

1 _____ BILL NO. _____

2 INTRODUCED BY _____

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; PROVIDING
8 LEGISLATIVE POLICY; AMENDING SECTIONS 3-7-211, 85-2-111, 85-2-114, 85-2-301, 85-2-302, 85-2-306,
9 85-2-506, AND 85-5-110, MCA; AND REPEALING SECTIONS 85-20-1901 AND 85-20-1902, MCA."

10
11 WHEREAS, the Montana Water Rights Protection Act (MWRPA), which was ratified by Congress and
12 became federal law on December 27, 2020, contains numerous specific elements that were not negotiated,
13 agreed to, or passed by the Montana Legislature; and

14 WHEREAS, the MWRPA resulted in land exchanges that were never a part of the bill negotiated,
15 agreed to, or passed by the Montana Legislature; and

16 WHEREAS, there has never been a quantification of the volume of water required by the Confederated
17 Salish and Kootenai Tribes (CSKT) in the MWRPA to meet the purposes for which the Flathead Indian
18 Reservation was created as required by the Winters doctrine; and

19 WHEREAS, the United States has refused repeatedly to provide the public with a copy of the report
20 entitled "Damages of the Confederated Salish and Kootenai Tribes Due to Actions by the United States,"
21 Volume I (March, 2011), Volume II (March, 2011), Volume III (October, 2011), and the final supplement and
22 economic valuation (February, 2016), which is on file at the United States Department of Justice and upon
23 which much of the monetary funds awarded in the MWRPA are based; and

24 WHEREAS, Article IX, section 3(3), of the Montana Constitution states that, "[a]ll surface, underground,
25 flood, and atmospheric waters within the boundaries of the state are the property of the state for use of its
26 people and are subject to appropriation for beneficial uses as provided by law"; and

27 WHEREAS, there are no provisions in the Hellgate Treaty of 1855 that secure for or state that the
28 CSKT has sole control of the water of the Flathead region; and

1 WHEREAS, much of the Flathead Indian Reservation consists of private landowners and non-tribal
2 members who live within the boundaries of the reservation on land removed from tribal control by the Allotment
3 Acts; and

4 WHEREAS, canons of construction that are favorable to the tribes contradict and conflict with the
5 Fourteenth Amendment to the United States Constitution, which provides that no state shall “deny to any
6 person within its jurisdiction the equal protection of the laws”; and

7 WHEREAS, the MWRPA as written assumes that a collective ownership of property and of water by an
8 independent body residing within the state is constitutional, which is repugnant to this republic and to the
9 concept of private property in Montana; and

10 WHEREAS, the MWRPA is fraught with constitutional errors and improprieties, and the MWRPA
11 utilized improper and possibly deceitful means to achieve a final, agreed upon document that was subsequently
12 modified, amended, and altered at the federal level without consultation or input from the Montana Legislature;
13 and

14 WHEREAS, the MWRPA was passed by Congress as an attachment to an omnibus spending bill and
15 was not subject to debate in Congress.

16
17 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

18
19 **NEW SECTION. Section 1. Water right claims on Flathead Indian Reservation -- policy --**
20 **transition.** (1) The state of Montana withdraws from the Montana Water Rights Protection Act, declaring the
21 provisions of the act null and void.

22 (2) The state shall resume control of all adjudication and distribution of water within the state
23 through the department of natural resources and conservation in accordance with the Winters doctrine and
24 established law.

25 (3) The Confederated Salish and Kootenai tribes may quantify and specify their federally reserved
26 water rights to meet requirements for which the Flathead Indian reservation was created and as it exists today.

27 (4) The department of natural resources and conservation shall process all water right claims filed
28 with the department and shall immediately grant ground water claims exempt from filing a flow rate of 35

1 gallons a minute [on the effective date of this act].

2 (5) The state and its agencies shall defend the water rights of each citizen equally and may not
3 delegate adjudication authority to any other body.

4

5 **Section 2.** Section 3-7-211, MCA, is amended to read:

6 **"3-7-211. Appointment of water commissioners.** ~~Except as provided in 85-20-1902, the~~ The district
7 court having jurisdiction over the hydrologically interrelated portion of a water division, as described in 85-2-
8 231(3), in which the controversy arises may appoint and supervise a water commissioner as provided for in
9 Title 85, chapter 5."

10

11 **Section 3.** Section 85-2-111, MCA, is amended to read:

12 **"85-2-111. Department powers.** ~~(1)~~ The department may:

13 ~~(a)(1)~~ enter into agreements with federal, state, or local agencies necessary to carry out this chapter;
14 and

15 ~~(b)(2)~~ apply for, accept, administer, and expend funds, grants, gifts, and loans from the federal
16 government or any other public or private source for the purposes of this chapter.

