made available to interested persons.

25 (5) A state official or an agency of this state, as defined in 2-18-101, may not enter into an agreement
26 with a tribal government for the administration of water, including enforcement of water rights, permitting of water
27 rights, adjudication of water rights, change of a water right, or data management."

28

29 **Section 7.** Section 23-1-111, MCA, is amended to read:

30 **"23-1-111. Powers and duties of board -- rulemaking -- meetings.** (1) Except as provided in

1 subsection (2), for state parks, primitive parks, state recreational areas, public camping grounds, state historic
2 sites, state monuments, and other heritage and recreational resources, land, and water administered pursuant
3 to Title 23, chapter 1, and Title 23, chapter 2, parts 1, 4, and 9, the board shall:

4 (a) set the policies and provide direction to the department for:

5 (i) the management, protection, conservation, and preservation of these properties, lands, and waters
6 and their appropriate role relative to tourism and the economic health of Montana;

7 (ii) coordinating, integrating, promoting, and furthering opportunities for education and recreation at these
8 sites, including but not limited to camping, hiking, snowmobiling, off-highway vehicle use, horseback riding,
9 mountain biking, boating, and swimming;

10 (b) work with the commission to maintain hunting and angling opportunities on these lands and waters;

11 (c) establish the rules of the department governing the use of these properties and lands. The rules must
12 be adopted in the interest of public health, public safety, public welfare, and protection of property and public
13 resources in regulating recreation, including picnicking, camping, and swimming, and sanitation. These rules are
14 subject to review and approval by the department of public health and human services with regard to issues of
15 public health and sanitation before becoming effective. Copies of the rules must show that endorsement.

16 (d) review and approve all acquisitions or transfers of interest in these properties, lands, and waters by
17 the department, except as provided in 87-1-209(4) and subject to 87-1-209(9);

18 (e) review and approve the budget of the department for the administration of these properties, lands,
19 and waters prior to its transmittal to the office of budget and program planning;

20 (f) review and approve construction projects that have an estimated cost of more than \$5,000;

21 (g) work with local, state, and federal agencies to evaluate, integrate, coordinate, and promote
22 recreational opportunities statewide; and

23 (h) encourage citizen involvement in management planning for these properties, lands, and waters.

24 (2) Pursuant to 87-1-301(1), the board does not oversee department activities related to the
25 administration of fishing access sites.

26 (3) The members of the board shall hold quarterly or other meetings for the transaction of business at
27 times and places considered necessary and proper. The meetings must be called by the presiding officer or by
28 a majority of the board and must be held at the time and place specified in the call for the meeting. A majority of
29 the members constitutes a quorum for the transaction of any business. The board shall keep a record of all the
30 business it transacts. The presiding officer and secretary shall sign all orders, minutes, or documents for the

1 board."

2

3 **Section 8.** Section 85-1-204, MCA, is amended to read:

4 **"85-1-204. Department powers over state water.** (1) The department may sell, lease, and otherwise
5 dispose of water impounded under this chapter. The water may be sold for the purpose of irrigation, development
6 of power, watering of stock, or other purposes. The department may also lease water under the state water
7 leasing program established under the provisions of 85-2-141. To the extent that it may be necessary to carry
8 out this chapter and subject to compliance with the other provisions of this chapter, the department has full control
9 of all the water of the state not under the exclusive control of the United States and not appropriated for private
10 use. The department shall take the necessary actions to appropriate and conserve the water for the use of the
11 people. The authority of the department conferred by this chapter extends and applies to rights to the natural flow
12 of the water of this state that it may acquire by condemnation pursuant to Title 70, chapter 30, or by purchase,
13 exchange, appropriation, or agreement.

14 (2) For the purpose of regulating the diversion of water, the department may enter upon the means and
15 place of use of all appropriators for making surveys of respective rights and seasonal needs.

16 (3) The department may take into consideration the decrees of the courts of this state having jurisdiction
17 that purport to adjudicate the water of a stream or its tributaries. A fair, reasonable, and equitable reconciliation
18 must be made between the claimants asserting rights under different decrees and between decreed rights and
19 asserted rights of appropriation not adjudicated by a court.

20 (4) The department may hold hearings relating to the rights of respective claimants after first giving the
21 notice that it considers appropriate. The department shall make findings of the date and quantity of appropriation
22 and use of all claimants that the department recognizes and observes in diverting the water that the department
23 is appropriated. The department may measure and distribute the water to the holder of the recognized
24 appropriation right under agreed-upon terms.

