

SENATE BILL NO. 539

INTRODUCED BY B. MOLNAR

A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING HYDROELECTRIC GENERATION FACILITY FEES FOR THE USE OF MONTANA'S WATER; CREATING THE WATER SEVERANCE BENEFICIAL USE ACT; IMPOSING A PER MEGAWATT-HOUR WATER SEVERANCE BENEFICIAL USE FEE IN LIEU OF TAX ON THE TRANSMISSION OF CERTAIN ELECTRICITY; PROVIDING FOR THE CALCULATION OF THE FEE IN LIEU OF TAX FOR WATER USE BASED ON THE AMOUNT OF COAL GROSS PROCEEDS TAX IMPOSED ON COAL THAT GENERATES AN EQUAL AMOUNT OF ELECTRICITY; PROVIDING THE FEE IN LIEU OF TAX MAY BE IMPOSED ON ELECTRICITY GENERATED BY A FEDERAL HYDROELECTRIC FACILITY; PROVIDING EXEMPTIONS FOR ELECTRICITY PRODUCED BY CERTAIN FACILITIES OR DISTRIBUTED TO CERTAIN ENTITIES; PROVIDING FOR THE DISTRIBUTION OF FEE REVENUE TO PUBLIC SCHOOLS; PROVIDING FOR OFFSETTING MILL LEVY REDUCTIONS; PROVIDING RULEMAKING AUTHORITY; PROVIDING DEFINITIONS; AMENDING SECTIONS 20-9-331, 20-9-333, AND 20-9-360, MCA; AND PROVIDING AN APPLICABILITY DATE."

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

NEW SECTION. Section 1. Short title. [Sections 1 through 14] may be cited as the "Water Severance Beneficial Use Act".

NEW SECTION. Section 2. Purpose. (1) The legislature finds that:

(a) Article IX, section 3, of the Montana constitution provides that the use of all water that is or may be appropriated for sale, rent, distribution, or other beneficial use, the right-of-way over the lands of others for all ditches, drains, flumes, canals, and aqueducts necessarily used in connection with the beneficial use, and the sites for reservoirs necessary for collecting and storing water are a public use;

(b) clearly, Montana waters belong to the state;

(c) water that is used to generate electricity is a public use;

(d) the courts have always upheld the rights of the state and its people, including regarding all waters that stand, flow, are underground, or fall on the state;

(e) the state has a right to the economic value of the flows, falling, and storage of the water that belongs to the state;

(f) the United States environmental protection agency recognized the state's primacy over its water and under political and legal pressure withdrew a 2015 rule that impermissibly expanded the definition of waters of the United States under the federal Clean Water Act;

(g) Yosemite national park, a political subunit, is compensated for the fall of its water generating electricity for San Francisco;

(h) in 1989, the Montana supreme court, in its decision *Pacific Power and Light Co. v. Department of Revenue*, 237 MT 77, upheld that an enforceable contract right to use or enjoy property owned by a federal agency is subject to taxation;

(i) pursuant to Article X, section 1, of the Montana constitution, the legislature is required to provide a basic system of free, quality, public elementary and secondary schools throughout the state that will guarantee equality of educational opportunity to all; and

(j) the best way to compensate the people of the state is to benefit the public school system.

(2) Consistent with the policy established by the legislature, the purpose of [sections 1 through 14] is to reimburse the people of the state for the beneficial use of one of the state's most important resources by funding public elementary and secondary schools. The people of the state that receive electricity from hydroelectric generation in the state receive a corresponding benefit, and therefore a fee should not be imposed on this electricity. However, the people of the state do not receive a benefit for the use of the state's water that is used predominately to produce electricity used outside the state. The only way to equitably reimburse the people of the state is to impose a fee in lieu of tax on hydroelectric generation that does not provide a beneficial use to the people of the state. The fee in lieu of tax must be imposed as a beneficial use fee, regardless of whether the electricity is generated by an agency of the federal government or a private producer that does not sell significant electricity to Montanans. The fee in lieu of tax is imposed on the use of state water, and the only way to determine the amount of state water that is being used is through the amount of power generated.