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

21

22 **Section 4.** Section 85-2-114, MCA, is amended to read:

23 **"85-2-114. Judicial enforcement.** (1) If the department ascertains, by a means reasonably
24 considered sufficient by it, that a person is wasting water, using water unlawfully, preventing water from moving
25 to another person having a prior right to use the water, or violating a provision of this chapter, it may petition the
26 district court supervising the distribution of water among appropriators from the source to:

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

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

(c) issue a temporary, preliminary, or permanent injunction to prevent a violation of this chapter. Notwithstanding the provisions of Title 27, chapter 19, part 3, a temporary restraining order must be granted if it clearly appears from the specific facts shown by affidavit or by the verified complaint that a provision of this chapter is being violated.

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

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

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

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

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

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

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

~~(9)~~(8) The provisions of this section do not limit a water right owner from seeking relief, including

1 injunctive relief, in district court under Title 27, chapter 19, or this chapter."

2

3 **Section 5.** Section 85-2-301, MCA, is amended to read:

4 **"85-2-301. Right to appropriate -- recognition and confirmation of permits issued after July 1,**
5 **1973.** (1) After July 1, 1973, a person may not appropriate water except as provided in this chapter. A person
6 may appropriate water only for a beneficial use.

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

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

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

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

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

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

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

18 (b) The department may lease water subject to this subsection (2) under the provisions of 85-2-
19 141.

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

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

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

26

27 **Section 6.** Section 85-2-302, MCA, is amended to read:

28 **"85-2-302. (Temporary) Application for permit or change in appropriation right.** (1) Except as

1 provided in 85-2-306 and 85-2-369, a person may not appropriate water or commence construction of
2 diversion, impoundment, withdrawal, or related distribution works unless the person applies for and receives a
3 permit or an authorization for a change in appropriation right from the department.

4 (2) The department shall adopt rules:

5 (a) for the preapplication meeting process pursuant to subsection (3)(b);

6 (b) that are necessary to determine whether or not an application is correct and complete, based
7 on the provisions applicable to issuance of a permit under this part or a change in appropriation right pursuant
8 to Title 85, chapter 2, part 4; and

9 (c) in compliance with Title 2, chapter 4.

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

12 (b) Prior to filing the application, an applicant may participate in a preapplication meeting with the
13 department to discuss the application process. During this meeting, the applicant and the department will
14 discuss the technical analyses to be completed for the application and if the applicant or the department will
15 complete the technical analyses. A preapplication meeting must be documented on a form provided by the
16 department and included with the application.

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

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

25 (c) If an application is for a permit or change in appropriation right from a shared point of a
26 diversion or through a shared means of conveyance, the application is not correct and complete until the
27 applicant submits proof to the department that a written notice of the application was provided to each owner of
28 an appropriation right sharing the point of diversion or means of conveyance. For purposes of this subsection

(4), "conveyance" means a canal, ditch, flume, pipeline, or other constructed waterway.

(5) (a) The department shall notify the applicant of any defects in an application within:

(i) 15 business days of receipt of the application if the applicant has participated in a preapplication meeting; or

(ii) 30 business days of receipt of the application if the applicant has not participated in a preapplication meeting.

(b) The defects in an application must be identified by reference to the rules adopted under subsection (2).

(c) If the department does not notify the applicant of any defects within the time allowed in subsection (5)(a), the application must be treated as a correct and complete application.

(6) (a) An applicant shall submit a deficiency response to the defects identified in subsection (5)(a) within 120 days of the date of initial notification of the defects. If the applicant does not provide a deficiency response within 120 days, the application must be terminated.

(b) The department shall determine if the application is correct and complete or terminate the application within 30 days of receipt of a deficiency response. An application not terminated within 30 days of the deficiency response is considered correct and complete.

~~(7) Pursuant to 85-20-1902, the provisions of this section do not apply within the exterior boundaries of the Flathead Indian reservation. (Terminates June 30, 2031--sec. 9, Ch. 244, L. 2023.)~~

85-2-302. (Effective July 1, 2031) Application for permit or change in appropriation right. (1)

Except as provided in 85-2-306 and 85-2-369, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or related distribution works unless the person applies for and receives a permit or an authorization for a change in appropriation right from the department.

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

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

1 (4) (a) Subject to subsection (4)(b), the applicant shall submit a correct and complete application.

2 The determination of whether an application is correct and complete must be based on rules adopted under
3 subsection (2) that are in effect at the time the application is submitted.