25 (5) The department, when engaged in controlling and dividing the natural flow of a stream under the
26 authority granted by this chapter, is exercising a police power of the state, and water commissioners appointed
27 by any court may not deprive the department of any of the water appropriated or administered under agreement
28 with respective water right holders. The holder of a prior right who contends that the department is not recognizing
29 and respecting the appropriation may resort to a court for the purpose of determining whether or not the rights
30 of the claimant have been invaded, and the department shall observe the terms of the final decree.

1 (6) When the department impounds or acquires the right of appropriation of the water of a stream, it may
2 divert or authorize the diversion at a point on the stream or a portion of the stream when it is done without injury
3 to a prior appropriator.

4 (7) The department may not co-own a water right with the federal government, a tribal government or
5 corporation, a nongovernmental organization, or a corporation."

6
7 **Section 9.** Section 87-1-209, MCA, is amended to read:

8 **"87-1-209. Acquisition and sale of lands or waters.** (1) Subject to 87-1-218 and ~~subsection (8)~~
9 ~~subsections (8) and (9)~~ of this section, the department, with the consent of the commission or the board and, in
10 the case of land acquisition involving more than 100 acres or \$100,000 in value, the approval of the board of land
11 commissioners, may acquire by purchase, lease, agreement, gift, or devise and may acquire easements upon
12 lands or waters for the purposes listed in this subsection. The department may develop, operate, and maintain
13 acquired lands or waters:

- 14 (a) for fish hatcheries or nursery ponds;
15 (b) as lands or water suitable for game, bird, fish, or fur-bearing animal restoration, propagation, or
16 protection;
17 (c) for public hunting, fishing, or trapping areas;
18 (d) to capture, propagate, transport, buy, sell, or exchange any game, birds, fish, fish eggs, or fur-bearing
19 animals needed for propagation or stocking purposes or to exercise control measures of undesirable species;
20 (e) for state parks and outdoor recreation;
21 (f) to extend and consolidate by exchange, lands or waters suitable for these purposes.

22 (2) The department, with the consent of the board, may acquire by condemnation, as provided in Title
23 70, chapter 30, lands or structures for the preservation of historic or archaeological sites that are threatened with
24 destruction or alteration.

25 (3) (a) Subject to section 2(3), Chapter 560, Laws of 2005, and subsection (9) of this section, the
26 department, with the consent of the commission or the board, may dispose of lands and water rights acquired
27 by it on those terms after public notice as required by subsection (3)(b) of this section, without regard to other
28 laws that provide for sale or disposal of state lands and with or without reservation, as it considers necessary and
29 advisable. The department, with the consent of the commission or the board, may convey department lands and
30 water rights for full market value to other governmental entities or to adjacent landowners without regard to the

1 requirements of subsection (3)(b) or (3)(c) if the land is less than 10 acres or if the full market value of the interest
2 to be conveyed is less than \$20,000. When the department conveys land or water rights to another governmental
3 entity or to an adjacent landowner pursuant to this subsection, the department, in addition to giving notice
4 pursuant to subsection (3)(b), shall give notice by mail to the landowners whose property adjoins the department
5 property being conveyed.

6 (b) Subject to section 2(3), Chapter 560, Laws of 2005, notice of sale describing the lands or waters to
7 be disposed of must be published once a week for 3 successive weeks in a newspaper with general circulation
8 printed and published in the county where the lands or waters are situated or, if a newspaper is not published in
9 that county, then in any newspaper with general circulation in that county.

10 (c) The notice must advertise for cash bids to be presented to the director within 60 days from the date
11 of the first publication. Each bid must be accompanied by a cashier's check or cash deposit in an amount equal
12 to 10% of the amount bid. The highest bid must be accepted upon payment of the balance due within 10 days
13 after mailing notice by certified mail to the highest bidder. If that bidder defaults on payment of the balance due,
14 then the next highest bidders must be similarly notified in succession until a sale is completed. Deposits must be
15 returned to the unsuccessful bidders except bidders defaulting after notification.

16 (d) The department shall reserve the right to reject any bids that do not equal or exceed the full market
17 value of the lands and waters as determined by the department. If the department does not receive a bid that
18 equals or exceeds fair market value, it may then sell the lands or water rights at private sale. The price accepted
19 on any private sale must exceed the highest bid rejected in the bid process.

