

HOUSE BILL 420

Introduced by Harper, et al.

2/01	Introduced
2/01	Referred to Natural Resources
2/01	First Reading
2/08	Hearing
2/12	Committee Report--Bill Not Passed
2/15	Motion Failed to Reject Adverse Committee Report and place on 2nd Reading
2/15	Adverse Committee Report Adopted

1 *House* BILL NO. *420*  
2 INTRODUCED BY *Steve Bawden*  
3  
4 A BILL FOR AN ACT ENTITLED: "AN ACT PRESERVING RESERVATIONS  
5 OF WATER TO MAINTAIN A MINIMUM FLOW, LEVEL, OR QUALITY OF  
6 WATER IN A SOURCE OF SUPPLY WHEN PERMIT APPLICATIONS FOR ANY  
7 CLASS OF USES HAVE BEEN PRECLUDED; AMENDING SECTION  
8 85-2-316, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND  
9 A RETROACTIVE APPLICABILITY DATE."

10  
11 WHEREAS, under 85-2-316, water reservations may be  
12 granted to maintain a minimum flow, level, or quality of  
13 water; and

14 WHEREAS, reservations granted for this purpose are most  
15 important when the source of supply is subject to water  
16 shortages; and

17 WHEREAS, under 85-2-319, 85-2-506, or other action of  
18 the legislature, permit applications may be precluded on  
19 watercourses subject to shortages; and

20 WHEREAS, the Board of Natural Resources and Conservation  
21 has conditioned certain instream flow reservations to have  
22 no force and effect if permit applications are precluded on  
23 the source of supply; and

24 WHEREAS, the Board's conditions do not effectively carry  
25 out the intent of the reservation statutes;

1 THEREFORE, the Legislature of the State of Montana finds  
2 it appropriate to remove the Board's conditions and prohibit  
3 similar future conditions by amending state law clarifying  
4 that preclusion of permit applications may have no effect on  
5 reservations for the maintenance of a minimum flow, level,  
6 or quality of water.

7  
8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

9 **Section 1.** Section 85-2-316, MCA, is amended to read:

10 "85-2-316. Reservation of waters. (1) The state or any  
11 a political subdivision or agency thereof of the state or  
12 the United States or any an agency thereof of the United  
13 States may apply to the board to reserve waters for existing  
14 or future beneficial uses or to maintain a minimum flow,  
15 level, or quality of water throughout the year or at periods  
16 or for a length of time as the board designates.

17 (2) (a) Water may be reserved for existing or future  
18 beneficial uses in the basin where it is reserved, as  
19 described by the following basins:

20 (i) the Clark Fork River and its tributaries to its  
21 confluence with Lake Pend Oreille in Idaho;

22 (ii) the Kootenai River and its tributaries to its  
23 confluence with Kootenay Lake in British Columbia;

24 (iii) the St. Mary River and its tributaries to its  
25 confluence with the Oldman River in Alberta;

LC 0696/01

(iv) the Little Missouri River and its tributaries to its confluence with Lake Sakakawea in North Dakota;

(v) the Missouri River and its tributaries to its confluence with the Yellowstone River in North Dakota; and

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

(b) A water reservation may be made for an existing or future beneficial use outside the basin where the diversion occurs only if stored water is not reasonably available for water leasing under 85-2-141 and the proposed use would occur in a basin designated in subsection (2)(a).

(3) Upon receiving an application, the department shall proceed in accordance with 85-2-307 through 85-2-309. After the hearing provided in 85-2-309, the board shall decide whether to reserve the water for the applicant. The department's costs of giving notice, holding the hearing, conducting investigations, and making records incurred in acting upon the application to reserve water, except the cost of salaries of the department's personnel, must be paid by the applicant. In addition, a reasonable proportion of the department's cost of preparing an environmental impact statement must be paid by the applicant unless waived by the department upon a showing of good cause by the applicant.

(4) (a) The board may not adopt an order reserving water unless the applicant establishes to the satisfaction

of the board:

(i) the purpose of the reservation;

(ii) the need for the reservation;

(iii) the amount of water necessary for the purpose of the reservation;

(iv) that the reservation is in the public interest.