1

2 **NEW SECTION. Section 3. Definitions.** As used in [sections 1 through 14], unless the context

3 clearly indicates otherwise, the following definitions apply:

4 (1) "Customer" or "purchaser" means a person who acquires for consideration electricity for use or
5 consumption and not for resale.6 (2) (a) "Distribution services provider" means a person controlling or operating distribution facilities
7 for the distribution of electricity to the public. The term includes a purchaser who takes electricity directly from a
8 transmission line or substation and a purchaser who generates electricity for the purchaser's own use.9 (b) The term does not include electricity generated by the purchaser for noncommercial use or for
10 agricultural use.11 (3) "Hydroelectric facility" means an operating facility located in the state that produces electricity
12 using water power. The term includes a facility owned or operated by an agency of the United States
13 government.14 (4) "Person" means an individual, estate, trust, receiver, cooperative association, corporation,
15 limited liability company, firm, partnership, joint venture, syndicate, or other entity, including any gas or electric
16 utility owned or operated by a county, municipality, or other political subdivision of the state.17 (5) "Transmission services provider" means a person or entity controlling or operating facilities
18 used for the transmission of electricity.

19

20 **NEW SECTION. Section 4. Water power severance beneficial usage fee in lieu of tax --**21 **reimbursement for use of state resource.** (1) (a) Except as provided in subsection (3), a water power
22 severance beneficial usage fee in lieu of tax is imposed on state water use for electricity generated by a
23 hydroelectric facility. The fee payer provided for in subsection (2) shall remit the usage fee in lieu of tax based
24 on the number of megawatts of electricity delivered to the fee payer from the hydroelectric facility multiplied by
25 the rate in subsection (1)(b).26 (b) The department shall determine the rate of the usage fee in lieu of tax on an annual basis by
27 calculating the average amount of coal severance tax that is imposed on the amount of coal mined in the state
28 that it takes to generate 1 megawatt of electricity in the state. For the purpose of the calculation, the department

1 shall make the determination using the amount of severance tax for each megawatt generated in the prior
2 calendar year. The department shall publish the rate of the prior calendar year on the department's website.

3 (2) (a) (i) For electricity produced by a hydroelectric facility for delivery outside the state, the fee
4 payer is the transmission services provider. The transmission services provider shall remit the fee in lieu of tax
5 based on the megawatt hours introduced onto transmission lines from the hydroelectric facility.

6 (ii) For electricity produced by a hydroelectric facility in the state for delivery within the state, the
7 fee payer is the distribution services provider. The transmission services provider shall collect the fee in lieu of
8 tax based on the amount of kilowatt hours of electricity delivered to the distribution services provider. The fee
9 payer may apply for a refund for overpayment pursuant to [section 13].

10 (b) (i) If more than one transmission services provider transmits electricity, the last transmission
11 services provider transmitting or delivering the electricity shall collect the fee in lieu of tax.

12 (ii) If the transmission services provider is an agency of the United States government, the
13 distribution services provider receiving the electricity shall self-assess the fee in lieu of tax subject to the
14 provisions of [sections 1 through 14].

15 (3) Electricity generated by a hydroelectric facility that satisfies one of the following characteristics
16 is exempt from the fee in lieu of tax on the use of state water as provided in this section:

17 (a) all electricity generated by a hydroelectric facility that is rate-based by the public service
18 commission provided for in 2-15-2602;

19 (b) electricity produced by a hydroelectric facility within the exterior boundaries of a Montana
20 Indian reservation;

21 (c) electricity delivered to a distribution services provider that is a municipal electric utility
22 described in 69-8-103(4)(b) or a rural electric cooperative organized under the provisions of Title 35, chapter
23 18;

24 (d) electricity delivered to a customer located in the state by a distribution services provider that is
25 exempt from jurisdiction of the public service commission under 35-18-104; or

26 (e) electricity produced by a hydroelectric facility with a nameplate capacity of 10 megawatts or
27 less.

