

SENATE BILL NO. 447

INTRODUCED BY YELLOWTAIL, REAM

IN THE SENATE

FEBRUARY 15, 1989	INTRODUCED AND REFERRED TO COMMITTEE ON AGRICULTURE, LIVESTOCK & IRRIGATION. FIRST READING.
FEBRUARY 16, 1989	COMMITTEE RECOMMEND BILL DO PASS. REPORT ADOPTED.
FEBRUARY 17, 1989	PRINTING REPORT.
FEBRUARY 18, 1989	SECOND READING, DO PASS.
FEBRUARY 20, 1989	ENGROSSING REPORT.
FEBRUARY 21, 1989	THIRD READING, PASSED. AYES, 49; NOES, 1. TRANSMITTED TO HOUSE.

IN THE HOUSE

FEBRUARY 21, 1989	INTRODUCED AND REFERRED TO COMMITTEE ON NATURAL RESOURCES.
FEBRUARY 28, 1989	FIRST READING.
MARCH 14, 1989	COMMITTEE RECOMMEND BILL BE CONCURRED IN. REPORT ADOPTED.
MARCH 16, 1989	SECOND READING, CONCURRED IN.
MARCH 17, 1989	THIRD READING, CONCURRED IN. AYES, 75; NOES, 22. RETURNED TO SENATE.

IN THE SENATE

MARCH 18, 1989	RECEIVED FROM HOUSE.
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SENT TO ENROLLING.

REPORTED CORRECTLY ENROLLED.

the board may subordinate a reservation only to permits that in cumulative effect and in order of priority would not exceed the established level of interference. The board should consider priority dates in deciding which reservations are to be subordinated to which permits in order to avoid confusion about the priority of right to water among permits, between permits and reservations, and among reservations. For example, a reservation with a July 1, 1985, priority date should not be subordinated to a permit with a July 1, 1988, priority date without the reservation also being subordinated to a permit with a June 30, 1987, priority date. Also, a senior water reservation should not be subordinated to a permit without all junior reservations affected also being subordinated to the permit.

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 such periods or for such 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 department's costs of giving notice, holding the hearing, conducting investigations, and making records incurred in

1 acting upon the application to reserve water, except the
2 cost of salaries of the department's personnel, ~~shall~~ must
3 be paid by the applicant. In addition, a reasonable
4 proportion of the department's cost of preparing an
5 environmental impact statement ~~shall~~ must be paid by the
6 applicant unless waived by the department upon a showing of
7 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.

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

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

(8) Any person desiring to use water reserved to a conservation district for agricultural purposes shall make application for such the use with the district, and the district, upon approval of the application, must shall inform the department of the approved use. The department shall maintain records of all uses of water reserved to conservation districts and be responsible, when requested by the districts, for rendering technical and administrative assistance within the department's staffing and budgeting limitations in the preparation and processing of such applications for the conservation districts. The department shall, within its staffing and budgeting limitations, complete any feasibility study requested by the districts

within 12 months of the time the request was made. The board shall extend the time allowed to develop a plan identifying projects for utilizing a district's reservation so long as the conservation district makes a good faith effort, within its staffing and budget limitations, to develop a plan.

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

(a) A reservation under this section shall-date has a priority of appropriation dating from the date--the--order reserving-the-water-is-adopted-by-the-board-and-shall filing with the department of a notice of intention to apply for a water reservation in a basin in which no other notice of intention to apply is currently pending. The notice of intention to apply must specify the basin in which the applicant is seeking a reservation.

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

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

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

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

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

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

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

24 (11) The board may modify an existing or future order
 25 originally adopted to reserve water for the purpose of

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

16 (12) Nothing in this section vests the board with the
 17 authority to alter a water right that is not a reservation.

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

25 (14) Water reserved under this section is not subject to

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1 the state water leasing program established under 85-2-141."

2 NEW SECTION. **Section 2.** Extension of authority. Any
3 existing authority to make rules on the subject of the
4 provisions of [this act] is extended to the provisions of
5 [this act].

6 NEW SECTION. **Section 3.** Applicability. [This act] does
7 not apply to existing water reservations or to water
8 reservation applications filed with the department of
9 natural resources and conservation before October 1, 1989.

-End-

STATE OF MONTANA - FISCAL NOTE

Form BD-15

In compliance with a written request, there is hereby submitted a Fiscal Note for SB447, as introduced.

DESCRIPTION OF PROPOSED LEGISLATION:

SB447 would establish the priority of appropriation of a water reservation as the date of filing of a notice of intention to apply for a water reservation. That date would become the priority date if a complete and correct application were filed within one year of the notice of intention to apply.

ASSUMPTIONS:

1. There would be no impact on the workload of the Department of Natural Resources and Conservation because the proposed law changes the method of establishing priority dates for water reservations, but does not change the method for processing applications.
2. There is no state fiscal impact.

