

1 *Senate* BILL NO. *359*
 2 INTRODUCED BY *Four Members: Marko Lindgren, McOmber, Holt, Turner & Lheisan*
 3

4 A BILL FOR AN ACT ENTITLED: "AN ACT TO PROVIDE THAT CERTAIN
 5 WATER RIGHTS, INCLUDING RESERVATIONS UNDER SECTION 89-890,
 6 R.C.M. 1947, AND PERMITS FOR WATER IN EXCESS OF 20 CUBIC
 7 FEET OF WATER PER SECOND OR 14,000 ACRE-FEET ARE SUBJECT TO
 8 FUTURE APPROPRIATIONS UNDER A SYSTEM OF PREFERRED USES;
 9 AMENDING SECTIONS 89-891 AND 89-8-105, R.C.M. 1947; AND
 10 PROVIDING AN IMMEDIATE EFFECTIVE DATE."

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

13 Section 1. Certain water rights and reservations
 14 subject to future appropriation for preferred uses. Any
 15 water right based on a permit approved after [the effective
 16 date of this act] for water in an amount in excess of 20
 17 cubic feet of water per second or 14,000 acre-feet and any
 18 reservation of water made pursuant to 89-890 and approved
 19 after [the effective date of this act] is subject to future
 20 appropriation according to the preference system established
 21 in [section 2 of this act].

22 Section 2. System of preferred uses. (1) For purposes
 23 of this act, the following list of priorities is
 24 established, in decreasing order of priority:

- 25 (a) domestic and municipal use;

- 1 (b) agricultural and irrigation use;
 2 (c) industrial use;
 3 (d) recreational and fish and wildlife use.
 4 (2) After [the effective date of this act], for each
 5 permit for water in excess of 20 cubic feet of water per
 6 second or 14,000 acre-feet and each reservation of water
 7 made pursuant to 89-890, the department shall specify the
 8 class of use based on the four classes listed in subsection
 9 (1).

10 (3) The water rights of a holder of a permit or
 11 reservation in a given class are subject to future
 12 appropriation by a water user of a higher priority. Within a
 13 class, first in time is first in right. When a permit
 14 application is received for use in a given class, for
 15 purposes of the criteria of 89-885, the department shall
 16 consider as unappropriated any water in a lower use class
 17 held under a permit or a reservation which is subject to
 18 future appropriations under this section and the holder of
 19 such permit or reservation shall not be considered a prior
 20 appropriator.

21 Section 3. Section 89-891, R.C.M. 1947, is amended to
 22 read as follows:

23 "89-891. Priority. (1) As between appropriators, the
 24 first in time is the first in right. Priority of
 25 appropriation does not include the right to prevent changes

1 by later appropriators in the condition of water occurrence,
 2 such as the increase or decrease of streamflow, or the
 3 lowering of a water table, artesian pressure or water level,
 4 if the prior appropriator can reasonably exercise his water
 5 right under the changed conditions.

6 (2) Priority of appropriation made under this act
 7 dates from the filing of an application for a permit with
 8 the department, except as otherwise provided in section 16
 9 [89-880] of this act.

10 (3) Priority of appropriation perfected before the
 11 effective date of this act shall be determined as provided
 12 in sections 6 through 15 [89-870 through 89-879] of this
 13 act.

14 (4) The provisions of this section are subject to the
 15 provisions of [sections 1, 2, and 4 of this act] concerning
 16 priority of preferred uses."

17 Section 4. Section 89-8-105, R.C.M. 1947, is amended
 18 to read as follows:

19 "89-8-105. Suspension of action. (1) The department
 20 may not grant or otherwise take any action on an application
 21 until either of the following first occurs:

22 (a) three (3) years have elapsed from the effective
 23 date of this act, or

24 (b) a final determination of existing rights has been
 25 made in the source of supply in accordance with the Montana

1 Water Use Act.

2 (2) A reservation in a given use class as provided in
 3 [section 3 of this act] established before such application
 4 for permit for a lower use class is granted is a preferred
 5 use over the right to appropriate water pursuant to the
 6 permit, and the permit, if granted, shall be issued subject
 7 to that preferred use."

8 Section 5. Effective date. This act is effective on
 9 its passage and approval.

-End-

Approved by Committee
on Agriculture Livestock
& Irrigation

SENATE BILL NO. 359

INTRODUCED BY LOWE, MANNING, MATHERS,
MCOMBER, GALT, TURNAGE, THIESSEN, GRAHAM

A BILL FOR AN ACT ENTITLED: "AN ACT TO PROVIDE THAT CERTAIN
WATER RIGHTS, INCLUDING RESERVATIONS UNDER SECTION 89-890,
R.C.M. 1947, AND PERMITS FOR WATER IN EXCESS OF 20 CUBIC
FEET OF WATER PER SECOND OR 14,000 ACRE- FEET ARE SUBJECT TO
FUTURE APPROPRIATIONS UNDER A SYSTEM OF PREFERRED USES;
AMENDING SECTIONS 89-891 AND 89-8-105, R.C.M. 1947; AND
PROVIDING AN IMMEDIATE EFFECTIVE DATE."