(b) In determining the public interest under subsection (4)(a)(iv), the board may not adopt an order reserving water for withdrawal and transport for use outside the state unless the applicant proves by clear and convincing evidence that:

(i) the proposed out-of-state use of water is not contrary to water conservation in Montana; and

(ii) the proposed out-of-state use of water is not otherwise detrimental to the public welfare of the citizens of Montana.

(c) In determining whether the applicant has proved by clear and convincing evidence that the requirements of subsections (4)(b)(i) and (4)(b)(ii) are met, the board shall consider the following factors:

(i) whether there are present or projected water shortages within the state of Montana;

(ii) whether the water that is the subject of the application could feasibly be transported to alleviate water shortages within the state of Montana;

1 (iii) the supply and sources of water available to the  
2 applicant in the state where the applicant intends to use  
3 the water; and

4 (iv) the demands placed on the applicant's supply in the  
5 state where the applicant intends to use the water.

6 (d) When applying for a reservation to withdraw and  
7 transport water for use outside the state, the applicant  
8 shall submit to and comply with the laws of the state of  
9 Montana governing the appropriation, lease, use, and  
10 reservation of water.

11 (5) If the purpose of the reservation requires  
12 construction of a storage or diversion facility, the  
13 applicant shall establish to the satisfaction of the board  
14 that there will be progress toward completion of the  
15 facility and accomplishment of the purpose with reasonable  
16 diligence in accordance with an established plan.

17 (6) The board shall limit any reservations after May 9,  
18 1979, for maintenance of minimum flow, level, or quality of  
19 water that it awards at any a point on a stream or river to  
20 a maximum of 50% of the average annual flow of record on  
21 gauged streams. Ungauged streams can be allocated at the  
22 discretion of the board.

23 (7) After the adoption of an order reserving waters,  
24 the department may reject an application and refuse a permit  
25 for the appropriation of reserved waters or may, with the

1 approval of the board, issue the permit subject to terms and  
2 conditions it considers necessary for the protection of the  
3 objectives of the reservation.

4 (8) (a) Any A person desiring to use water reserved to  
5 a conservation district for agricultural purposes shall make  
6 application for the use with the district, and the district,  
7 upon approval of the application, shall inform the  
8 department of the approved use and issue the applicant an  
9 authorization for the use. The department shall maintain  
10 records of all uses of water reserved to conservation  
11 districts and be responsible, when requested by the  
12 districts, for rendering technical and administrative  
13 assistance within the department's staffing and budgeting  
14 limitations in the preparation and processing of such  
15 applications for the conservation districts. The department  
16 shall, within its staffing and budgeting limitations,  
17 complete any feasibility study requested by the districts  
18 within 12 months of the time the request was made. The board  
19 shall extend the time allowed to develop a plan identifying  
20 projects for utilizing a district's reservation so long as  
21 the conservation district makes a good faith effort, within  
22 its staffing and budget limitations, to develop a plan.

23 (b) Upon actual application of water to the proposed  
24 beneficial use the authorized user shall notify the  
25 conservation district. The notification must contain a

1 certified statement by a person with experience in the  
2 design, construction, or operation of project works for  
3 agricultural purposes that the reserved water has been put  
4 to use in substantial accordance with the terms and  
5 conditions of the authorization to use reserved water. The  
6 department or the district may then inspect the  
7 appropriation to determine if it has been completed in  
8 substantial accordance with the authorization.

9 (9) Except as provided in 85-2-331, the priority of  
10 appropriation of a water reservation and the relative  
11 priority of the reservation to permits with a later priority  
12 of appropriation must be determined according to this  
13 subsection (9).

14 (a) A reservation under this section has a priority of  
15 appropriation dating from the filing with the department of  
16 a notice of intention to apply for a water reservation in a  
17 basin in which no other notice of intention to apply is  
18 currently pending. The notice of intention to apply must  
19 specify the basin in which the applicant is seeking a  
20 reservation.

21 (b) Upon receiving a notice of intention to apply for a  
22 water reservation, the department shall identify all  
23 potential water reservation applicants in the basin  
24 specified in the notice and notify each potential applicant  
25 of the opportunity to submit an application and to receive a

1 reservation with the priority of appropriation as described  
2 in subsection (9)(a).

3 (c) To receive the priority of appropriation described  
4 in subsection (9)(a), the applicant shall submit a correct  
5 and complete water reservation application within 1 year  
6 after the filing of the notice of intention to apply. Upon a  
7 showing of good cause, the board may extend the time for  
8 preparing the application.

