

1 SENATE BILL NO. 371

2 INTRODUCED BY B. KEENAN

3
 4 A BILL FOR AN ACT ENTITLED: "AN ACT REPEALING A WATER RIGHTS COMPACT BETWEEN THE
 5 STATE OF MONTANA, THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD
 6 INDIAN RESERVATION, AND THE UNITED STATES; REPEALING THE UNITARY ADMINISTRATION AND
 7 MANAGEMENT ORDINANCE FOR WATER USE ON THE FLATHEAD INDIAN RESERVATION; AMENDING
 8 SECTIONS 3-7-211, 85-2-111, 85-2-114, 85-2-301, 85-2-302, 85-2-306, 85-2-506, AND 85-5-110, MCA; AND
 9 REPEALING SECTIONS 85-20-1901 AND 85-20-1902, MCA."

10
 11 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

12
 13 **Section 1.** Section 3-7-211, MCA, is amended to read:

14 **"3-7-211. Appointment of water commissioners.** ~~Except as provided in 85-20-1902, the~~ The district
 15 court having jurisdiction over the hydrologically interrelated portion of a water division, as described in 85-2-
 16 231(3), in which the controversy arises may appoint and supervise a water commissioner as provided for in
 17 Title 85, chapter 5."

18
 19 **Section 2.** Section 85-2-111, MCA, is amended to read:

20 **"85-2-111. Department powers.** ~~(1)~~ The department may:
 21 (a) enter into agreements with federal, state, or local agencies necessary to carry out this chapter;
 22 (b) apply for, accept, administer, and expend funds, grants, gifts, and loans from the federal
 23 government or any other public or private source for the purposes of this chapter.

24 ~~(2) The department shall, pursuant to 85-20-1901 and 85-20-1902, recognize the jurisdiction of the~~
 25 ~~Flathead reservation water management board over water rights, including permitting of new uses, changes of~~
 26 ~~existing uses, enforcement of water right calls, and all aspects of enforcement within the exterior boundaries of~~
 27 ~~the Flathead Indian reservation."~~

1 **Section 3.** Section 85-2-114, MCA, is amended to read:

2 **"85-2-114. Judicial enforcement.** (1) If the department ascertains, by a means reasonably
3 considered sufficient by it, that a person is wasting water, using water unlawfully, preventing water from moving
4 to another person having a prior right to use the water, or violating a provision of this chapter, it may petition the
5 district court supervising the distribution of water among appropriators from the source to:

6 (a) regulate the controlling works of an appropriation as may be necessary to prevent the wasting or
7 unlawful use of water or to secure water to a person having a prior right to its use;

8 (b) order the person wasting, unlawfully using, or interfering with another's rightful use of the water to
9 cease and desist from doing so and to take steps that may be necessary to remedy the waste, unlawful use, or
10 interference; or

11 (c) issue a temporary, preliminary, or permanent injunction to prevent a violation of this chapter.

12 Notwithstanding the provisions of Title 27, chapter 19, part 3, a temporary restraining order must be granted if it
13 clearly appears from the specific facts shown by affidavit or by the verified complaint that a provision of this
14 chapter is being violated.

15 (2) Upon the issuance of an order or injunction, the department may attach to the controlling works a
16 written notice, properly dated and signed, setting forth the fact that the controlling works have been properly
17 regulated by it. The notice constitutes legal notice to all persons interested in the appropriation or distribution of
18 the water.

19 (3) The department may also direct its own attorney or request the attorney general or county
20 attorney to bring suit to enjoin the waste, unlawful use, interference, or violation.

21 (4) The county attorney or the attorney general may bring suit to enjoin the waste, unlawful use,
22 interference, or violation or bring an action under 85-2-122(1) without being requested to do so by the
23 department.

24 (5) A county attorney who takes action pursuant to subsection (3) or (4) may request assistance from
25 the attorney general.