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

Section 1. Certain water rights and reservations
subject to future appropriation for preferred uses. Any
water right based--on ARISING OR DERIVED FROM a permit
approved after [the effective date of this act] for water in
an amount in excess of 20 cubic feet of water per second or
14,000 acre-feet and any reservation of water made pursuant
to 89-890 and approved after [the effective date of this
act] is subject to future appropriation according to the
preference system established in [section 2 of this act].

Section 2. System of preferred uses. (1) For purposes
of this act, the following list of ~~priorities~~ PREFERENCES is
established, in decreasing order of ~~priority~~ PREFERENCE:

- (a) domestic and municipal uses;
- (b) agricultural and irrigation use;
- (c) industrial use;
- (d) recreational and fish and wildlife use.

(2) After [the effective date of this act], for each
permit for water in excess of 20 cubic feet of water per
second or 14,000 acre-feet and each reservation of water
made pursuant to 89-890, the department shall specify the
class of use based on the four classes listed in subsection
(1).

~~(3) The water rights of a holder of a permit or
reservation in a given class (A) EXCEPT AS PROVIDED IN
SUBSECTION (3)(B), WATER RIGHTS ARISING OR DERIVED FROM A
PERMIT OR RESERVATION DESCRIBED IN [SECTION 1] IN A GIVEN
CLASS AND NOT ESTABLISHED PRIOR TO [THE EFFECTIVE DATE OF
THIS ACT] are subject to future appropriation by a water
user of a higher priority PREFERENCE. Within a class, first
in time is first in right. When a permit application is
received for use in a given class, for purposes of the
criteria of 89-885, the department shall consider as
unappropriated any water in a lower use class held under a
permit or a reservation which is subject to future
appropriations under this section and the holder of such
permit or reservation shall not be considered a prior
appropriator.~~

1 (B) THE DEPARTMENT, IN THE CASE OF A PERMIT DESCRIBED
 2 IN [SECTION 1], OR THE BOARD, IN THE CASE OF A RESERVATION
 3 DESCRIBED IN [SECTION 1], MAY PROVIDE THAT A WATER RIGHT
 4 ARISING OR DERIVED FROM SUCH PERMIT OR RESERVATION, IS
 5 EXEMPTED FROM FUTURE APPROPRIATION UNDER SUBSECTION (3)(A)
 6 FOR A PERIOD OF TIME NOT TO EXCEED 50 YEARS. DURING THIS
 7 PERIOD THE WATER SHALL BE CONSIDERED APPROPRIATED AND THE
 8 HOLDER OF THE PERMIT OR RESERVATION SHALL BE CONSIDERED AS A
 9 PRIOR APPROPRIATOR FOR PURPOSES OF THE CRITERIA IN 89-885.
 10 AFTER THE EXPIRATION OF THE EXEMPTION PERIOD, THE WATER
 11 RIGHTS ARE SUBJECT TO FUTURE APPROPRIATION UNDER SUBSECTION
 12 (3)(A). IN CONSIDERING WHETHER TO PROVIDE AN EXEMPTION AND
 13 THE LENGTH OF AN EXEMPTION PERIOD, THE DEPARTMENT OR BOARD
 14 SHALL TAKE INTO CONSIDERATION THE ECONOMIC INVESTMENT THE
 15 APPLICANT PLANS TO MAKE AND THE PERIOD OF TIME NECESSARY TO
 16 RECOVER THE INVESTMENT PLUS A REASONABLE PROFIT.

17 Section 3. Section 89-891, R.C.M. 1947, is amended to
 18 read as follows:

19 "89-891. Priority. (1) As between appropriators, the
 20 first in time is the first in right. Priority of
 21 appropriation does not include the right to prevent changes
 22 by later appropriators in the condition of water occurrence,
 23 such as the increase or decrease of streamflow, or the
 24 lowering of a water table, artesian pressure or water level,
 25 if the prior appropriator can reasonably exercise his water

1 right under the changed conditions.

2 (2) Priority of appropriation made under this act
 3 dates from the filing of an application for a permit with
 4 the department, except as otherwise provided in section 16
 5 [89-880] of this act.

6 (3) Priority of appropriation perfected before the
 7 effective date of this act shall be determined as provided
 8 in sections 6 through 15 [89-870 through 89-879] of this
 9 act.

10 (4) The provisions of this section are subject to the
 11 provisions of [sections 1, 2, and 4 of this act] concerning
 12 priority of preferred uses."

13 Section 4. Section 89-8-105, R.C.M. 1947, is amended
 14 to read as follows:

15 "89-8-105. Suspension of action. (1) The department
 16 may not grant or otherwise take any action on an application
 17 until either of the following first occurs:

18 (a) three (3) years have elapsed from the effective
 19 date of this act, or

20 (b) a final determination of existing rights has been
 21 made in the source of supply in accordance with the Montana
 22 Water Use Act.

23 (2) A reservation in a given use class as provided in
 24 [section 3 of this act] established before such application
 25 for permit for a lower use class is granted is a preferred

1 use over the right to appropriate water pursuant to the
2 permit, and the permit, if granted, shall be issued subject
3 to that preferred use."