9 (d) The board may by order subordinate a water  
10 reservation to a permit issued pursuant to this part if:

11 (i) the permit application was accepted by the  
12 department before the date of the board order granting the  
13 reservation; and

14 (ii) the effect of subordinating the reservation to one  
15 or more permits does not interfere substantially with the  
16 purpose of the reservation.

17 (e) The board shall by order establish the relative  
18 priority of reservations approved under this section that  
19 have the same day of priority. A reservation may not  
20 adversely affect any rights in existence at that time.

21 (10) The board shall, periodically but at least once  
22 every 10 years, review existing reservations to ensure that  
23 the objectives of the reservation are being met. Where the  
24 objectives of the reservation are not being met, the board  
25 may extend, revoke, or modify the reservation. Any

1 undeveloped Undeveloped water made available as a result of  
 2 a revocation or modification under this subsection is  
 3 available for appropriation by others pursuant to this part.

4 (11) The board may modify an existing or future order  
 5 originally adopted to reserve water for the purpose of  
 6 maintaining minimum flow, level, or quality of water, so as  
 7 to reallocate the reservation or portion of the reservation  
 8 to an applicant who is a qualified reservant under this  
 9 section. Reallocation of reserved water may be made by the  
 10 board following notice and hearing wherein if the board  
 11 finds that all or part of the reservation is not required  
 12 for its purpose and that the need for the reallocation has  
 13 been shown by the applicant to outweigh the need shown by  
 14 the original reservant. Reallocation of reserved water may  
 15 not adversely affect the priority date of the reservation,  
 16 and the reservation ~~shall~~ must retain its priority date  
 17 despite reallocation to a different entity for a different  
 18 use. The board may not reallocate water reserved under this  
 19 section on any a stream or river more frequently than once  
 20 every 5 years.

21 (12) A reservant may not make a change in a reservation  
 22 under this section except as permitted under 85-2-402 and  
 23 this subsection. If the department approves a change, the  
 24 board, upon notification by the department of its approval,  
 25 shall give notice and require the reservant to establish

1 that the criteria in subsection (4) will be met under the  
 2 approved change.

3 (13) A reservation may be transferred to another entity  
 4 qualified to hold a reservation under subsection (1). Only  
 5 the entity holding the reservation may initiate a transfer.  
 6 The transfer occurs upon the filing of a water right  
 7 transfer certificate with the board together with an  
 8 affidavit from the entity receiving the reservation  
 9 establishing that the entity is a qualified reservant under  
 10 subsection (1), that the entity agrees to comply with the  
 11 requirements of this section and the conditions of the  
 12 reservation, and that the entity can meet the objectives of  
 13 the reservation as granted. If the transfer of a reservation  
 14 involves a change in an appropriation right, the necessary  
 15 approvals must be acquired pursuant to subsection (12).

16 (14) ~~Nothing--in--this~~ This section vests does not give  
 17 the board ~~wich~~ the authority to alter a water right that is  
 18 not a reservation.

19 (15) The department shall undertake a program to educate  
 20 the public, other state agencies, and political subdivisions  
 21 of the state as to the benefits of the reservation process  
 22 and the procedures to be followed to secure the reservation  
 23 of water. The department shall provide technical assistance  
 24 to other state agencies and political subdivisions in  
 25 applying for reservations under this section.

1 (16) Water reserved under this section is not subject to  
2 the state water leasing program established under 85-2-141.

3 (17) The preclusion of permit applications for any class  
4 of uses for any period of time on any source of water supply  
5 does not effect a reservation to maintain a minimum flow,  
6 level, or quality of water that was made prior to the  
7 preclusion."

8 NEW SECTION. Section 2. Severability. If a part of  
9 [this act] is invalid, all valid parts that are severable  
10 from the invalid part remain in effect. If a part of [this  
11 act] is invalid in one or more of its applications, the part  
12 remains in effect in all valid applications that are  
13 severable from the invalid applications.

14 NEW SECTION. Section 3. Retroactive applicability.  
15 [This act] applies retroactively, within the meaning of  
16 1-2-109, to all water reservation orders adopted by the  
17 board after June 1, 1992.

18 NEW SECTION. Section 4. Effective date. [This act] is  
19 effective on passage and approval.

-End-