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

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

14 (5) The department shall notify the applicant of any defects in an application within 180 days. The
15 defects must be identified by reference to the rules adopted under subsection (2). If the department does not
16 notify the applicant of any defects within 180 days, the application must be treated as a correct and complete
17 application.

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

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

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

24
25 **Section 7.** Section 85-2-306, MCA, is amended to read:

26 **"85-2-306. Exceptions to permit requirements.** (1) (a) Except as provided in subsection (1)(b),
27 ground water may be appropriated only by a person who has a possessory interest in the property where the
28 water is to be put to beneficial use and exclusive property rights in the ground water development works.

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

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

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

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

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

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

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

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

27 (iii) when the appropriation is outside a stream depletion zone, is 35 gallons a minute or less, and
28 does not exceed 10 acre-feet a year, except that a combined appropriation from the same source by two or

1 more wells or developed springs exceeding 10 acre-feet, regardless of the flow rate, requires a permit; or
2 (iv) when the appropriation is within a stream depletion zone, is 20 gallons a minute or less, and
3 does not exceed 2 acre-feet a year, except that a combined appropriation from the same source by two or more
4 wells or developed springs exceeding this limitation requires a permit.

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

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

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

15 (c) A certificate of water right may not be issued until a correct and complete notice has been filed
16 with the department, including proof of landowner notification or a written federal special use authorization as
17 necessary under subsection (1). The original of the certificate must be sent to the appropriator. The department
18 shall keep a copy of the certificate in its office in Helena. The date of filing of the notice of completion is the date
19 of priority of the right.

20 (d) (i) Construction of a water supply system subject to Title 75, chapter 6, part 1, and use of a
21 permit exception for the appropriation of water pursuant to this section is proof of beneficial use.

22 (ii) The department shall allocate a volume of 10 acre-feet a year to the system and issue a
23 certificate of water right after the conditions in subsection (3)(d)(i) are met.

24 (iii) The department shall consider a water right as perfected after the conditions in subsection
25 (3)(d)(i) are met.

26 (iv) When the appropriation is for a water supply system that is subject to Title 75, chapter 6, part 1,
27 and is located outside of a stream depletion zone and does not exceed 10 acre-feet a year:

28 (A) For the purposes of subsection (3)(b)(i), the appropriation will be considered perfected upon

1 completion of construction of the water supply system.

2 (B) A copy of the department of environmental quality approval for the water supply system must
3 be submitted with the notice of completion. This section does not preclude the public water supply developer or
4 any subsequent owners from expanding the water system or from revising the water use restrictions within the
5 subdivision, provided that the total amount does not exceed 10 acre-feet per year.

6 (C) Water appropriated under this exception must be measured and reported annually to the
7 department.

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

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

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

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

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

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

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

27 (7) (a) Within 60 days after constructing an impoundment or pit, the appropriator shall apply for a
28 permit as prescribed by this part. Subject to subsection (7)(b), upon receipt of a correct and complete

1 application for a stock water provisional permit, the department shall automatically issue a provisional permit. If
2 the department determines after a hearing that the rights of other appropriators have been or will be adversely
3 affected, it may revoke the permit or require the permittee to modify the impoundment or pit and may then make
4 the permit subject to terms, conditions, restrictions, or limitations that it considers necessary to protect the rights
5 of other appropriators.

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

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

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

14
15 **Section 8.** Section 85-2-506, MCA, is amended to read:

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

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

21 (a) the department;

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

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

25 (i) by a municipality, county, conservation district, or local water quality district formed under Title
26 7, chapter 13, part 45; or

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

- 1 (3) (a) A correct and complete petition must:
- 2 (i) be in a form prescribed by the department and must contain analysis prepared by a
- 3 hydrogeologist, a qualified scientist, or a qualified licensed professional engineer concluding that one or more of
- 4 the criteria provided in subsection (5) are met; and
- 5 (ii) describe proposed measures, if any, to mitigate effects of the criteria identified in subsection (5)
- 6 that are alleged in the petition.
- 7 (b) When the department proposes a rule pursuant to this section, the place for the hearing must
- 8 be within or as close as practical to the proposed or existing controlled ground water area.
- 9 (c) (i) The department shall notify the petitioner of any defects in a petition within 180 days. If the
- 10 department does not notify the petitioner of any defects within 180 days, the petition must be treated as correct
- 11 and complete.
- 12 (ii) A petition that is not made correct and complete within 90 days from the date of notification by
- 13 the department of any defect is terminated.
- 14 (4) (a) Within 60 days after a petition is determined to be correct and complete, the department
- 15 shall:
- 16 (i) deny in writing the petition in whole or in part, stating the reasons for denial;
- 17 (ii) inform the petitioner that the department will study the information presented in the petition for
- 18 a period not to exceed 90 days before denying or proceeding with the petition; or
- 19 (iii) initiate rulemaking proceedings in accordance with Title 2, chapter 4, part 3.
- 20 (b) Failure of the department to act under subsection (4)(a) does not mandate that the department
- 21 grant the petition for rulemaking.
- 22 (c) In addition to the notice requirements of Title 2, chapter 4, parts 1 through 4, the department
- 23 shall provide public notice of the rulemaking hearing by:
- 24 (i) publishing a notice at least once each week for 3 successive weeks, with the first notice not
- 25 less than 30 days before the date of the hearing in a newspaper of general circulation in the county or counties
- 26 in which the proposed controlled ground water area is located;
- 27 (ii) serving by mail a copy of the notice, not less than 30 days before the hearing, upon each
- 28 person or public agency known from an examination of the records of the department to be a water right holder

