

## 1 HOUSE BILL NO. 630

2 INTRODUCED BY T. MANZELLA

3

4 A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING WATER LAWS; RETAINING STATE  
5 AUTHORITY TO ALLOCATE, ADMINISTER, AND PROTECT STATE WATER RESOURCES; AUTHORIZING  
6 AN INTERIM STUDY; PROVIDING AN APPROPRIATION; AMENDING SECTIONS 2-1-404, 18-11-103, AND  
7 85-2-708, MCA; AND PROVIDING EFFECTIVE DATES."

8

9 WHEREAS, by the Public Land Laws of 1866, 14 Stat. 253, and 1870, 16 Stat. 218, ownership of the  
10 United States in the nonnavigable waters was severed from the public domain; and

11 WHEREAS, the Desert Land Act of 1877, 19 Stat. 377, expressly relinquished plenary control over water  
12 resources on the public domain to the states, including those created out of the territories; and

13 WHEREAS, the Desert Land Act of 1877 provided that "all surplus water over and above each actual  
14 appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the  
15 public lands and not navigable, shall remain and be held free for the appropriation and use of the public", with  
16 the right in each to determine for itself to what extent the rule of appropriation or common-law rule in respect of  
17 riparian rights should obtain; and

18 WHEREAS, the rule generally recognized throughout the states and territories of the arid region was that  
19 the acquisition of water by prior appropriation for a beneficial use was entitled to protection (*California Oregon  
20 Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142) and that the appropriation doctrine was recognized  
21 in Montana among several other western states; and

22 WHEREAS, Montana passed a law in 1905 enabling the United States Bureau of Reclamation to file  
23 water rights under state law for various irrigation projects it had planned in Montana; and

24 WHEREAS, in 1908 the United States Supreme Court decided *Winters v. United States*, 207 U.S. 564,  
25 holding that when the United States withdrew lands from the public domain in order to establish the Fort Belknap  
26 Indian Reservation, it also impliedly withdrew from the then-unappropriated waters of the Milk River sufficient  
27 water to satisfy the purposes for which the lands were withdrawn (207 U.S. at 577); and

28 WHEREAS, the doctrine of federal reserved water rights arose from the *Winters* case and was then  
29 extended to non-Indian federal lands by *Cappaert v. United States* 426 U.S. 128, 138 (1976), such that whenever  
30 the federal government withdraws its lands from the public domain and reserves it for a federal purpose, the

1 government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish  
2 the purpose of the reservation; and

3 WHEREAS, Congress enacted the McCarran Amendment, 43 U.S.C. 666, in 1952 to integrate federal  
4 reserved water rights with state rights through the adjudication process and in subsequent administration under  
5 state law; and

6 WHEREAS, the provisions of Article IX of the Montana Constitution apply interactively to the State of  
7 Montana and convey upon the state a constitutional duty to protect the state's resources for the benefit of its  
8 people; and

9 WHEREAS, Article IX, section 3(1), states that all existing rights to the use of any waters for any useful  
10 or beneficial purpose are hereby recognized and confirmed; and

11 WHEREAS, Article IX, section 3(3), states that all surface, underground, flood, and atmospheric waters  
12 within the boundaries of the state are the property of the state for the use of its people and are subject to  
13 appropriate for beneficial uses as provided by law; and

14 WHEREAS, Article IX, section 3(4), states that the legislature shall provide for the administration, control,  
15 and regulation of water rights and shall establish a system of centralized records; and

16 WHEREAS, the mandate to provide for state water administration required:

17 (1) adjudication of all pre-1973 water rights recognized in Article IX, section 3(1), in order to make them  
18 subject to administration;

19 (2) creation of a statutory procedure for perfecting post-1973 changes in places or purpose of use of pre-  
20 1973 rights and newly permitted water rights;

21 (3) the creation of a statewide system of adjudication wherein all rights are determined with respect to  
22 individuals and the state as among one another in order to make the United States on its own and on behalf of  
23 Indian Tribes subject to Montana's adjudication under the McCarran Amendment; and

24 (4) the creation of a system for administration for all interdependent, adjudicated water rights as among  
25 one another; and

26 WHEREAS, the Montana Legislature established statutory schemes for all four of these prerequisites in  
27 Article IX that have statewide application in order to enable the State to control and regulate the water rights and  
28 to establish a system of centralized records; and

29 WHEREAS, the Montana Water Use Act specifies, among other things, that the "water resources of the  
30 state must be protected and conserved to assure adequate supplies for public recreational purposes and for the

