

SENATE BILL NO. 314

INTRODUCED BY GROSFIELD, NOBLE, SWYSGOOD, CLARK,
BENEDICT, BLAYLOCK
BY REQUEST OF THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

IN THE SENATE

FEBRUARY 7, 1991 INTRODUCED AND REFERRED TO COMMITTEE
 ON NATURAL RESOURCES.

 FIRST READING.

FEBRUARY 21, 1991 COMMITTEE RECOMMEND BILL
 DO PASS AS AMENDED. REPORT ADOPTED.

FEBRUARY 22, 1991 PRINTING REPORT.

FEBRUARY 23, 1991 SECOND READING, DO PASS.

FEBRUARY 25, 1991 ENGROSSING REPORT.

 THIRD READING, PASSED.
 AYES, 48; NOES, 1.

 TRANSMITTED TO HOUSE.

IN THE HOUSE

MARCH 4, 1991 INTRODUCED AND REFERRED TO COMMITTEE
 ON NATURAL RESOURCES.

 FIRST READING.

MARCH 21, 1991 COMMITTEE RECOMMEND BILL BE
 CONCURRED IN. REPORT ADOPTED.

APRIL 6, 1991 SECOND READING, CONCURRED IN.

 ON MOTION, RULES SUSPENDED. BILL
 PLACED ON THIRD READING THIS DAY.

 THIRD READING, CONCURRED IN.
 AYES, 94; NOES, 2.

 RETURNED TO SENATE.

IN THE SENATE

APRIL 9, 1991 RECEIVED FROM HOUSE.

SENT TO ENROLLING.

REPORTED CORRECTLY ENROLLED.

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SENATE BILL NO. *314*
INTRODUCED BY *Goodfield Noble Seymour Clark*
Beard *Blaylock*
BY REQUEST OF THE DEPARTMENT OF NATURAL RESOURCES

AND CONSERVATION

A BILL FOR AN ACT ENTITLED: "AN ACT TO GENERALLY REVISE AND CLARIFY THE WATER RESERVATION PROCESS; ALLOWING AVAILABLE WATER FROM A REVOKED OR MODIFIED RESERVATION TO BE APPROPRIATED; REQUIRING APPROVAL BY THE BOARD OF NATURAL RESOURCES AND CONSERVATION OF CHANGES IN RESERVATIONS; ALLOWING TRANSFERS OF WATER RESERVATIONS AND ESTABLISHING CRITERIA FOR SUCH TRANSFERS; ALLOWING THE CONVERSION OF A CONSERVATION DISTRICT RESERVATION TO A PERMIT; AMENDING SECTION 85-2-316, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND A RETROACTIVE APPLICABILITY PROVISION."

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

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

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

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

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

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

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

(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,



1 conducting investigations, and making records incurred in
 2 acting upon the application to reserve water, except the
 3 cost of salaries of the department's personnel, must be paid
 4 by the applicant. In addition, a reasonable proportion of
 5 the department's cost of preparing an environmental impact
 6 statement must be paid by the applicant unless waived by the
 7 department upon a showing of good cause by the applicant.

8 (4) (a) The board may not adopt an order reserving
 9 water unless the applicant establishes to the satisfaction
 10 of the board:

- 11 (i) the purpose of the reservation;
- 12 (ii) the need for the reservation;
- 13 (iii) the amount of water necessary for the purpose of
 14 the reservation;
- 15 (iv) that the reservation is in the public interest.

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

- 21 (i) the proposed out-of-state use of water is not
 22 contrary to water conservation in Montana; and
- 23 (ii) the proposed out-of-state use of water is not
 24 otherwise detrimental to the public welfare of the citizens
 25 of Montana.

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

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

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

10 (iii) the supply and sources of water available to the
 11 applicant in the state where the applicant intends to use
 12 the water; and

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

15 (d) When applying for a reservation to withdraw and
 16 transport water for use outside the state, the applicant
 17 shall submit to and comply with the laws of the state of
 18 Montana governing the appropriation, lease, use, and
 19 reservation of water.

20 (5) If the purpose of the reservation requires
 21 construction of a storage or diversion facility, the
 22 applicant shall establish to the satisfaction of the board
 23 that there will be progress toward completion of the
 24 facility and accomplishment of the purpose with reasonable
 25 diligence in accordance with an established plan.

1 (6) The board shall limit any reservations after May 9,
 2 1979, for maintenance of minimum flow, level, or quality of
 3 water that it awards at any point on a stream or river to a
 4 maximum of 50% of the average annual flow of record on
 5 gauged streams. Ungauged streams can be allocated at the
 6 discretion of the board.

7 (7) After the adoption of an order reserving waters,
 8 the department may reject an application and refuse a permit
 9 for the appropriation of reserved waters or may, with the
 10 approval of the board, issue the permit subject to terms and
 11 conditions it considers necessary for the protection of the
 12 objectives of the reservation.