1 with a diversion within the proposed controlled ground water area, all landowners of record within the proposed
2 controlled ground water area, and each well driller licensed in Montana whose address is within any county in
3 which any part of the proposed controlled ground water area is located; and

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

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

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

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

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

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

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

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

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

28 (6) (a) If the department finds that sufficient facts are not available to designate a permanent

1 controlled ground water area, it may designate by rule a temporary controlled ground water area to allow
2 studies to obtain the facts needed to determine whether or not it is appropriate to designate a permanent
3 controlled ground water area. The department shall set the length of time that the temporary controlled ground
4 water area will be in effect. Subject to subsection (6)(c), the term of a temporary controlled ground water area
5 may be extended by rule.

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

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

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

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

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

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

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

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

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

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

- 1 (e) a provision for well spacing requirements, well construction constraints, and prior department
- 2 approval before well drilling, unless the well is regulated pursuant to Title 82, chapter 11;
- 3 (f) a provision for mitigation of ground water withdrawals;
- 4 (g) a provision for water quality testing;
- 5 (h) a provision for data reporting to the department; and
- 6 (i) other control provisions that the department determines are appropriate and adopts through
- 7 rulemaking.

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

9 ~~boundaries of the Flathead Indian reservation."~~

11 **Section 9.** Section 85-5-110, MCA, is amended to read:

12 **"85-5-110. Appointment of water mediators -- duties.** (1) ~~Except as provided in 85-20-1902, the~~

13 The judge of the district court may appoint a water mediator to mediate a water controversy in a decreed or

14 nondecreed basin under the following circumstances:

- 15 (a) upon request of the governor;
- 16 (b) upon petition by at least 15% of the owners of water rights in a decreed or nondecreed basin;
- 17 or
- 18 (c) in the discretion of the district court having jurisdiction.
- 19 (2) A water mediator appointed under this section may:
 - 20 (a) discuss proposed solutions to a water controversy with affected water right holders;
 - 21 (b) review options related to scheduling and coordinating water use with affected water right
 - 22 holders;
 - 23 (c) discuss water use and water needs with persons and entities affected by the existing water
 - 24 use;
 - 25 (d) meet with principal parties to mediate differences over the use of water; and
 - 26 (e) hold public meetings and conferences to discuss and negotiate potential solutions to
 - 27 controversies over use of water.
- 28 (3) If the governor requests or a state agency petitions for a water mediator, the governor or

1 agency shall pay all or a majority of the costs of the water mediator as determined equitable by the district court
2 having jurisdiction.

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

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

7 (6) If an appropriator voluntarily ceases to use all or part of an appropriation right or voluntarily
8 ceases to use an appropriation right according to its terms and conditions as a result of the efforts of a mediator
9 appointed under this section, the appropriator may not be considered to have abandoned all or any portion of
10 the appropriation right."
11

12 NEW SECTION. **Section 10. Repealer.** The following sections of the Montana Code Annotated are
13 repealed:

14 85-20-1901. Water rights compact entered into by the Confederated Salish and Kootenai Tribes of the
15 Flathead Reservation, Montana, the State of Montana, and the United States ratified.

16 85-20-1902. Unitary administration and management ordinance.
17

18 NEW SECTION. **Section 11. Notification to tribal governments.** The secretary of state shall send
19 a copy of [this act] to each federally recognized tribal government in Montana.
20

21 NEW SECTION. **Section 12. Codification instruction.** [Section 1] is intended to be codified as an
22 integral part of Title 85, chapter 20, part 19, and the provisions of Title 85, chapter 20, part 19, apply to [section
23 1].
24

- END -