26 (6) When enforcing the provisions of this section, the department, the county attorney, and the
27 attorney general shall give priority to protecting the water rights of a prior appropriator under an existing water
28 right, a certificate, a permit, or a state water reservation.

1 (7) After considering the provisions of subsection (6), the department may attempt to obtain voluntary
 2 compliance through warning, conference, or any other appropriate means before petitioning the district court
 3 under subsection (1). An attempt to obtain voluntary compliance under this subsection must extend over a
 4 period of at least 7 days and may not exceed 30 working days.

5 ~~(8) Pursuant to 85-20-1902, the provisions of this section do not apply within the exterior boundaries~~
 6 ~~of the Flathead Indian reservation.~~

7 ~~(9)~~(8) The provisions of this section do not limit a water right owner from seeking relief, including
 8 injunctive relief, in district court under Title 27, chapter 19, or this chapter."

9

10 **Section 4.** Section 85-2-301, MCA, is amended to read:

11 **"85-2-301. Right to appropriate -- recognition and confirmation of permits issued after July 1,**

12 **1973.** (1) After July 1, 1973, a person may not appropriate water except as provided in this chapter. A person
 13 may appropriate water only for a beneficial use.

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

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

21 and

22 (vi) the Yellowstone River and its tributaries to its confluence with the Missouri River in North Dakota.

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

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

26 (4) All permit actions of the department after July 1, 1973, are recognized and confirmed subject to
 27 this part and any terms, conditions, and limitations placed on a permit by the department.

28 ~~(5) Pursuant to 85-20-1902, the provisions of this section do not apply within the exterior boundaries~~

1 ~~of the Flathead Indian reservation."~~

2

3 **Section 5.** Section 85-2-302, MCA, is amended to read:

4 **"85-2-302. Application for permit or change in appropriation right.** (1) Except as provided in 85-2-
5 306 and 85-2-369, a person may not appropriate water or commence construction of diversion, impoundment,
6 withdrawal, or related distribution works unless the person applies for and receives a permit or an authorization
7 for a change in appropriation right from the department.

8 (2) The department shall adopt rules that are necessary to determine whether or not an application is
9 correct and complete, based on the provisions applicable to issuance of a permit under this part or a change in
10 appropriation right pursuant to Title 85, chapter 2, part 4. The rules must be adopted in compliance with Title 2,
11 chapter 4.

12 (3) The application must be made on a form prescribed by the department. The department shall
13 make the forms available through its offices.

14 (4) (a) Subject to subsection (4)(b), the applicant shall submit a correct and complete application.
15 The determination of whether an application is correct and complete must be based on rules adopted under
16 subsection (2) that are in effect at the time the application is submitted.

17 (b) If an application is for a permit to appropriate water with a point of diversion, conveyance, or place
18 of use on national forest system lands, the application is not correct and complete under this section until the
19 applicant has submitted proof of any written special use authorization required by federal law to occupy, use, or
20 traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation,
21 withdrawal, use, or distribution of water under the permit.

22 (c) If an application is for a permit or change in appropriation right from a shared point of a diversion
23 or through a shared means of conveyance, the application is not correct and complete until the applicant
24 submits proof to the department that a written notice of the application was provided to each owner of an
25 appropriation right sharing the point of diversion or means of conveyance. For purposes of this subsection (4),
26 "conveyance" means a canal, ditch, flume, pipeline, or other constructed waterway.

27 (5) The department shall notify the applicant of any defects in an application within 180 days. The
28 defects must be identified by reference to the rules adopted under subsection (2). If the department does not

1 notify the applicant of any defects within 180 days, the application must be treated as a correct and complete
2 application.

3 (6) An application does not lose priority of filing because of defects if the application is corrected or
4 completed within 120 days of the date of initial notification of the defects.

5 (7) An application not corrected or completed within 120 days of the date of initial notification of the
6 defects is terminated.