13 (8) (a) Any person desiring to use water reserved to a
 14 conservation district for agricultural purposes shall make
 15 application for the use with the district, and the district,
 16 upon approval of the application, shall inform the
 17 department of the approved use and issue the applicant an
 18 authorization for the use. The department shall maintain
 19 records of all uses of water reserved to conservation
 20 districts and be responsible, when requested by the
 21 districts, for rendering technical and administrative
 22 assistance within the department's staffing and budgeting
 23 limitations in the preparation and processing of such
 24 applications for the conservation districts. The department
 25 shall, within its staffing and budgeting limitations,

1 complete any feasibility study requested by the districts
 2 within 12 months of the time the request was made. The board
 3 shall extend the time allowed to develop a plan identifying
 4 projects for utilizing a district's reservation so long as
 5 the conservation district makes a good faith effort, within
 6 its staffing and budget limitations, to develop a plan.

7 (b) Upon actual application of water to the proposed
 8 beneficial use and completion of the authorization to use
 9 reserved water, the appropriator shall notify the
 10 conservation district. The department or the district may
 11 inspect the appropriation to determine if it has been
 12 completed in substantial accordance with the authorization.
 13 If an appropriator wishes to convert the conservation
 14 district reserved water right to a permit he must establish
 15 to the satisfaction of the department that he has put the
 16 reserved water right to use for the authorized purpose in
 17 accordance with the authorization for 5 years. Any
 18 conversion of a portion of a reservation water right as
 19 provided in this subsection will constitute a proportional
 20 reduction of that reservation water right.

21 (9) Except as provided in 85-2-331, the priority of
 22 appropriation of a water reservation and the relative
 23 priority of the reservation to permits with a later priority
 24 of appropriation must be determined according to this
 25 subsection (9).

1 (a) A reservation under this section has a priority of
 2 appropriation dating from the filing with the department of
 3 a notice of intention to apply for a water reservation in a
 4 basin in which no other notice of intention to apply is
 5 currently pending. The notice of intention to apply must
 6 specify the basin in which the applicant is seeking a
 7 reservation.

8 (b) Upon receiving a notice of intention to apply for a
 9 water reservation, the department shall identify all
 10 potential water reservation applicants in the basin
 11 specified in the notice and notify each potential applicant
 12 of the opportunity to submit an application and to receive a
 13 reservation with the priority of appropriation as described
 14 in subsection (9)(a).

15 (c) To receive the priority of appropriation described
 16 in subsection (9)(a), the applicant shall submit a correct
 17 and complete water reservation application within 1 year
 18 after the filing of the notice of intention to apply. Upon a
 19 showing of good cause, the board may extend the time for
 20 preparing the application.

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

23 (i) the permit application was accepted by the
 24 department before the date of the board order granting the
 25 reservation; and

1 (ii) the effect of subordinating the reservation to one
 2 or more permits does not interfere substantially with the
 3 purpose of the reservation.

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

8 (10) The board shall, periodically but at least once
 9 every 10 years, review existing reservations to ensure that
 10 the objectives of the reservation are being met. Where the
 11 objectives of the reservation are not being met, the board
 12 may extend, revoke, or modify the reservation. Any
 13 undeveloped water made available as a result of a revocation
 14 or modification under this subsection is available for
 15 appropriation by others pursuant to this part.

16 (11) The board may modify an existing or future order
 17 originally adopted to reserve water for the purpose of
 18 maintaining minimum flow, level, or quality of water, so as
 19 to reallocate the reservation or portion of the reservation
 20 to an applicant who is a qualified reservant under this
 21 section. Reallocation of reserved water may be made by the
 22 board following notice and hearing wherein the board finds
 23 that all or part of the reservation is not required for its
 24 purpose and that the need for the reallocation has been
 25 shown by the applicant to outweigh the need shown by the

1 original reservant. Reallocation of reserved water may not
 2 adversely affect the priority date of the reservation, and
 3 the reservation shall retain its priority date despite
 4 reallocation to a different entity for a different use. The
 5 board may not reallocate water reserved under this section
 6 on any stream or river more frequently than once every 5
 7 years.

8 (12) A reservant may not make a change in a reservation
 9 under this section except as permitted under 85-2-402 and
 10 this subsection. If the department approves a change, the
 11 board, upon notification by the department of its approval,
 12 shall give notice and require the reservant to establish
 13 that the criteria in subsection (4) will be met under the
 14 approved change.

15 (13) A reservation may be transferred to another entity
 16 qualified to hold a reservation under subsection (1). Only
 17 the entity holding the reservation may initiate a transfer.
 18 The transfer occurs upon the filing of a water right
 19 transfer certificate with the board together with an
 20 affidavit from the entity receiving the reservation
 21 establishing that the entity is a qualified reservant under
 22 subsection (1), that the entity agrees to comply with the
 23 requirements of this section and the conditions of the
 24 reservation, and that the entity can meet the objectives of
 25 the reservation as granted. If the transfer of a reservation

1 involves a change in an appropriation right, the necessary
 2 approvals must be acquired pursuant to subsection (12).

3 ~~(12)~~ (14) Nothing in this section vests the board with
 4 the authority to alter a water right that is not a
 5 reservation.

6 ~~(13)~~ (15) The department shall undertake a program to
 7 educate the public, other state agencies, and political
 8 subdivisions of the state as to the benefits of the
 9 reservation process and the procedures to be followed to
 10 secure the reservation of water. The department shall
 11 provide technical assistance to other state agencies and
 12 political subdivisions in applying for reservations under
 13 this section.

14 ~~(14)~~ (16) Water reserved under this section is not
 15 subject to the state water leasing program established under
 16 85-2-141."