28

1 **NEW SECTION. Section 5. Collection of fee in lieu of tax for state water use.** (1) A transmission

2 services provider shall collect the water power severance beneficial usage fee in lieu of tax imposed under
3 [section 4] from the fee payer and pay the fee in lieu of tax collected to the department. If the transmission
4 services provider collects a fee in lieu of tax in excess of the fee in lieu of tax imposed by [section 4] for using
5 state water, both the fee in lieu of tax and the excess must be remitted to the department.

6 (2) A self-assessing distribution services provider is subject to the provisions of [sections 1 through
7 14].

8 (3) The fee in lieu of tax for using state water collected under [sections 1 through 14] must, in
9 accordance with the provisions of 17-2-124, be deposited in the water severance account provided for in
10 [section 6].

11
12 **NEW SECTION. Section 6. Water severance account -- school funding -- mill levy reduction --**
13 **rulemaking.** (1) There is a water severance account in the state special revenue fund provided for in 17-2-102.
14 Money in the account and money appropriated from the account by the legislature must be used for the
15 purposes provided in this section.

16 (2) The amount of 90% of revenue is allocated to school funding by offsetting the statewide mill
17 levies in 20-9-331, 20-9-333, and 20-9-360.

18 (a) The allocation must be used to reduce the statewide property tax levies for the fiscal year in an
19 amount equal to fee revenues allocated under this subsection (2) during the preceding fiscal year.

20 (b) The money must be used first to reduce the mill levy provided for in 20-9-360. If the amount of
21 revenue allocated under this subsection (2) exceeds the amount of revenue that would have been collected
22 under 20-9-360, the department shall reduce the mill levies provided for in 20-9-331, followed by the mill levies
23 provided for in 20-9-333. If all three levies are reduced to 0%, the excess revenue must be deposited in the
24 guarantee account provided for in 20-9-622.

25 (c) The department shall calculate the mill levy reductions and instruct the county commissioners
26 of each county to reduce the number of mills levied based on this subsection (2). The mill levy calculation must
27 be established in tenths of mills and must be the same for every taxing entity on a statewide basis. If the mill
28 levy calculation does not result in an even tenth of a mill, then the calculation must be rounded up to the

1 nearest tenth of a mill. The department shall adopt rules that provide the amount of the reductions and the
2 process for implementation of property tax relief by the county treasurer, the department, and the taxpayer,
3 including the reasonable extension of any statutory deadlines.

4 (3) The amount of 10% of revenue is allocated to the department for administration and legal
5 expenses associated with the implementation of [sections 1 through 14]. The department, the attorney general,
6 and the public service commission may seek outside counsel and use existing appropriation authority or
7 contingency appropriation authority for legal expenses associated with the implementation of [sections 1
8 through 14].

9
10 **NEW SECTION. Section 7. Returns -- payment -- authority of department.** (1) On or before the
11 30th day of the month following the end of the calendar quarter in which the water power severance beneficial
12 usage fee in lieu of tax imposed by [sections 1 through 14] is payable, a return, on a form provided by the
13 department, and payment of the fee in lieu of tax for the preceding calendar quarter must be filed with the
14 department.

15 (2) Each person engaged in transmitting electricity in this state that is subject to the fee in lieu of
16 tax under [sections 1 through 14] shall file a return.

17 (3) (a) A person required to collect and pay to the department the fee in lieu of tax imposed by
18 [sections 1 through 14] shall keep records, render statements, make returns, and comply with the provisions of
19 [sections 1 through 14] and the rules prescribed by the department. Each return or statement must include the
20 information required by the rules of the department.