7 ~~(8) Pursuant to 85-20-1902, the provisions of this section do not apply within the exterior boundaries
8 of the Flathead Indian reservation."~~

9

10 **Section 6.** Section 85-2-306, MCA, is amended to read:

11 **"85-2-306. Exceptions to permit requirements.** (1) (a) Except as provided in subsection (1)(b),
12 ground water may be appropriated only by a person who has a possessory interest in the property where the
13 water is to be put to beneficial use and exclusive property rights in the ground water development works.

14 (b) If another person has rights in the ground water development works, water may be appropriated
15 with the written consent of the person with those property rights or, if the ground water development works are
16 on national forest system lands, with any prior written special use authorization required by federal law to
17 occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage,
18 transportation, withdrawal, use, or distribution of water under the certificate.

19 (c) If the person does not have a possessory interest in the real property from which the ground water
20 may be appropriated, the person shall provide to the owner of the real property written notification of the works
21 and the person's intent to appropriate ground water from the works. The written notification must be provided to
22 the landowner at least 30 days prior to constructing any associated works or, if no new or expanded works are
23 proposed, 30 days prior to appropriating the water. The written notification under this subsection is a notice
24 requirement only and does not create an easement in or over the real property where the ground water
25 development works are located.

26 (2) Inside the boundaries of a controlled ground water area, ground water may be appropriated only:

27 (a) according to a permit received pursuant to 85-2-508; or

28 (b) according to the requirements of a rule promulgated pursuant to 85-2-506.

1 (3) (a) Outside the boundaries of a controlled ground water area, a permit is not required before
2 appropriating ground water by means of a well or developed spring:

3 (i) when the appropriation is made by a local governmental fire agency organized under Title 7,
4 chapter 33, and the appropriation is used only for emergency fire protection, emergency fire training, and
5 emergency fire-related operations, which may include enclosed storage;

6 (ii) when a maximum appropriation of 350 gallons a minute or less is used in nonconsumptive
7 geothermal heating or cooling exchange applications, all of the water extracted is returned without delay to the
8 same source aquifer, and the distance between the extraction well and both the nearest existing well and the
9 hydraulically connected surface waters is more than twice the distance between the extraction well and the
10 injection well;

11 (iii) when the appropriation is outside a stream depletion zone, is 35 gallons a minute or less, and does
12 not exceed 10 acre-feet a year, except that a combined appropriation from the same source by two or more
13 wells or developed springs exceeding 10 acre-feet, regardless of the flow rate, requires a permit; or

14 (iv) when the appropriation is within a stream depletion zone, is 20 gallons a minute or less, and does
15 not exceed 2 acre-feet a year, except that a combined appropriation from the same source by two or more wells
16 or developed springs exceeding this limitation requires a permit.

17 (b) (i) Within 60 days of completion of the well or developed spring and appropriation of the ground
18 water for beneficial use, the appropriator shall file a notice of completion with the department on a form
19 provided by the department through its offices.

20 (ii) Upon receipt of the notice, the department shall review the notice and may, before issuing a
21 certificate of water right, return a defective notice for correction or completion, together with the reasons for
22 returning it. A notice does not lose priority of filing because of defects if the notice is corrected, completed, and
23 refiled with the department within 30 days of notification of defects or within a further time as the department
24 may allow, not to exceed 6 months.

25 (iii) If a notice is not corrected and completed within the time allowed, the priority date of appropriation
26 is the date of refiled a correct and complete notice with the department.

27 (c) A certificate of water right may not be issued until a correct and complete notice has been filed
28 with the department, including proof of landowner notification or a written federal special use authorization as

1 necessary under subsection (1). The original of the certificate must be sent to the appropriator. The department
2 shall keep a copy of the certificate in its office in Helena. The date of filing of the notice of completion is the date
3 of priority of the right.