1 conservation of wildlife and aquatic life", and the State vested that protection in the departments of fish, wildlife,  
2 and parks and natural resources and conservation; and

3 WHEREAS, Article V, section 12, of the Montana Constitution states that "the legislature shall not pass  
4 a special or local act when a general act is, or can be made, applicable"; and

5 WHEREAS, Article VII, section 4, of the Montana Constitution mandates that the process of the district  
6 courts "shall extend to all parts of the state", and Article VII, section 2, of the Montana Constitution mandates that  
7 the Supreme Court process "shall extend to all parts of the state"; and

8 WHEREAS, Article XIV, sections 8 and 9, of the Montana Constitution prohibit the amendment of the  
9 Constitution except by legislative referendum submitted to qualified electors in the next election or by initiative  
10 submitted to qualified electors; and

11 WHEREAS, the proposed water compact with the Confederated Salish and Kootenai Tribes rejects the  
12 provisions of Article IX of Montana's Constitution and state water law as applied to 23,000 nonmember Montana  
13 citizens, effectively delegating constitutional obligations and statutory law to a tribal government; and

14 WHEREAS, the proposed compact awards to the tribes and the United States large volumes of state  
15 water resources off the federally reserved Indian reservation; and

16 WHEREAS, the compact proposes that the tribes and the United States co-own state water resources  
17 dedicated to instream flow, including Murphy rights managed by the Department of Fish, Wildlife, and Parks, and  
18 such co-ownership interferes with state legislative and judicial prerogatives that determine if and when those  
19 waters are needed for a more beneficial use.

20

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

22

23 **NEW SECTION. Section 1. Ownership of water.** (1) The legislature, mindful of the provisions of Article  
24 IX, section 3, of the Montana constitution that provide for the state ownership of all surface, underground, flood,  
25 and atmospheric waters within the boundaries of the state, declares that the federal government or any tribal  
26 government may not share ownership of a water right authorized or regulated under Title 85, chapter 2.

27 (2) The department may not create a water right that infringes upon a water right authorized or regulated  
28 under Title 85, chapter 2.

29 (3) The department shall resist any attempt by the federal government to enact a law or rule that  
30 diminishes the authority of the state to own, manage, administer, or protect its water resources for the benefit of

1 its citizens.

2

3 **Section 2.** Section 2-1-404, MCA, is amended to read:

4 **"2-1-404. State programs to implement federal statutes.** (1) ~~A~~ Except as provided in subsection (3),  
 5 a state official or employee charged with the duty of implementing a federal statute shall implement the law as  
 6 required by the federal statute in good faith and with a critical view toward the provisions of any federal regulation,  
 7 guideline, or policy in order to identify those provisions of any federal regulation, guideline, or policy that are  
 8 inconsistent with Montana policy or do not advance Montana policy in a cost-effective manner.

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

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

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

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

21 (3) A state official or an agency of this state, as defined in 2-18-101, may not enter into an agreement  
 22 with a federal or local entity that infringes upon the authority of the state to own, manage, administer, or protect  
 23 its water resources for the benefit of its citizens."

24

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

26 **"18-11-103. Authorization to enter agreement -- general contents.** (1) ~~Any~~ Except as provided in  
 27 subsection (5), any one or more public agencies may enter into an agreement with any one or more tribal  
 28 governments to:

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

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

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

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

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

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

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

17 (5) A state official or an agency of this state, as defined in 2-18-101, may not enter into an agreement  
18 with a tribal government that infringes upon the authority of the state to own, manage, administer, or protect its  
19 water resources for the benefit of its citizens."

20

21 **Section 4.** Section 85-2-708, MCA, is amended to read:

22 **"85-2-708. Water administration ~~interim agreements~~ within Indian reservations -- intent.** (1) The  
23 intent of this section is to prevent any infringement upon the authority of the state to own, manage, administer,  
24 or protect its water resources for the benefit of its citizens.

25 ~~(1)~~(2) Because it appears to be to the common advantage of the state and Indian tribes to cooperate in  
26 matters involving the permitting and use of water within the exterior boundaries of an Indian reservation ~~prior to~~  
27 ~~the final adjudication of Indian reserved water rights~~ and because the state does not intend by enactment of this  
28 section to limit, expand, alter, or waive state jurisdiction to administer water rights within the exterior boundaries  
29 of an Indian reservation, pursuant to the requirements of Title 18, chapter 11, the department may negotiate and  
30 conclude an ~~interim~~ agreement with the tribal government of any Indian tribe in Montana ~~prior to final adjudication~~

1 of Indian reserved water rights for the purpose of implementing a water administration plan and a permitting  
 2 process for the issuance of water rights and changes in water right uses within the exterior boundaries of an  
 3 Indian reservation.