17 NEW SECTION. Section 2. Retroactive applicability.
 18 [This act] applies retroactively, within the meaning of
 19 1-2-109, to all reservations of waters granted pursuant to
 20 85-2-316.

21 NEW SECTION. Section 3. Effective date. [This act] is
 22 effective on passage and approval.

-End-

APPROVED BY COMM. ON
NATURAL RESOURCES

SENATE BILL NO. 314

INTRODUCED BY GROSFIELD, NOBLE, SWYSGOOD, CLARK,

BENEDICT, BLAYLOCK

BY REQUEST OF THE DEPARTMENT OF NATURAL RESOURCES

AND CONSERVATION

A BILL FOR AN ACT ENTITLED: "AN ACT TO GENERALLY REVISE AND CLARIFY THE WATER RESERVATION PROCESS; ALLOWING AVAILABLE WATER FROM A REVOKED OR MODIFIED RESERVATION TO BE APPROPRIATED; REQUIRING APPROVAL BY THE BOARD OF NATURAL RESOURCES AND CONSERVATION OF CHANGES IN RESERVATIONS; ALLOWING TRANSFERS OF WATER RESERVATIONS AND ESTABLISHING CRITERIA FOR SUCH TRANSFERS; ~~ALLOWING THE CONVERSION OF A CONSERVATION DISTRICT RESERVATION TO A PERMIT~~; AMENDING SECTION 85-2-316, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND A RETROACTIVE APPLICABILITY PROVISION."

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

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

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

designates.

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

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

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

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

(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

1 department's costs of giving notice, holding the hearing,
 2 conducting investigations, and making records incurred in
 3 acting upon the application to reserve water, except the
 4 cost of salaries of the department's personnel, must be paid
 5 by the applicant. In addition, a reasonable proportion of
 6 the department's cost of preparing an environmental impact
 7 statement must be paid by the applicant unless waived by the
 8 department upon a showing of good cause by the applicant.

9 (4) (a) The board may not adopt an order reserving
 10 water unless the applicant establishes to the satisfaction
 11 of the board:

12 (i) the purpose of the reservation;

13 (ii) the need for the reservation;

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

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

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

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

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

1 of Montana.

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

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

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

11 (iii) the supply and sources of water available to the
 12 applicant in the state where the applicant intends to use
 13 the water; and

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

16 (d) When applying for a reservation to withdraw and
 17 transport water for use outside the state, the applicant
 18 shall submit to and comply with the laws of the state of
 19 Montana governing the appropriation, lease, use, and
 20 reservation of water.

21 (5) If the purpose of the reservation requires
 22 construction of a storage or diversion facility, the
 23 applicant shall establish to the satisfaction of the board
 24 that there will be progress toward completion of the
 25 facility and accomplishment of the purpose with reasonable

1 diligence in accordance with an established plan.

2 (6) The board shall limit any reservations after May 9,
3 1979, for maintenance of minimum flow, level, or quality of
4 water that it awards at any point on a stream or river to a
5 maximum of 50% of the average annual flow of record on
6 gauged streams. Ungauged streams can be allocated at the
7 discretion of the board.

8 (7) After the adoption of an order reserving waters,
9 the department may reject an application and refuse a permit
10 for the appropriation of reserved waters or may, with the
11 approval of the board, issue the permit subject to terms and
12 conditions it considers necessary for the protection of the
13 objectives of the reservation.

14 (8) (a) Any person desiring to use water reserved to a
15 conservation district for agricultural purposes shall make
16 application for the use with the district, and the district,
17 upon approval of the application, shall inform the
18 department of the approved use and issue the applicant an
19 authorization for the use. The department shall maintain
20 records of all uses of water reserved to conservation
21 districts and be responsible, when requested by the
22 districts, for rendering technical and administrative
23 assistance within the department's staffing and budgeting
24 limitations in the preparation and processing of such
25 applications for the conservation districts. The department

1 shall, within its staffing and budgeting limitations,
2 complete any feasibility study requested by the districts
3 within 12 months of the time the request was made. The board
4 shall extend the time allowed to develop a plan identifying
5 projects for utilizing a district's reservation so long as
6 the conservation district makes a good faith effort, within
7 its staffing and budget limitations, to develop a plan.

8 (b) Upon actual application of water to the proposed
9 beneficial use and completion of the authorization to use
10 reserved water, the appropriator AUTHORIZED USER shall
11 notify the conservation district. THE NOTIFICATION MUST
12 CONTAIN A CERTIFIED STATEMENT BY A PERSON WITH EXPERIENCE IN
13 THE DESIGN, CONSTRUCTION, OR OPERATION OF PROJECT WORKS FOR
14 AGRICULTURAL PURPOSES THAT THE RESERVED WATER HAS BEEN PUT
15 TO USE IN SUBSTANTIAL ACCORDANCE WITH THE TERMS AND
16 CONDITIONS OF THE AUTHORIZATION TO USE RESERVED WATER. The
17 department or the district may THEN inspect the
18 appropriation to determine if it has been completed in
19 substantial accordance with the authorization. if--an
20 appropriator--wishes--to--convert--the-conservation-district
21 reserved-water-right-to-a-permit-he-must--establish--to--the
22 satisfaction--of-the-department-that-he-has-put-the-reserved
23 water-right-to-use-for-the-authorized-purpose-in--accordance
24 with--the--authorization--for--5--years--Any-conversion-of-a
25 portion-of-a-reservation-water-right--as--provided--in--this

1 ~~subsection--will-constitute-a-proportional-reduction-of-that~~
2 ~~reservation-water-right.~~

3 (9) Except as provided in 85-2-331, the priority of
4 appropriation of a water reservation and the relative
5 priority of the reservation to permits with a later priority
6 of appropriation must be determined according to this
7 subsection (9).