20 (4) When necessary and advisable for the management and use of department property, the director
21 is authorized to grant or acquire from willing sellers right-of-way easements for purposes of utilities, roads,
22 drainage facilities, ditches for water conveyance, and pipelines if the full market value of the interest to be
23 acquired is less than \$20,000. Whenever possible, easements must include a weed management plan. Approval
24 of the commission or the board is not required for grants and acquisitions made pursuant to this subsection. In
25 granting any right-of-way pursuant to this subsection, the department shall obtain a fair market value, but the
26 department is not otherwise required to follow the disposal requirements of subsection (3). The director shall
27 report any easement grant or acquisition made pursuant to this subsection to the commission or the board at its
28 next regular meeting.

29 (5) The department shall convey lands and water rights without covenants of warranty by deed executed
30 by the governor or in the governor's absence or disability by the lieutenant governor, attested by the secretary

1 of state and further countersigned by the director.

2 (6) Subject to 87-1-218, the department, with the consent of the commission, is authorized to utilize the
3 installment contract method to facilitate the acquisition of wildlife management areas in which game and nongame
4 fur-bearing animals and game and nongame birds may breed and replenish and areas that provide access to
5 fishing sites for the public. The total cost of installment contracts may not exceed the cost of purchases authorized
6 by the department and appropriated by the legislature.

7 (7) The department is authorized to enter into leases of land under its control in exchange for services
8 to be provided by the lessee on the leased land.

9 (8) ~~Approval~~ Subject to subsection (9), approval of the board for the acquisition or disposal of land or
10 water pursuant to this section is required only for land and water administered under Title 23, chapter 1, or Title
11 23, chapter 2, parts 1 and 4.

12 (9) The department may not co-own a water right with the federal government, a tribal government or
13 corporation, a nongovernmental organization, or a corporation."

14

15 **Section 10.** Section 87-1-301, MCA, is amended to read:

16 **"87-1-301. Powers of commission.** (1) Except as provided in subsections (7) and (8), the commission:

17 (a) shall set the policies for the protection, preservation, management, and propagation of the wildlife,
18 fish, game, furbearers, waterfowl, nongame species, and endangered species of the state and for the fulfillment
19 of all other responsibilities of the department related to fish and wildlife as provided by law;

20 (b) shall establish the hunting, fishing, and trapping rules of the department;

21 (c) except as provided in 23-1-111 and 87-1-303(3), shall establish the rules of the department governing
22 the use of lands owned or controlled by the department and waters under the jurisdiction of the department;

23 (d) must have the power within the department to establish wildlife refuges and bird and game preserves;

24 (e) shall approve all acquisitions or transfers by the department of interests in land or water, except as
25 provided in 23-1-111 and 87-1-209(2) and (4) and subject to 87-1-209(9);

26 (f) except as provided in 23-1-111, shall review and approve the budget of the department prior to its
27 transmittal to the office of budget and program planning;

28 (g) except as provided in 23-1-111, shall review and approve construction projects that have an
29 estimated cost of more than \$1,000 but less than \$5,000;

30 (h) shall manage elk, deer, and antelope populations based on habitat estimates determined as provided

1 in 87-1-322 and maintain elk, deer, and antelope population numbers at or below population estimates as
2 provided in 87-1-323. In developing or implementing an elk management plan, the commission shall consider
3 landowner tolerance when deciding whether to restrict elk hunting on surrounding public land in a particular
4 hunting district. As used in this subsection (1)(h), "landowner tolerance" means the written or documented verbal
5 opinion of an affected landowner regarding the impact upon the landowner's property within the particular hunting
6 district where a restriction on elk hunting on public property is proposed.

7 (i) shall set the policies for the salvage of antelope, deer, elk, or moose pursuant to 87-3-145; and

8 (j) shall comply with, adopt policies that comply with, and ensure the department implements in each
9 region the provisions of state wildlife management plans adopted following an environmental review conducted
10 pursuant to Title 75, chapter 1, parts 1 through 3.

11 (2) The commission may adopt rules regarding the use and type of archery equipment that may be
12 employed for hunting and fishing purposes, taking into account applicable standards as technical innovations in
13 archery equipment change.

14 (3) The commission may adopt rules regarding the establishment of special licenses or permits, seasons,
15 conditions, programs, or other provisions that the commission considers appropriate to promote or enhance
16 hunting by Montana's youth and persons with disabilities.