4 (4) An appropriator of ground water by means of a well or developed spring first put to beneficial use
5 between January 1, 1962, and July 1, 1973, who did not file a notice of completion, as required by laws in force
6 prior to April 14, 1981, with the county clerk and recorder shall file a notice of completion, as provided in
7 subsection (3), with the department to perfect the water right. The filing of a claim pursuant to 85-2-221 is
8 sufficient notice of completion under this subsection. The priority date of the appropriation is the date of the
9 filing of a notice, as provided in subsection (3), or the date of the filing of the claim of existing water right.

10 (5) An appropriation under subsection (4) is an existing right, and a permit is not required. However,
11 the department shall acknowledge the receipt of a correct and complete filing of a notice of completion, except
12 that for an appropriation of 35 gallons a minute or less, not to exceed 10 acre-feet a year, the department shall
13 issue a certificate of water right. If a certificate is issued under this section, a certificate need not be issued
14 under the adjudication proceedings provided for in 85-2-236.

15 (6) A permit is not required before constructing an impoundment or pit and appropriating water for use
16 by livestock if:

17 (a) the maximum capacity of the impoundment or pit is less than 15 acre-feet;

18 (b) the appropriation is less than 30 acre-feet a year;

19 (c) the appropriation is from an ephemeral stream, an intermittent stream, or another source other
20 than a perennial flowing stream; and

21 (d) the impoundment or pit is to be constructed on and will be accessible to a parcel of land that is
22 owned or under the control of the applicant and that is 40 acres or larger.

23 (7) (a) Within 60 days after constructing an impoundment or pit, the appropriator shall apply for a
24 permit as prescribed by this part. Subject to subsection (7)(b), upon receipt of a correct and complete
25 application for a stock water provisional permit, the department shall automatically issue a provisional permit. If
26 the department determines after a hearing that the rights of other appropriators have been or will be adversely
27 affected, it may revoke the permit or require the permittee to modify the impoundment or pit and may then make
28 the permit subject to terms, conditions, restrictions, or limitations that it considers necessary to protect the rights

1 of other appropriators. [For purposes of an adverse effects determination under this subsection, the department
2 may not consider adverse effects on any water right identified in a written consent to approval filed pursuant to
3 85-2-311.]

4 (b) If the impoundment or pit is on national forest system lands, an application is not correct and
5 complete under this section until the applicant has submitted proof of any written special use authorization
6 required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion,
7 impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit.

8 (8) A person may also appropriate water without applying for or prior to receiving a permit under rules
9 adopted by the department under 85-2-113.

10 ~~(9) Pursuant to 85-20-1902, the provisions of this section do not apply within the exterior boundaries~~
11 ~~of the Flathead Indian reservation. (Bracketed language in subsection (7)(a) terminates September 30, 2023--~~
12 ~~sec. 8, Ch. 243, L. 2017.)"~~

13

14 **Section 7.** Section 85-2-506, MCA, is amended to read:

15 **"85-2-506. Controlled ground water areas -- designation or modification.** (1) The department may
16 by rule designate or modify permanent or temporary controlled ground water areas as provided in this part. The
17 rule for each controlled ground water area must designate the boundaries of the controlled ground water area.

18 (2) The rulemaking process for designation or modification of a controlled ground water area may be
19 initiated by:

20 (a) the department;

21 (b) submission of a correct and complete petition from a state or local public health agency for
22 identified public health risks; or

23 (c) submission of a correct and complete petition:

24 (i) by a municipality, county, conservation district, or local water quality district formed under Title 7,
25 chapter 13, part 45; or

26 (ii) signed by at least one-third of the water right holders in a proposed controlled ground water area.

27 (3) (a) A correct and complete petition must:

28 (i) be in a form prescribed by the department and must contain analysis prepared by a hydrogeologist,

1 a qualified scientist, or a qualified licensed professional engineer concluding that one or more of the criteria
2 provided in subsection (5) are met; and

3 (ii) describe proposed measures, if any, to mitigate effects of the criteria identified in subsection (5)
4 that are alleged in the petition.