8 (a) A reservation under this section has a priority of
9 appropriation dating from the filing with the department of
10 a notice of intention to apply for a water reservation in a
11 basin in which no other notice of intention to apply is
12 currently pending. The notice of intention to apply must
13 specify the basin in which the applicant is seeking a
14 reservation.

15 (b) Upon receiving a notice of intention to apply for a
16 water reservation, the department shall identify all
17 potential water reservation applicants in the basin
18 specified in the notice and notify each potential applicant
19 of the opportunity to submit an application and to receive a
20 reservation with the priority of appropriation as described
21 in subsection (9)(a).

22 (c) To receive the priority of appropriation described
23 in subsection (9)(a), the applicant shall submit a correct
24 and complete water reservation application within 1 year
25 after the filing of the notice of intention to apply. Upon a

1 showing of good cause, the board may extend the time for
2 preparing the application.

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

5 (i) the permit application was accepted by the
6 department before the date of the board order granting the
7 reservation; and

8 (ii) the effect of subordinating the reservation to one
9 or more permits does not interfere substantially with the
10 purpose of the reservation.

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

15 (10) The board shall, periodically but at least once
16 every 10 years, review existing reservations to ensure that
17 the objectives of the reservation are being met. Where the
18 objectives of the reservation are not being met, the board
19 may extend, revoke, or modify the reservation. Any
20 undeveloped water made available as a result of a revocation
21 or modification under this subsection is available for
22 appropriation by others pursuant to this part.

23 (11) The board may modify an existing or future order
24 originally adopted to reserve water for the purpose of
25 maintaining minimum flow, level, or quality of water, so as

1 to reallocate the reservation or portion of the reservation
 2 to an applicant who is a qualified reservant under this
 3 section. Reallocation of reserved water may be made by the
 4 board following notice and hearing wherein the board finds
 5 that all or part of the reservation is not required for its
 6 purpose and that the need for the reallocation has been
 7 shown by the applicant to outweigh the need shown by the
 8 original reservant. Reallocation of reserved water may not
 9 adversely affect the priority date of the reservation, and
 10 the reservation shall retain its priority date despite
 11 reallocation to a different entity for a different use. The
 12 board may not reallocate water reserved under this section
 13 on any stream or river more frequently than once every 5
 14 years.

15 (12) A reservant may not make a change in a reservation
 16 under this section except as permitted under 85-2-402 and
 17 this subsection. If the department approves a change, the
 18 board, upon notification by the department of its approval,
 19 shall give notice and require the reservant to establish
 20 that the criteria in subsection (4) will be met under the
 21 approved change.

22 (13) A reservation may be transferred to another entity
 23 qualified to hold a reservation under subsection (1). Only
 24 the entity holding the reservation may initiate a transfer.
 25 The transfer occurs upon the filing of a water right

1 transfer certificate with the board together with an
 2 affidavit from the entity receiving the reservation
 3 establishing that the entity is a qualified reservant under
 4 subsection (1), that the entity agrees to comply with the
 5 requirements of this section and the conditions of the
 6 reservation, and that the entity can meet the objectives of
 7 the reservation as granted. If the transfer of a reservation
 8 involves a change in an appropriation right, the necessary
 9 approvals must be acquired pursuant to subsection (12).

10 ~~(14)~~ Nothing in this section vests the board with
 11 the authority to alter a water right that is not a
 12 reservation.

13 ~~(15)~~ The department shall undertake a program to
 14 educate the public, other state agencies, and political
 15 subdivisions of the state as to the benefits of the
 16 reservation process and the procedures to be followed to
 17 secure the reservation of water. The department shall
 18 provide technical assistance to other state agencies and
 19 political subdivisions in applying for reservations under
 20 this section.

21 ~~(16)~~ Water reserved under this section is not
 22 subject to the state water leasing program established under
 23 85-2-141."

24 **NEW SECTION. Section 2.** Retroactive applicability.
 25 [This act] applies retroactively, within the meaning of

SB 0314/02

1 1-2-109, to all reservations of waters granted pursuant to
2 85-2-316.

