



# ENVIRONMENTAL QUALITY COUNCIL

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## Memorandum

To: Environmental Quality Council

From: Krista Lee Evans, Research Analyst

RE: Review and evaluation of water storage policy

Date: November 21, 2003

In the work planning process, the EQC gave priority to the review and evaluation of section 85-1-703, MCA. The purpose of this paper is to provide a copy of that statute and facts associated with its implementation.

**85-1-703. Water storage policy.** (1) The legislature recognizes that water resource needs are growing, existing water facilities are aging and in need of repair, and new water storage projects have become more difficult to complete. Other types of action will be needed to solve many emerging problems, but if water storage is the best way to meet growing water needs and solve problems, then it should be actively pursued.

(2) In determining the best solution for a particular water management problem, the state shall:

- (a) carefully define the problem;
- (b) identify all options to solve the problem, including water storage;
- (c) determine whether water is physically and legally available to solve the problem; and
- (d) select the option that best meets the following criteria:
  - (i) technical feasibility;
  - (ii) financial feasibility;
  - (iii) economic feasibility;
  - (iv) political feasibility;
  - (v) legal feasibility; and
  - (vi) environmental feasibility.

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This section of law provides an outline to the executive branch agency charged with implementing the statute, DNRC, for determining solutions for particular water management problems. Through my research, I was unable to find any rules associated with the section of law that might provide more insight into the actual implementation on the ground.

There are other sections of the MCA that would be pertinent in a discussion regarding Montana's water storage policies. Sections 85-1-210, MCA, and 85-1-211, MCA, give the department the authority to sell or otherwise dispose of a water project. The department is bound by the requirement that if bonds were issued as a means of financing the project, all of the bonds must be discharged prior to selling or disposing of the project. Interest and other costs associated with the bonds must also be discharged. In the event the department plans to abandon, sell, or otherwise dispose of a facility that involves a water users' association, there are requirements that the department must meet with regard to notice, petitions, etc. I have provided the three statutes for your review below.

**85-1-210. Disposal of property by department.** In addition to the powers conferred upon the department to sell, lease, or otherwise dispose of water for the purpose of irrigation, development of power, watering of stock, or other purposes, the department may sell, lease, or otherwise dispose of water from its waterworks systems for public, domestic, industrial, and other uses and for fire protection. The department may sell or otherwise dispose of a water project, after the discharge of all of the bonds issued to finance the construction or acquisition of the project, if any, and of all interest on the bonds, costs, and expenses incurred in connection with any action or proceeding by or on behalf of the holders of the bonds. Except for a water project for which no water purchase contracts are managed by the department and for which no money is collected by the department, the department shall make a determination of the market value of a water project prior to its sale or other disposition. The department's determination of market value must consider all liens, encumbrances, and other limitations on the water project. [emphasis added]

**85-1-211. Management of property -- water contracts. (1)** Subject to this chapter, the department may fix and establish the prices, rates, and charges at which the resources and facilities made available under this chapter may be sold and disposed of and enter into contracts and agreements and do those things that in its judgment are necessary, convenient, or expedient for the accomplishment of the purposes and

objects of this chapter, under general rules and upon terms, limitations, and conditions as it prescribes.

(2) The department shall enter into the contracts and fix and establish the prices, rates, and charges to provide at all times funds that are sufficient to pay all costs of operation and maintenance of the works authorized by this chapter, together with necessary repairs to the works, and that will provide at all times sufficient funds to meet and pay the principal and interest of all bonds or loans as they severally become due and payable.

(3) This chapter does not authorize any change, alteration, or revision of the rates, prices, or charges as established by a contract entered into under this chapter except as provided by the contract.

(4) A contract made by the department for the sale of water, use of water, water storage, or other service or for the sale of property or facilities must provide that, in the event of a failure or default in the payment of money specified in the contract to be paid to the department, the department may, upon notice as is prescribed in the contract, terminate the contract and all obligations under the contract. The act of the department in ceasing on default to furnish or deliver water, use of water, water storage, or other service under the contract does not deprive the department of or limit a remedy provided by the contract or by law for the recovery of money due or that may become due under the contract.

(5) The department may sell, transfer to water users' associations, abandon, lease or rent, or otherwise dispose of any rights-of-way, easements, properties, or interests or otherwise take and receive the income or profit and revenue from property without regard to other laws providing for the disposition of state property. Except for a water project for which no water management contracts are managed by the department and for which no money is collected by the department, prior to the department's sale, transfer, or other disposition, a determination must be made by the department as to the market value of the rights-of-way, easements, properties, or interests to be sold, transferred, abandoned, or otherwise disposed of. The department's determination of market value must consider all liens, encumbrances, and other limitations on the project properties or interests. In the disposal of a project, the department shall comply with the provisions of 85-6-109 and shall give purchase preference to existing water users' associations operating and maintaining the project proposed for disposal.

(6) An employee or agent of the department authorized by the director may enter upon any land to carry out the purposes of this section, including but not limited to entry to make an inspection of the project that the department considers necessary, entry to salvage or remove project

property, and entry to make physical alterations to project property. The department shall give reasonable notice to the landowner of its intention to enter upon the land. The department is responsible for actual damages done to property. [emphasis added]

**85-6-109. Operation of projects with water users' association**

-- **definitions.** (1) As used in this section, the following definitions apply:

(a) "Association" means a water users' association.

(b) "Department" means the department of natural resources and conservation provided for in Title 2, chapter 15, part 33.

(2) Whenever the department proposes a program of maintenance, repair, operation, or alteration of a project in excess of \$25,000, the cost of which will be borne by an association pursuant to the terms of a water marketing contract, the association must be informed of the program and given an opportunity to comment. The department shall notify the association of its decision. If the association believes the program to be unnecessary or excessive in cost, it may appeal the department decision to the district court in any county where all or part of the project works is located or to the district court in Lewis and Clark County.

(3) If an appeal is filed under subsection (2), the court shall hold a trial de novo on the question of necessity of the department program and the question of excessive costs. If the association prevails, the court may award costs to the association. The court may specify an acceptable program of maintenance, repair, operation, or alteration or may order the department and the association to develop a program, subject to court approval.

(4) Whenever a program of maintenance, repair, operation, or alteration is proposed, the department shall assist the association in attempting to secure sources of financing, including federal funds.

(5) Whenever the department proposes to abandon, sell, or otherwise dispose of a project that involves a water users' association, the department shall notify the association. Before the department may take further action to abandon, sell, or otherwise dispose of a project that involves a water users' association, the department must receive a petition approving the abandonment, sale, or disposition. The petition must be signed by stockholders of the association who represent 66 2/3% or more of the issued and outstanding stock of the association. If, within 30 days of receipt of the final proposal of abandonment, sale, or other disposal, stockholders of the association who represent 30% or more of the issued and outstanding stock of the association file a petition of protest with the department, the project may not be abandoned, sold, or

otherwise disposed of without the consent of the legislature. [emphasis added]

The disposition of facilities is currently a priority of the Water Resources Division at DNRC. In the time period spanning 1991-1999, the department sold 6 storage facilities. They are War Horse, Big Dry, Camp Creek, Lisk Creek, Petrolia, and Theboe. The department will continue to investigate and dispose of storage facilities that are more appropriately owned by other entities.<sup>1</sup>

Issues that must be assessed when determining whether or not a storage facility should be sold include the project's ability to generate enough income to cover maintenance costs and operation costs. The issue of liability in the event of a failure of the project is also an issue that must be discussed and weighed.

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<sup>1</sup>Email from Jack Stults, Water Resources Division Administrator, Department of Natural Resources and Conservation, November 3, 2003.