21 (b) For the purpose of determining compliance with the provisions of [sections 1 through 14], the
22 department is authorized to examine or cause to be examined any books, papers, records, or memoranda
23 relevant to making a determination of the amount of the fee due, whether the books, papers, records, or
24 memoranda are the property of or in the possession of the person filing the return or another person. In
25 determining compliance, the department may use statistical sampling and other sampling techniques consistent
26 with generally accepted auditing standards. The department may also:

27 (i) require the attendance of a person having knowledge or information relevant to a return;

28 (ii) compel the production of books, papers, records, or memoranda by the person required to

- 1 attend;
- 2 (iii) implement the provisions of 15-1-703 if the department determines that the collection of the fee
- 3 is or may be jeopardized because of delay;
- 4 (iv) take testimony on matters material to the determination; and
- 5 (v) administer oaths or affirmations.
- 6 (4) Pursuant to rules established by the department, returns may be computer-generated and
- 7 electronically filed.
- 8

9 **NEW SECTION. Section 8. Examination of return -- adjustments -- delivery of notices and**

10 **demands.** (1) If the department determines that the amount of the water power severance beneficial usage fee

11 in lieu of tax due is different from the amount reported, the amount of the fee in lieu of tax computed on the

12 basis of the examination conducted pursuant to [section 7] constitutes the fee in lieu of tax to be paid.

13 (2) If the fee in lieu of tax due exceeds the amount of fee in lieu of tax reported as due on the

14 return, the excess must be paid to the department within 30 days after notice of the amount and demand for

15 payment is mailed or delivered to the person making the return unless the fee payer files a timely objection as

16 provided in 15-1-211. If the amount of the fee in lieu of tax found due by the department is less than that

17 reported as due on the return and has been paid, the excess must be credited or, if no fee liability exists or is

18 likely to exist, refunded to the person making the return.

19 (3) The notice and demand provided for in this section must contain a statement of the

20 computation of the fee and interest and must be:

21 (a) sent by mail to the fee in lieu of tax payer at the address given in the fee payer's return, if any,

22 or to the fee payer's last-known address; or

23 (b) served personally on the fee in lieu of tax payer.

24 (4) A fee in lieu of tax payer filing an objection to the demand for payment is subject to and

25 governed by the uniform procedure provided in 15-1-211.

26

27 **NEW SECTION. Section 9. Penalties and interest for violation.** (1) (a) A person who fails to file a

28 return as required by [section 7] must be assessed a penalty as provided in 15-1-216. The department may

1 waive the penalty as provided in 15-1-206.

2 (b) A person who fails to file the return required by [section 7] and to pay the fee in lieu of tax on or
3 before the due date must be assessed a penalty and interest as provided in 15-1-216. The department may
4 waive the penalty as provided in 15-1-206.

5 (2) A person who purposely fails to pay the water power severance beneficial usage fee in lieu of
6 tax when due must be assessed an additional penalty as provided in 15-1-216.

7

8 **NEW SECTION. Section 10. Authority to collect delinquent fee.** (1) (a) The department shall
9 collect water power severance beneficial usage fees in lieu of tax that are delinquent as determined under
10 [sections 1 through 14].

11 (b) If a fee in lieu of tax imposed by [sections 1 through 14] or any portion of the fee in lieu of tax is
12 not paid when due, the department may issue a warrant for distraint as provided in Title 15, chapter 1, part 7.

13 (2) In addition to any other remedy, in order to collect delinquent fees after the time for appeal has
14 expired, the department may direct the offset refunds or other funds that are due to the transmission services
15 provider from the state, except wages subject to the provisions of 25-13-614 and retirement benefits.

16 (3) As provided in 15-1-705, the transmission services provider has the right to a review on the
17 liability prior to any offset by the department.

18 (4) The department may file a claim for state funds on behalf of the transmission services provider
19 if a claim is required before funds are available for offset.

20

21 **NEW SECTION. Section 11. Penalty and interest on deficiency.** Penalty and interest must be
22 added to any deficiency assessment as provided in 15-1-216.

23

24 **NEW SECTION. Section 12. Limitations.** (1) Except in the case of a person who purposely or
25 knowingly, as those terms are defined in 45-2-101, files a false or fraudulent return violating the provisions of
26 [sections 1 through 14], a deficiency may not be assessed or collected with respect to a month or quarter for
27 which a return is filed unless the notice of additional water power severance beneficial usage fee in lieu of tax
28 proposed to be assessed is mailed to or personally served on the fee in lieu of tax payer within 5 years from the

1 date on which the return was filed. For the purposes of this section, a return filed before the last day prescribed
2 for filing is considered to be filed on the last day.