3 NEW SECTION. **Section 3.** **Effective date.** [This act] is
4 effective on passage and approval.

-End-

1 SENATE BILL NO. 314

2 INTRODUCED BY GROSFIELD, NOBLE, SWYSGOOD, CLARK,

3 BENEDICT, BLAYLOCK

4 BY REQUEST OF THE DEPARTMENT OF NATURAL RESOURCES

5 AND CONSERVATION

6
7 A BILL FOR AN ACT ENTITLED: "AN ACT TO GENERALLY REVISE AND
8 CLARIFY THE WATER RESERVATION PROCESS; ALLOWING AVAILABLE
9 WATER FROM A REVOKED OR MODIFIED RESERVATION TO BE
10 APPROPRIATED; REQUIRING APPROVAL BY THE BOARD OF NATURAL
11 RESOURCES AND CONSERVATION OF CHANGES IN RESERVATIONS;
12 ALLOWING TRANSFERS OF WATER RESERVATIONS AND ESTABLISHING
13 CRITERIA FOR SUCH TRANSFERS; ~~ALLOWING THE CONVERSION OF A~~
14 ~~CONSERVATION DISTRICT RESERVATION TO A PERMIT~~; AMENDING
15 SECTION 85-2-316, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE
16 DATE AND A RETROACTIVE APPLICABILITY PROVISION."

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

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21 political subdivision or agency thereof or the United States
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23 waters for existing or future beneficial uses or to maintain
24 a minimum flow, level, or quality of water throughout the
25 year or at periods or for a length of time as the board

1 designates.

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

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

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8 confluence with Kootenay Lake in British Columbia;

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10 confluence with the Oldman River in Alberta;

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12 its confluence with Lake Sakakawea in North Dakota;

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

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

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

22 (3) Upon receiving an application, the department shall
23 proceed in accordance with 85-2-307 through 85-2-309. After
24 the hearing provided in 85-2-309, the board shall decide
25 whether to reserve the water for the applicant. The

1 department's costs of giving notice, holding the hearing,
 2 conducting investigations, and making records incurred in
 3 acting upon the application to reserve water, except the
 4 cost of salaries of the department's personnel, must be paid
 5 by the applicant. In addition, a reasonable proportion of
 6 the department's cost of preparing an environmental impact
 7 statement must be paid by the applicant unless waived by the
 8 department upon a showing of good cause by the applicant.

9 (4) (a) The board may not adopt an order reserving
 10 water unless the applicant establishes to the satisfaction
 11 of the board:

- 12 (i) the purpose of the reservation;
- 13 (ii) the need for the reservation;
- 14 (iii) the amount of water necessary for the purpose of
- 15 the reservation;
- 16 (iv) that the reservation is in the public interest.

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

- 22 (i) the proposed out-of-state use of water is not
- 23 contrary to water conservation in Montana; and
- 24 (ii) the proposed out-of-state use of water is not
- 25 otherwise detrimental to the public welfare of the citizens

1 of Montana.

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

- 6 (i) whether there are present or projected water
- 7 shortages within the state of Montana;
- 8 (ii) whether the water that is the subject of the
- 9 application could feasibly be transported to alleviate water
- 10 shortages within the state of Montana;
- 11 (iii) the supply and sources of water available to the
- 12 applicant in the state where the applicant intends to use
- 13 the water; and
- 14 (iv) the demands placed on the applicant's supply in the
- 15 state where the applicant intends to use the water.

16 (d) When applying for a reservation to withdraw and
 17 transport water for use outside the state, the applicant
 18 shall submit to and comply with the laws of the state of
 19 Montana governing the appropriation, lease, use, and
 20 reservation of water.

21 (5) If the purpose of the reservation requires
 22 construction of a storage or diversion facility, the
 23 applicant shall establish to the satisfaction of the board
 24 that there will be progress toward completion of the
 25 facility and accomplishment of the purpose with reasonable

1 diligence in accordance with an established plan.

2 (6) The board shall limit any reservations after May 9,
3 1979, for maintenance of minimum flow, level, or quality of
4 water that it awards at any point on a stream or river to a
5 maximum of 50% of the average annual flow of record on
6 gauged streams. Ungauged streams can be allocated at the
7 discretion of the board.

8 (7) After the adoption of an order reserving waters,
9 the department may reject an application and refuse a permit
10 for the appropriation of reserved waters or may, with the
11 approval of the board, issue the permit subject to terms and
12 conditions it considers necessary for the protection of the
13 objectives of the reservation.

14 (8) (a) Any person desiring to use water reserved to a
15 conservation district for agricultural purposes shall make
16 application for the use with the district, and the district,
17 upon approval of the application, shall inform the
18 department of the approved use and issue the applicant an
19 authorization for the use. The department shall maintain
20 records of all uses of water reserved to conservation
21 districts and be responsible, when requested by the
22 districts, for rendering technical and administrative
23 assistance within the department's staffing and budgeting
24 limitations in the preparation and processing of such
25 applications for the conservation districts. The department

1 shall, within its staffing and budgeting limitations,
2 complete any feasibility study requested by the districts
3 within 12 months of the time the request was made. The board
4 shall extend the time allowed to develop a plan identifying
5 projects for utilizing a district's reservation so long as
6 the conservation district makes a good faith effort, within
7 its staffing and budget limitations, to develop a plan.