5 (b) When the department proposes a rule pursuant to this section, the place for the hearing must be
6 within or as close as practical to the proposed or existing controlled ground water area.

7 (c) (i) The department shall notify the petitioner of any defects in a petition within 180 days. If the
8 department does not notify the petitioner of any defects within 180 days, the petition must be treated as correct
9 and complete.

10 (ii) A petition that is not made correct and complete within 90 days from the date of notification by the
11 department of any defect is terminated.

12 (4) (a) Within 60 days after a petition is determined to be correct and complete, the department shall:

13 (i) deny in writing the petition in whole or in part, stating the reasons for denial;

14 (ii) inform the petitioner that the department will study the information presented in the petition for a
15 period not to exceed 90 days before denying or proceeding with the petition; or

16 (iii) initiate rulemaking proceedings in accordance with Title 2, chapter 4, part 3.

17 (b) Failure of the department to act under subsection (4)(a) does not mandate that the department
18 grant the petition for rulemaking.

19 (c) In addition to the notice requirements of Title 2, chapter 4, parts 1 through 4, the department shall
20 provide public notice of the rulemaking hearing by:

21 (i) publishing a notice at least once each week for 3 successive weeks, with the first notice not less
22 than 30 days before the date of the hearing in a newspaper of general circulation in the county or counties in
23 which the proposed controlled ground water area is located;

24 (ii) serving by mail a copy of the notice, not less than 30 days before the hearing, upon each person or
25 public agency known from an examination of the records of the department to be a water right holder with a
26 diversion within the proposed controlled ground water area, all landowners of record within the proposed
27 controlled ground water area, and each well driller licensed in Montana whose address is within any county in
28 which any part of the proposed controlled ground water area is located; and

1 (iii) serving by mail a copy of the notice upon any other person or state or federal agency that the
2 department feels may be interested in or affected by the proposed designation or modification of a controlled
3 ground water area.

4 (d) The notice under subsection (4)(c) must include a summary of the basis for the proposed rule.
5 Publication and mailing of the notice as prescribed in this section, when completed, is considered to be
6 sufficient notice of the hearing to all interested persons.

7 (5) The department may designate a permanent controlled ground water area by rule if it finds by a
8 preponderance of the evidence that any of the following criteria have been met and cannot be appropriately
9 mitigated:

10 (a) current or projected reductions of recharge to the aquifer or aquifers in the proposed controlled
11 ground water area will cause ground water levels to decline to the extent that water right holders cannot
12 reasonably exercise their water rights;

13 (b) current or projected ground water withdrawals from the aquifer or aquifers in the proposed
14 controlled ground water area have reduced or will reduce ground water levels or surface water availability
15 necessary for water right holders to reasonably exercise their water rights;

16 (c) current or projected ground water withdrawals from the aquifer or aquifers in the proposed
17 controlled ground water area have induced or altered or will induce or alter contaminant migration exceeding
18 relevant water quality standards;

19 (d) current or projected ground water withdrawals from the aquifer or aquifers in the proposed
20 controlled ground water area have impaired or will impair ground water quality necessary for water right holders
21 to reasonably exercise their water rights based on relevant water quality standards;

22 (e) ground water within the proposed controlled ground water area is not suited for beneficial use; or

23 (f) public health, safety, or welfare is or will become at risk.

24 (6) (a) If the department finds that sufficient facts are not available to designate a permanent
25 controlled ground water area, it may designate by rule a temporary controlled ground water area to allow
26 studies to obtain the facts needed to determine whether or not it is appropriate to designate a permanent
27 controlled ground water area. The department shall set the length of time that the temporary controlled ground
28 water area will be in effect. Subject to subsection (6)(c), the term of a temporary controlled ground water area

1 may be extended by rule.

2 (b) A temporary controlled ground water area designation is for the purpose of study and cannot
3 include the control provisions provided in subsection (7), other than measurement, water quality testing, and
4 reporting requirements.