3 (2) If, before the expiration of the 5-year period prescribed in subsection (1) for assessment of the
4 fee in lieu of tax, the transmission services provider consents in writing to an assessment after expiration of the
5 5-year period, a deficiency may be assessed at any time prior to the expiration of that period.

6
7 **NEW SECTION. Section 13. Refunds -- interest -- limitations.** (1) A claim for a refund or credit as a
8 result of overpayment of water power severance beneficial usage fees in lieu of tax collected under [sections 1
9 through 14] must be filed within 5 years of the date on which the return was due, without regard to any
10 extension of time for filing.

11 (2) (a) Interest on an overpayment must be paid or credited at the same rate as the interest rate
12 charged on unpaid taxes as provided in 15-1-216.

13 (b) Except as provided in subsection (2)(c), interest must be paid from the date on which the return
14 was due or the date of overpayment, whichever is later. Interest does not accrue during any period in which the
15 processing of a claim is delayed more than 30 days because the transmission services provider has not
16 furnished necessary information.

17 (c) The department is not required to pay interest if:

- 18 (i) the overpayment is refunded or credited within 6 months of the date on which a claim was filed;
19 or
20 (ii) the amount of overpayment and interest does not exceed \$1.

21
22 **NEW SECTION. Section 14. Administration -- rules.** The department shall:

- 23 (1) administer and enforce the provisions of [sections 1 through 14];
24 (2) cause to be prepared and distributed forms and information that may be necessary to
25 administer the provisions of [sections 1 through 14]; and
26 (3) adopt rules that may be necessary or appropriate to administer and enforce the provisions of
27 [sections 1 through 14].
28

1 **Section 15.** Section 20-9-331, MCA, is amended to read:

2 **"20-9-331. Basic county tax for elementary equalization and other revenue for county**
3 **equalization of elementary BASE funding program.** (1) Subject to 15-10-420 and subsection (3) of
4 this section, the county commissioners of each county shall levy an annual basic county tax of 33 mills on the
5 dollar of the taxable value of all taxable property within the county, except for property subject to a tax or fee
6 under 61-3-321(2) or (3), 61-3-529, 61-3-537, 61-3-562, 61-3-570, and 67-3-204, for the purposes of
7 elementary equalization and state BASE funding program support. The revenue collected from this levy or
8 distributed pursuant to [section 6] must be apportioned to the support of the elementary BASE funding
9 programs of the school districts in the county and to the state general fund in the following manner:

10 (a) In order to determine the amount of revenue raised by this levy that is retained by the county,
11 the sum of the estimated revenue identified in subsection (2) must be subtracted from the total of the BASE
12 funding programs of all elementary districts of the county.

13 (b) If the basic levy and other revenue prescribed by this section produce more revenue than is
14 required to repay a state advance for county equalization, the county treasurer shall remit the surplus funds to
15 the department of revenue, as provided in 15-1-504, for deposit to the state general fund immediately upon
16 occurrence of a surplus balance and each subsequent month, with any final remittance due no later than June
17 20 of the fiscal year for which the levy has been set.

18 (2) The revenue realized from the county's portion of the levy prescribed by this section and the
19 revenue from the following sources must be used for the equalization of the elementary BASE funding program
20 of the county as prescribed in 20-9-335, and a separate accounting must be kept of the revenue by the county
21 treasurer in accordance with 20-9-212(1):

22 (a) the portion of the federal Taylor Grazing Act funds designated for the elementary county
23 equalization fund under the provisions of 17-3-222;

24 (b) the portion of the federal flood control act funds distributed to a county and designated for
25 expenditure for the benefit of the county common schools under the provisions of 17-3-232;

26 (c) all money paid into the county treasury as a result of fines for violations of law, except money
27 paid to a justice's court, and the use of which is not otherwise specified by law;

28 (d) any money remaining at the end of the immediately preceding school fiscal year in the county

1 treasurer's accounts for the various sources of revenue established or referred to in this section;

2 (e) any federal or state money distributed to the county as payment in lieu of property taxation,
3 including federal forest reserve funds allocated under the provisions of 17-3-213;

4 (f) gross proceeds taxes from coal under 15-23-703; and

5 (g) oil and natural gas production taxes.