8 (b) Upon actual application of water to the proposed
9 beneficial use and completion of the authorization to use
10 reserved water, the appropriator AUTHORIZED USER shall
11 notify the conservation district. THE NOTIFICATION MUST
12 CONTAIN A CERTIFIED STATEMENT BY A PERSON WITH EXPERIENCE IN
13 THE DESIGN, CONSTRUCTION, OR OPERATION OF PROJECT WORKS FOR
14 AGRICULTURAL PURPOSES THAT THE RESERVED WATER HAS BEEN PUT
15 TO USE IN SUBSTANTIAL ACCORDANCE WITH THE TERMS AND
16 CONDITIONS OF THE AUTHORIZATION TO USE RESERVED WATER. The
17 department or the district may THEN inspect the
18 appropriation to determine if it has been completed in
19 substantial accordance with the authorization. If--an
20 appropriator--wishes--to--convert--the--conservation--district
21 reserved--water--right--to--a--permit--he--must--establish--to--the
22 satisfaction--of--the--department--that--he--has--put--the--reserved
23 water--right--to--use--for--the--authorized--purpose--in--accordance
24 with--the--authorization--for--5--years--Any--conversion--of--a
25 portion--of--a--reservation--water--right--as--provided--in--this

1 ~~subsection--will constitute a proportional reduction of that~~
2 ~~reservation water right.~~

3 (9) Except as provided in 85-2-331, the priority of
4 appropriation of a water reservation and the relative
5 priority of the reservation to permits with a later priority
6 of appropriation must be determined according to this
7 subsection (9).

8 (a) A reservation under this section has a priority of
9 appropriation dating from the filing with the department of
10 a notice of intention to apply for a water reservation in a
11 basin in which no other notice of intention to apply is
12 currently pending. The notice of intention to apply must
13 specify the basin in which the applicant is seeking a
14 reservation.

15 (b) Upon receiving a notice of intention to apply for a
16 water reservation, the department shall identify all
17 potential water reservation applicants in the basin
18 specified in the notice and notify each potential applicant
19 of the opportunity to submit an application and to receive a
20 reservation with the priority of appropriation as described
21 in subsection (9)(a).

22 (c) To receive the priority of appropriation described
23 in subsection (9)(a), the applicant shall submit a correct
24 and complete water reservation application within 1 year
25 after the filing of the notice of intention to apply. Upon a

1 showing of good cause, the board may extend the time for
2 preparing the application.

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

5 (i) the permit application was accepted by the
6 department before the date of the board order granting the
7 reservation; and

8 (ii) the effect of subordinating the reservation to one
9 or more permits does not interfere substantially with the
10 purpose of the reservation.

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

15 (10) The board shall, periodically but at least once
16 every 10 years, review existing reservations to ensure that
17 the objectives of the reservation are being met. Where the
18 objectives of the reservation are not being met, the board
19 may extend, revoke, or modify the reservation. Any
20 undeveloped water made available as a result of a revocation
21 or modification under this subsection is available for
22 appropriation by others pursuant to this part.

23 (11) The board may modify an existing or future order
24 originally adopted to reserve water for the purpose of
25 maintaining minimum flow, level, or quality of water, so as

1 to reallocate the reservation or portion of the reservation
 2 to an applicant who is a qualified reservant under this
 3 section. Reallocation of reserved water may be made by the
 4 board following notice and hearing wherein the board finds
 5 that all or part of the reservation is not required for its
 6 purpose and that the need for the reallocation has been
 7 shown by the applicant to outweigh the need shown by the
 8 original reservant. Reallocation of reserved water may not
 9 adversely affect the priority date of the reservation, and
 10 the reservation shall retain its priority date despite
 11 reallocation to a different entity for a different use. The
 12 board may not reallocate water reserved under this section
 13 on any stream or river more frequently than once every 5
 14 years.

15 (12) A reservant may not make a change in a reservation
 16 under this section except as permitted under 85-2-402 and
 17 this subsection. If the department approves a change, the
 18 board, upon notification by the department of its approval,
 19 shall give notice and require the reservant to establish
 20 that the criteria in subsection (4) will be met under the
 21 approved change.

22 (13) A reservation may be transferred to another entity
 23 qualified to hold a reservation under subsection (1). Only
 24 the entity holding the reservation may initiate a transfer.
 25 The transfer occurs upon the filing of a water right

1 transfer certificate with the board together with an
 2 affidavit from the entity receiving the reservation
 3 establishing that the entity is a qualified reservant under
 4 subsection (1), that the entity agrees to comply with the
 5 requirements of this section and the conditions of the
 6 reservation, and that the entity can meet the objectives of
 7 the reservation as granted. If the transfer of a reservation
 8 involves a change in an appropriation right, the necessary
 9 approvals must be acquired pursuant to subsection (12).

10 ~~(12)~~(14) Nothing in this section vests the board with
 11 the authority to alter a water right that is not a
 12 reservation.

13 ~~(13)~~(15) The department shall undertake a program to
 14 educate the public, other state agencies, and political
 15 subdivisions of the state as to the benefits of the
 16 reservation process and the procedures to be followed to
 17 secure the reservation of water. The department shall
 18 provide technical assistance to other state agencies and
 19 political subdivisions in applying for reservations under
 20 this section.

21 ~~(14)~~(16) Water reserved under this section is not
 22 subject to the state water leasing program established under
 23 85-2-141."

24 NEW SECTION. Section 2. Retroactive applicability.
 25 [This act] applies retroactively, within the meaning of

SB 0314/02

1 1-2-109, to all reservations of waters granted pursuant to
2 85-2-316.