4 Section 5. Effective date. This act is effective on
5 its passage and approval.

-End-

HOUSE OF REPRESENTATIVES

March 28, 1977

HOUSE COMMITTEE ON JUDICIARY AMENDMENTS TO SENATE BILL 359

1. Amend title, lines 6 through 8.

Following: "RIGHTS"

Strike: ", INCLUDING RESERVATIONS UNDER SECTION 89-890, R.C.M. 1947, AND PERMITS FOR WATER IN EXCESS OF 20 CUBIC FEET OF WATER PER SECOND OR 14,000 ACRE-FEET"

Insert: "IN THE YELLOWSTONE RIVER BASIN IN MONTANA"

2. Amend the bill, pages 1 through 5.

Strike: all of the bill following the enacting clause

Insert: "Section 1. Certain water reservations and permits within the Yellowstone River basin subject to future appropriation for preferred beneficial uses. Within the Yellowstone River basin in Montana, any reservation of water made pursuant to 89-890 and approved after [the effective date of this act] and any water right arising or derived from a water use permit suspended under 89-8-104 and 89-8-105 and granted after [the effective date of this act] are subject to future appropriation according to the preference system established in [section 2 of this act]. This act does not affect water rights vested before [the effective date of this act]."

Section 2. System of preferences. (1) For purposes of this act, the following order of classes of preferred beneficial uses is established, in decreasing order of preference:

- (a) domestic use, including municipal domestic use;
- (b) agricultural, irrigation, and stockwater uses;
- (c) a minimum flow for recreational, fish and wildlife, and water quality uses which equals the percentages of the average monthly gauged flows of record through 1975 as shown by the following table:

Stream-fishery Classification	October-March	April-September
I	40%	60%
II	30%	50%
III	20%	40%
IV	10%	30%
Unclassified	10%	30%

The stream-fishery classifications adopted by the bureau of sport fisheries and wildlife, the department of fish and game and Montana State University, as shown on map no. M013-1-1 compiled and traced at MRBS office, Billings, Montana, 1959, revised 1965, shall be used for the purposes of this subsection;

- (d) municipal use other than domestic;
- (e) industrial use by means of water storage;
- (f) industrial use by means of direct diversion;
- (g) recreational, fish and wildlife, and water quality uses;
- (h) all other uses.

(2) For each reservation of water approved after [the effective date of this act] pursuant to 89-890, the board shall specify the class or classes of use based on the classes listed in subsection (1), and for each water user permit suspended under 89-8-104 and 89-8-105 and granted after [the effective date of this act], the department shall specify the class or classes of use based on the classes listed in subsection (1) of this section.

(3) A water right arising or derived from a reservation or permit suspended under 89-8-104 and 89-8-105 in a given class are subject to future appropriation by a holder of a reservation or such permit of a higher preference. Within a class, first in time is first in right.

Section 3. Compensation -- condemnation (1) The exercise of a preference under this act may be made only by compensation or consent of the holder of the water right arising or derived from the reservation or permit of a lower class or by court ordered condemnation of the water right arising or derived from such reservation or permit.

(2) This act does not affect the rights of any state agency or political subdivision to condemn water rights existing before or after [the effective date of this act].

Section 4. Section 89-891, R.C.M. 1947, is amended to read as follows:

89-891. Priority. (1) As between appropriators, the first in time is the first in right. Priority of appropriation does not include the right to prevent changes by later appropriators in the condition of water occurrence, such as the increase or decrease of stream flow, or the lowering of a water table, artesian pressure or water level, if the prior appropriator can reasonably exercise his water right under the changed conditions.

(2) Priority of appropriation made under this act dates from the filing of an application for a permit with the department, except as otherwise provided in ~~section-16~~ (89-880) of this act, or in the case of a reservation of water under 89-880, from the date of approval of the reservation.

(3) Priority of appropriation perfected before the effective date of this act shall be determined as provided in ~~sections-6 through-15--~~(89-870 through 89-879) of this act.

(4) The provisions of this section are subject to the provisions of [sections 1 through 3 of this act] concerning preferred uses.

Section 5. Section 89-8-105, R.C.M. 1947, is amended to read as follows:

89-8-105. Suspension of action. ~~(1)~~ The department may not grant or otherwise take any action on an application until either of the following first occurs:

~~(a)~~ (1) three (3) years have elapsed from the effective date of this act, or

~~(b)~~ (2) a final determination of existing rights has been made in the source of supply in accordance with the Montana Water Use Act.

~~(2)--A-reservation-established-before-such-application-for-permit is-granted-is-a-preferred-use-over-the-right-to-appropriate-water pursuant-to-the-permit,-and-the-permit,-if-granted,-shall-be-issued subject-to-that-preferred-use-~~

Section 6. Legislative modification. The order of preferred uses established in [section 2 of this act] may be altered by legislative action for waters or sections of waters in particular locations but such alteration may not be retroactive.

Section 7. Effective date. This act is effective on its passage and approval."

AS AMENDED CONCURRED IN