17 (4) (a) The commission may adopt rules regarding nonresident big game combination licenses to:

18 (i) separate deer licenses from nonresident elk combination licenses;

19 (ii) set the fees for the separated deer combination licenses and the elk combination licenses without the
20 deer tag;

21 (iii) condition the use of the deer licenses; and

22 (iv) limit the number of licenses sold.

23 (b) The commission may exercise the rulemaking authority in subsection (4)(a) when it is necessary and
24 appropriate to regulate the harvest by nonresident big game combination license holders:

25 (i) for the biologically sound management of big game populations of elk, deer, and antelope;

26 (ii) to control the impacts of those elk, deer, and antelope populations on uses of private property; and

27 (iii) to ensure that elk, deer, and antelope populations are at a sustainable level as provided in 87-1-321
28 through 87-1-325.

29 (5) (a) Subject to the provisions of 87-2-115, the commission may adopt rules establishing license
30 preference systems to distribute hunting licenses and permits:

1 (i) giving an applicant who has been unsuccessful for a longer period of time priority over an applicant
2 who has been unsuccessful for a shorter period of time; and

3 (ii) giving a qualifying landowner a preference in drawings. As used in this subsection (5)(a), "qualifying
4 landowner" means the owner of land that provides some significant habitat benefit for wildlife, as determined by
5 the commission.

6 (b) The commission shall square the number of points purchased by an applicant per species when
7 conducting drawings for licenses and permits.

8 (6) (a) The commission may adopt rules to:

9 (i) limit the number of nonresident mountain lion hunters in designated hunting districts; and

10 (ii) determine the conditions under which nonresidents may hunt mountain lion in designated hunting
11 districts.

12 (b) The commission shall consider, but is not limited to consideration of, the following factors:

13 (i) harvest of lions by resident and nonresident hunters;

14 (ii) history of quota overruns;

15 (iii) composition, including age and sex, of the lion harvest;

16 (iv) historical outfitter use;

17 (v) conflicts among hunter groups;

18 (vi) availability of public and private lands; and

19 (vii) whether restrictions on nonresident hunters are more appropriate than restrictions on all hunters.

20 (7) The commission may not regulate the use or possession of firearms, firearm accessories, or
21 ammunition, including the chemical elements of ammunition used for hunting. This does not prevent:

22 (a) the restriction of certain hunting seasons to the use of specified hunting arms, such as the
23 establishment of special archery seasons;

24 (b) for human safety, the restriction of certain areas to the use of only specified hunting arms, including
25 bows and arrows, traditional handguns, and muzzleloading rifles;

26 (c) the restriction of the use of shotguns for the hunting of deer and elk pursuant to 87-6-401(1)(f);

27 (d) the regulation of migratory game bird hunting pursuant to 87-3-403; or

28 (e) the restriction of the use of rifles for bird hunting pursuant to 87-6-401(1)(g) or (1)(h).

29 (8) Pursuant to 23-1-111, the commission does not oversee department activities related to the
30 administration of state parks, primitive parks, state recreational areas, public camping grounds, state historic

1 sites, state monuments, and other heritage and recreational resources, land, and water administered pursuant
2 to Title 23, chapter 1, and Title 23, chapter 2, parts 1, 4, and 9."

3
4 **NEW SECTION. Section 11. Appropriation.** There is appropriated \$25,000 for the biennium beginning
5 July 1, 2017, from the general fund to the legislative branch for use by the water policy interim committee for the
6 purposes described in [section 4].

7
8 **NEW SECTION. Section 12. Codification instruction.** (1) [Sections 1 and 2] are intended to be
9 codified as an integral part of Title 2, chapter 1, and the provisions of Title 2, chapter 1, apply to [sections 1 and
10 2].

11 (2) [Section 3] is intended to be codified as an integral part of Title 75, chapter 1, and the provisions of
12 Title 75, chapter 1, apply to [section 3].

13

14 **NEW SECTION. Section 13. Effective date.** [This act] is effective July 1, 2017.

15

16 **NEW SECTION. Section 14. Applicability.** [This act] applies to water resource agreements entered
17 into after [the effective date of this act] and to water right ownership updates filed by the department of fish,
18 wildlife, and parks, the department of environmental quality, and the department of natural resources and
19 conservation indicating a transfer of ownership to shared ownership of a water right after [the effective date of
20 this act].

21

- END -