3 NEW SECTION. **Section 3.** Effective date. [This act] is
4 effective on passage and approval.

-End-

1 SENATE BILL NO. 314

2 INTRODUCED BY GROSFIELD, NOBLE, SWYSGOOD, CLARK,
3 BENEDICT, BLAYLOCK
4 BY REQUEST OF THE DEPARTMENT OF NATURAL RESOURCES
5 AND CONSERVATION

6
7 A BILL FOR AN ACT ENTITLED: "AN ACT TO GENERALLY REVISE AND
8 CLARIFY THE WATER RESERVATION PROCESS; ALLOWING AVAILABLE
9 WATER FROM A REVOKED OR MODIFIED RESERVATION TO BE
10 APPROPRIATED; REQUIRING APPROVAL BY THE BOARD OF NATURAL
11 RESOURCES AND CONSERVATION OF CHANGES IN RESERVATIONS;
12 ALLOWING TRANSFERS OF WATER RESERVATIONS AND ESTABLISHING
13 CRITERIA FOR SUCH TRANSFERS; ~~ALLOWING THE CONVERSION OF A~~
14 ~~CONSERVATION DISTRICT RESERVATION TO A PERMIT~~; AMENDING
15 SECTION 85-2-316, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE
16 DATE AND A RETROACTIVE APPLICABILITY PROVISION."

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

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

20 "85-2-316. Reservation of waters. (1) The state or any
21 political subdivision or agency thereof or the United States
22 or any agency thereof may apply to the board to reserve
23 waters for existing or future beneficial uses or to maintain
24 a minimum flow, level, or quality of water throughout the
25 year or at periods or for a length of time as the board

1 designates.

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

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

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

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

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

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

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

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

22 (3) Upon receiving an application, the department shall
23 proceed in accordance with 85-2-307 through 85-2-309. After
24 the hearing provided in 85-2-309, the board shall decide
25 whether to reserve the water for the applicant. The

1 department's costs of giving notice, holding the hearing,
 2 conducting investigations, and making records incurred in
 3 acting upon the application to reserve water, except the
 4 cost of salaries of the department's personnel, must be paid
 5 by the applicant. In addition, a reasonable proportion of
 6 the department's cost of preparing an environmental impact
 7 statement must be paid by the applicant unless waived by the
 8 department upon a showing of good cause by the applicant.

9 (4) (a) The board may not adopt an order reserving
 10 water unless the applicant establishes to the satisfaction
 11 of the board:

- 12 (i) the purpose of the reservation;
- 13 (ii) the need for the reservation;
- 14 (iii) the amount of water necessary for the purpose of
 15 the reservation;
- 16 (iv) that the reservation is in the public interest.

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

- 22 (i) the proposed out-of-state use of water is not
 23 contrary to water conservation in Montana; and
- 24 (ii) the proposed out-of-state use of water is not
 25 otherwise detrimental to the public welfare of the citizens

1 of Montana.

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

- 6 (i) whether there are present or projected water
 7 shortages within the state of Montana;
- 8 (ii) whether the water that is the subject of the
 9 application could feasibly be transported to alleviate water
 10 shortages within the state of Montana;
- 11 (iii) the supply and sources of water available to the
 12 applicant in the state where the applicant intends to use
 13 the water; and
- 14 (iv) the demands placed on the applicant's supply in the
 15 state where the applicant intends to use the water.

16 (d) When applying for a reservation to withdraw and
 17 transport water for use outside the state, the applicant
 18 shall submit to and comply with the laws of the state of
 19 Montana governing the appropriation, lease, use, and
 20 reservation of water.

21 (5) If the purpose of the reservation requires
 22 construction of a storage or diversion facility, the
 23 applicant shall establish to the satisfaction of the board
 24 that there will be progress toward completion of the
 25 facility and accomplishment of the purpose with reasonable

1 diligence in accordance with an established plan.

2 (6) The board shall limit any reservations after May 9,
3 1979, for maintenance of minimum flow, level, or quality of
4 water that it awards at any point on a stream or river to a
5 maximum of 50% of the average annual flow of record on
6 gauged streams. Ungauged streams can be allocated at the
7 discretion of the board.

8 (7) After the adoption of an order reserving waters,
9 the department may reject an application and refuse a permit
10 for the appropriation of reserved waters or may, with the
11 approval of the board, issue the permit subject to terms and
12 conditions it considers necessary for the protection of the
13 objectives of the reservation.

14 (8) (a) Any person desiring to use water reserved to a
15 conservation district for agricultural purposes shall make
16 application for the use with the district, and the district,
17 upon approval of the application, shall inform the
18 department of the approved use and issue the applicant an
19 authorization for the use. The department shall maintain
20 records of all uses of water reserved to conservation
21 districts and be responsible, when requested by the
22 districts, for rendering technical and administrative
23 assistance within the department's staffing and budgeting
24 limitations in the preparation and processing of such
25 applications for the conservation districts. The department

1 shall, within its staffing and budgeting limitations,
2 complete any feasibility study requested by the districts
3 within 12 months of the time the request was made. The board
4 shall extend the time allowed to develop a plan identifying
5 projects for utilizing a district's reservation so long as
6 the conservation district makes a good faith effort, within
7 its staffing and budget limitations, to develop a plan.