5 (c) A temporary controlled ground water area designation may not exceed a total of 6 years, including
6 any extensions.

7 (d) Prior to expiration of a temporary controlled ground water area, the department may amend or
8 repeal the rule establishing the temporary controlled ground water area or may designate a permanent
9 controlled ground water area through the rulemaking process under this section.

10 (e) Studies for temporary controlled ground water areas may be considered for funding under the
11 renewable resource grant and loan program in Title 85, chapter 1, part 6.

12 (f) If there is a ground water investigation program within the bureau, the ground water assessment
13 steering committee established by 2-15-1523 shall consider temporary controlled ground water areas for study.

14 (7) A controlled ground water area may include but is not limited to the following control provisions:

15 (a) a provision closing the controlled ground water area to further appropriation of ground water;

16 (b) a provision restricting the development of future ground water appropriations in the controlled
17 ground water area by flow, volume, purpose, aquifer, depth, water temperature, water quality, density, or other
18 criteria that the department determines necessary;

19 (c) a provision requiring measurement of future ground water or surface water appropriations;

20 (d) a provision requiring the filing of notice on land records within the boundary of a permanent
21 controlled ground water area to inform prospective holders of an interest in the property of the existence of a
22 permanent controlled ground water area. Notice of the designation must be removed or modified as necessary
23 to accurately reflect modification or repeal of a permanent designation within 60 days.

24 (e) a provision for well spacing requirements, well construction constraints, and prior department
25 approval before well drilling, unless the well is regulated pursuant to Title 82, chapter 11;

26 (f) a provision for mitigation of ground water withdrawals;

27 (g) a provision for water quality testing;

28 (h) a provision for data reporting to the department; and

1 (i) other control provisions that the department determines are appropriate and adopts through
2 rulemaking.

3 ~~(8) Pursuant to 85-20-1902, the provisions of this section do not apply within the exterior boundaries
4 of the Flathead Indian reservation."~~

5

6 **Section 8.** Section 85-5-110, MCA, is amended to read:

7 **"85-5-110. Appointment of water mediators -- duties.** (1) ~~Except as provided in 85-20-1902, the~~

8 The judge of the district court may appoint a water mediator to mediate a water controversy in a decreed or
9 nondecreed basin under the following circumstances:

10 (a) upon request of the governor;

11 (b) upon petition by at least 15% of the owners of water rights in a decreed or nondecreed basin; or

12 (c) in the discretion of the district court having jurisdiction.

13 (2) A water mediator appointed under this section may:

14 (a) discuss proposed solutions to a water controversy with affected water right holders;

15 (b) review options related to scheduling and coordinating water use with affected water right holders;

16 (c) discuss water use and water needs with persons and entities affected by the existing water use;

17 (d) meet with principal parties to mediate differences over the use of water; and

18 (e) hold public meetings and conferences to discuss and negotiate potential solutions to controversies
19 over use of water.

20 (3) If the governor requests or a state agency petitions for a water mediator, the governor or agency
21 shall pay all or a majority of the costs of the water mediator as determined equitable by the district court having
22 jurisdiction.

23 (4) The governor may use funds appropriated under 75-1-1101 to pay the costs of a water mediator.

24 (5) This section does not allow a water mediator to require any valid water right holder to compromise
25 or reduce any of the holder's existing water rights.

26 (6) If an appropriator voluntarily ceases to use all or part of an appropriation right or voluntarily ceases
27 to use an appropriation right according to its terms and conditions as a result of the efforts of a mediator
28 appointed under this section, the appropriator may not be considered to have abandoned all or any portion of

1 the appropriation right."

2

3 NEW SECTION. Section 9. Repealer. The following sections of the Montana Code Annotated are

4 repealed:

5 85-20-1901. Water rights compact entered into by the Confederated Salish and Kootenai Tribes of the
6 Flathead Reservation, Montana, the State of Montana, and the United States ratified.

7 85-20-1902. Unitary administration and management ordinance.

8

- END -