6 (3) The number of mills levied in subsection (1) of this section must be reduced when revenue is
7 available from the water power severance beneficial usage fee in lieu of tax pursuant to [section 6]."

8
9 **Section 16.** Section 20-9-333, MCA, is amended to read:

10 **"20-9-333. Basic county tax for high school equalization and other revenue for county**
11 **equalization of high school BASE funding program.** (1) Subject to 15-10-420 and subsection (3) of this
12 section, the county commissioners of each county shall levy an annual basic county tax of 22 mills on the dollar
13 of the taxable value of all taxable property within the county, except for property subject to a tax or fee under
14 61-3-321(2) or (3), 61-3-529, 61-3-537, 61-3-562, 61-3-570, and 67-3-204, for the purposes of high school
15 equalization and state BASE funding program support. The revenue collected from this levy or distributed
16 pursuant to [section 6] must be apportioned to the support of the BASE funding programs of high school
17 districts in the county and to the state general fund in the following manner:

18 (a) In order to determine the amount of revenue raised by this levy that is retained by the county,
19 the sum of the estimated revenue identified in subsection (2) must be subtracted from the sum of the county's
20 high school tuition obligation and the total of the BASE funding programs of all high school districts of the
21 county.

22 (b) If the basic levy and other revenue prescribed by this section produce more revenue than is
23 required to repay a state advance for county equalization, the county treasurer shall remit the surplus funds to
24 the department of revenue, as provided in 15-1-504, for deposit to the state general fund immediately upon
25 occurrence of a surplus balance and each subsequent month, with any final remittance due no later than June
26 20 of the fiscal year for which the levy has been set.

27 (2) The revenue realized from the county's portion of the levy prescribed in this section and the
28 revenue from the following sources must be used for the equalization of the high school BASE funding program

of the county as prescribed in 20-9-335, and a separate accounting must be kept of the revenue by the county treasurer in accordance with 20-9-212(1):

(a) any money remaining at the end of the immediately preceding school fiscal year in the county treasurer's accounts for the various sources of revenue established in this section;

(b) any federal or state money distributed to the county as payment in lieu of property taxation, including federal forest reserve funds allocated under the provisions of 17-3-213;

(c) gross proceeds taxes from coal under 15-23-703; and

(d) oil and natural gas production taxes.

(3) The number of mills levied in subsection (1) of this section must be reduced when revenue is available from the water power severance beneficial usage fee in lieu of tax pursuant to [section 6]."

Section 17. Section 20-9-360, MCA, is amended to read:

"20-9-360. State equalization aid levy. (1) Subject to 15-10-420 and subsection (2) of this section, there is a levy of 40 mills imposed by the county commissioners of each county on all taxable property within the state, except property for which a tax or fee is required under 61-3-321(2) or (3), 61-3-529, 61-3-537, 61-3-562, 61-3-570, and 67-3-204. Proceeds of the levy must be remitted to the department of revenue, as provided in 15-1-504, and revenue received pursuant to [section 6] must be deposited to the credit of the state general fund for state equalization aid to the public schools of Montana.

(2) The number of mills levied in subsection (1) of this section must be reduced when revenue is available from the water power severance beneficial usage fee in lieu of tax pursuant to [section 6]."

NEW SECTION. Section 18. Codification instruction. [Sections 1 through 14] are intended to be codified as a new chapter in Title 15, and the provisions of Title 15 apply to [sections 1 through 14].

NEW SECTION. Section 19. Saving clause. [This act] does not affect rights and duties that matured, penalties that were incurred, or proceedings that were begun before [the effective date of this act].

NEW SECTION. Section 20. Severability. If a part of [this act] is invalid, all valid parts that are

1 severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications,
2 the part remains in effect in all valid applications that are severable from the invalid applications.

3

4 NEW SECTION. **Section 21. Applicability.** [This act] applies to electricity generated from a
5 hydroelectric facility after December 31, 2023.

6

- END -