8 (b) Upon actual application of water to the proposed
9 beneficial use and completion of the authorization to use
10 reserved water, the appropriator AUTHORIZED USER shall
11 notify the conservation district. THE NOTIFICATION MUST
12 CONTAIN A CERTIFIED STATEMENT BY A PERSON WITH EXPERIENCE IN
13 THE DESIGN, CONSTRUCTION, OR OPERATION OF PROJECT WORKS FOR
14 AGRICULTURAL PURPOSES THAT THE RESERVED WATER HAS BEEN PUT
15 TO USE IN SUBSTANTIAL ACCORDANCE WITH THE TERMS AND
16 CONDITIONS OF THE AUTHORIZATION TO USE RESERVED WATER. The
17 department or the district may THEN inspect the
18 appropriation to determine if it has been completed in
19 substantial accordance with the authorization. IF--an
20 appropriator--wishes--to--convert--the--conservation--district
21 reserved--water--right--to--a--permit--he--must--establish--to--the
22 satisfaction--of--the--department--that--he--has--put--the--reserved
23 water--right--to--use--for--the--authorized--purpose--in--accordance
24 with--the--authorization--for--5--years--Any--conversion--of--a
25 portion--of--a--reservation--water--right--as--provided--in--this

1 ~~subsection--will constitute a proportional reduction of that~~
 2 ~~reservation water right.~~

3 (9) Except as provided in 85-2-331, the priority of
 4 appropriation of a water reservation and the relative
 5 priority of the reservation to permits with a later priority
 6 of appropriation must be determined according to this
 7 subsection (9).

8 (a) A reservation under this section has a priority of
 9 appropriation dating from the filing with the department of
 10 a notice of intention to apply for a water reservation in a
 11 basin in which no other notice of intention to apply is
 12 currently pending. The notice of intention to apply must
 13 specify the basin in which the applicant is seeking a
 14 reservation.

15 (b) Upon receiving a notice of intention to apply for a
 16 water reservation, the department shall identify all
 17 potential water reservation applicants in the basin
 18 specified in the notice and notify each potential applicant
 19 of the opportunity to submit an application and to receive a
 20 reservation with the priority of appropriation as described
 21 in subsection (9)(a).

22 (c) To receive the priority of appropriation described
 23 in subsection (9)(a), the applicant shall submit a correct
 24 and complete water reservation application within 1 year
 25 after the filing of the notice of intention to apply. Upon a

1 showing of good cause, the board may extend the time for
 2 preparing the application.

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

5 (i) the permit application was accepted by the
 6 department before the date of the board order granting the
 7 reservation; and

8 (ii) the effect of subordinating the reservation to one
 9 or more permits does not interfere substantially with the
 10 purpose of the reservation.

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

15 (10) The board shall, periodically but at least once
 16 every 10 years, review existing reservations to ensure that
 17 the objectives of the reservation are being met. Where the
 18 objectives of the reservation are not being met, the board
 19 may extend, revoke, or modify the reservation. Any
 20 undeveloped water made available as a result of a revocation
 21 or modification under this subsection is available for
 22 appropriation by others pursuant to this part.

23 (11) The board may modify an existing or future order
 24 originally adopted to reserve water for the purpose of
 25 maintaining minimum flow, level, or quality of water, so as

1 to reallocate the reservation or portion of the reservation
 2 to an applicant who is a qualified reservant under this
 3 section. Reallocation of reserved water may be made by the
 4 board following notice and hearing wherein the board finds
 5 that all or part of the reservation is not required for its
 6 purpose and that the need for the reallocation has been
 7 shown by the applicant to outweigh the need shown by the
 8 original reservant. Reallocation of reserved water may not
 9 adversely affect the priority date of the reservation, and
 10 the reservation shall retain its priority date despite
 11 reallocation to a different entity for a different use. The
 12 board may not reallocate water reserved under this section
 13 on any stream or river more frequently than once every 5
 14 years.

15 (12) A reservant may not make a change in a reservation
 16 under this section except as permitted under 85-2-402 and
 17 this subsection. If the department approves a change, the
 18 board, upon notification by the department of its approval,
 19 shall give notice and require the reservant to establish
 20 that the criteria in subsection (4) will be met under the
 21 approved change.

22 (13) A reservation may be transferred to another entity
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1 transfer certificate with the board together with an
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 4 subsection (1), that the entity agrees to comply with the
 5 requirements of this section and the conditions of the
 6 reservation, and that the entity can meet the objectives of
 7 the reservation as granted. If the transfer of a reservation
 8 involves a change in an appropriation right, the necessary
 9 approvals must be acquired pursuant to subsection (12).

10 ~~(14)~~ Nothing in this section vests the board with
 11 the authority to alter a water right that is not a
 12 reservation.

13 ~~(15)~~ The department shall undertake a program to
 14 educate the public, other state agencies, and political
 15 subdivisions of the state as to the benefits of the
 16 reservation process and the procedures to be followed to
 17 secure the reservation of water. The department shall
 18 provide technical assistance to other state agencies and
 19 political subdivisions in applying for reservations under
 20 this section.

21 ~~(16)~~ Water reserved under this section is not
 22 subject to the state water leasing program established under
 23 85-2-141."

24 NEW SECTION. Section 2. Retroactive applicability.
 25 [This act] applies retroactively, within the meaning of

1 1-2-109, to all reservations of waters granted pursuant to
2 85-2-316.

3 NEW SECTION. **Section 3.** Effective date. [This act] is
4 effective on passage and approval.

-End-