4 ~~(2)~~(3) Subject to subsection ~~(4)~~, an An agreement entered into pursuant to subsection ~~(4)~~ (2) must:

5 (a) provide for the retention of exclusive authority by the state to issue permits to applicants who are not  
 6 members of the tribe and to issue change of use authorizations;

7 (b) provide that any permits must be issued in accordance with the criteria established by state law; and

8 (c) provide that permits may be only for new uses with a date of priority in compliance with state law.

9 ~~(3)~~(4) Prior to concluding any agreement under this section, the department shall hold public meetings,  
 10 after proper public notice of the meetings has been given and the proposed agreement has been made available  
 11 for public review, to afford the public an opportunity to comment on the contents of the agreement.

12 ~~(4)~~ The provisions of subsection ~~(2)~~ do not apply if a court of competent jurisdiction has held that the  
 13 department lacks exclusive authority to issue new water use permits within the exterior boundaries of an Indian  
 14 reservation pending final adjudication of Indian reserved water rights. In that case, the department, with the  
 15 approval of the governor, may enter into an interim agreement that provides for joint tribal and state administration  
 16 of new water uses on the reservation pending final adjudication of Indian reserved water rights. Any interim  
 17 agreement entered into pursuant to this subsection ~~(4)~~:

18 ~~———(a) must address how and whether new ground water uses for domestic and municipal purposes will be~~  
 19 ~~granted. Except for the criterion in 85-2-311(1)(a)(ii), an interim agreement that grants new ground water uses~~  
 20 ~~must establish criteria for new water uses that incorporate the criteria listed in 85-2-311.~~

21 ~~———(b) must address how and whether changes in existing appropriation rights within the exterior boundaries~~  
 22 ~~of the reservation will be granted. An interim agreement that grants changes must establish criteria for changes~~  
 23 ~~in existing appropriation rights that incorporate the criteria listed in 85-2-402.~~

24 ~~———(c) must address how and whether water use will be authorized under the interim agreement and how~~  
 25 ~~the use will be secure and valid in the event of the termination of the interim agreement, quantification of reserved~~  
 26 ~~water rights, or termination of negotiations of reserved water rights under 85-2-704;~~

27 ~~———(d) must maintain the jurisdictional claims of each party to the interim agreement;~~

28 ~~———(e) must protect each party against a waiver of the right to challenge the claims of each party at any time;~~

29 ~~———(f) may not prejudice the regulatory or adjudicatory jurisdiction of either party;~~

30 ~~———(g) must provide that none of the activities of each party in the negotiation or implementation of an interim~~

1 agreement may be used to affect the equitable or legal position of either party in any future litigation; and  
2 ~~—— (h) must provide that nothing in the negotiation or implementation of an interim agreement may be~~  
3 ~~considered as enlarging or diminishing the jurisdiction or authority of either party within the reservation."~~  
4

5 **NEW SECTION. Section 5. Interim study.** (1) The water policy interim committee, provided for in  
6 5-5-231, shall conduct a study of issues related to the provisions of [this act] that intend to prevent any  
7 infringement upon the authority of the state to own, manage, administer, or protect its water resources for the  
8 benefit of its citizens.

9 (2) The committee may request research and legal analysis from staff of the legislative services division,  
10 the department of natural resources and conservation, and any other individual or entity.

11 (3) The committee shall prepare a report to submit to the 65th legislature.

12 (4) All aspects of the study, including presentation and review requirements, must be concluded prior to  
13 September 15, 2016.  
14

15 **NEW SECTION. Section 6. Appropriation.** There is appropriated \$25,000 from the general fund for  
16 the biennium beginning July 1, 2015, to the legislative branch for the purposes described in [section 5].  
17

18 **NEW SECTION. Section 7. Notification to tribal governments.** The secretary of state shall send a  
19 copy of [this act] to each tribal government located on the seven Montana reservations and to the Little Shell  
20 Chippewa tribe.  
21

22 **NEW SECTION. Section 8. Codification instruction.** [Section 1] is intended to be codified as an  
23 integral part of Title 85, chapter 2, part 1, and the provisions of Title 85, chapter 2, part 1, apply to [section 1].  
24

25 **NEW SECTION. Section 9. Effective dates.** (1) Except as provided in subsection (2), [this act] is  
26 effective on passage and approval.

27 (2) [Section 6] is effective July 1, 2015.  
28

- END -