FISCAL IMPACT: None



RAY SHACKLEFORD, BUDGET DIRECTOR
OFFICE OF BUDGET AND PROGRAM PLANNING

DATE 2/20/89



BILL YELLOWTAIL, PRIMARY SPONSOR

DATE 2/20/89

Fiscal Note for SB447, as introduced

SB 447

APPROVED BY COMMITTEE
ON AGRICULTURE LIVESTOCK
& IRRIGATION

1 *Senate* BILL NO. *447*
2 INTRODUCED BY *Yellowtail Resum*
3
4 A BILL FOR AN ACT ENTITLED: "AN ACT ESTABLISHING THE
5 PRIORITY OF APPROPRIATION OF A WATER RESERVATION AS THE DATE
6 OF FILING OF A NOTICE OF INTENTION TO APPLY FOR A WATER
7 RESERVATION IN A BASIN WHERE A NOTICE IS NOT PENDING;
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9 BASIN TO RECEIVE THE SAME PRIORITY OF APPROPRIATION IF A
10 CORRECT AND COMPLETE APPLICATION IS FILED WITHIN 1 YEAR
11 AFTER THE FILING OF THE NOTICE OF INTENTION TO APPLY;
12 ALLOWING THE BOARD OF NATURAL RESOURCES AND CONSERVATION TO
13 SUBORDINATE WATER RESERVATIONS TO WATER USE PERMITS WITH
14 PRIORITY DATES PRECEDING THE DATE OF THE BOARD ORDER
15 ESTABLISHING WATER RESERVATIONS; EXEMPTING EXISTING WATER
16 RESERVATIONS, THE ONGOING MISSOURI RIVER BASIN PROCEEDINGS,
17 AND ANY PENDING WATER RESERVATION APPLICATIONS FROM THE
18 REQUIREMENTS OF THIS ACT; AMENDING SECTION 85-2-316, MCA;
19 AND PROVIDING AN APPLICABILITY DATE."

STATEMENT OF INTENT

22 A statement of intent is required for this bill to guide
23 the board of natural resources and conservation in the
24 subordination of water reservations to junior water use
25 permits. The legislature intends that the board amend the

1 rules governing water reservations to clarify the procedure
2 by which subordination, if necessary, will be undertaken and
3 to ensure that any subordination occurs in a manner that
4 results in a clear order of priority among all permits and
5 reservations for use in the administration of water rights
6 associated with the specific water source.

7 In amending the rules, the board should make clear that
8 the matter of subordination may be considered only after a
9 final decision has been made on all applications for water
10 reservations from a specific water source. If the board
11 determines that subordination should be considered, it may
12 request that the department of natural resources and
13 conservation prepare an analysis concerning the potential
14 for subordination to interfere with the purpose of the
15 reservation and the level at which substantial interference
16 with the reservation would occur. Once the department's
17 analysis is completed, all affected reservants,
18 permitholders, and other interests are to be provided legal
19 notice and the opportunity to appear before the board to
20 present testimony and other evidence concerning
21 subordination. Any board decision on the matter of
22 subordination should be written as an order that includes
23 findings of fact and conclusions of law.

24 After determining the level at which substantial
25 interference with the purpose of a reservation would occur,

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 2 in subsection (9)(a), the applicant shall submit a correct
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2 NEW SECTION. Section 2. Extension of authority. Any
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5 [this act].

6 NEW SECTION. Section 3. Applicability. [This act] does
7 not apply to existing water reservations or to water
8 reservation applications filed with the department of
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-End-

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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.

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

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

(8) Any person desiring to use water reserved to a conservation district for agricultural purposes shall make application for such the use with the district, and the district, upon approval of the application, must shall inform the department of the approved use. The department shall maintain records of all uses of water reserved to conservation districts and be responsible, when requested by the districts, for rendering technical and administrative assistance within the department's staffing and budgeting limitations in the preparation and processing of such applications for the conservation districts. The department shall, within its staffing and budgeting limitations, complete any feasibility study requested by the districts

within 12 months of the time the request was made. The board shall extend the time allowed to develop a plan identifying projects for utilizing a district's reservation so long as the conservation district makes a good faith effort, within its staffing and budget limitations, to develop a plan.

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

(a) A reservation under this section shall date has a priority of appropriation dating from the date the order reserving the water is adopted by the board and shall filing with the department of a notice of intention to apply for a water reservation in a basin in which no other notice of intention to apply is currently pending. The notice of intention to apply must specify the basin in which the applicant is seeking a reservation.

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

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

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

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

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

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

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

(11) The board may modify an existing or future order originally adopted to reserve water for the purpose of

maintaining minimum flow, level, or quality of water, so as to reallocate such the reservation or portion thereof of the reservation to an applicant who is a qualified reservant under this section. Reallocation of reserved water may be made by the board following notice and hearing wherein the board finds that all or part of the reservation is not required for its purpose and that the need for the reallocation has been shown by the applicant to outweigh the need shown by the original reservant. Reallocation of reserved water shall may not adversely affect the priority date of the reservation, and the reservation shall retain its priority date despite reallocation to a different entity for a different use. The board may not reallocate water reserved under this section on any stream or river more frequently than once every 5 years.

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

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

(14) Water reserved under this section is not subject to

1 the state water leasing program established under 85-2-141."

2 NEW SECTION. Section 2. Extension of authority. Any
3 existing authority to make rules on the subject of the
4 provisions of [this act] is extended to the provisions of
5 [this act].

6 NEW SECTION. Section 3. Applicability. [This act] does
7 not apply to existing water reservations or to water
8 reservation applications filed with the department of
9 natural resources and conservation before October 1, 1989.

-End-

1 SENATE BILL NO. 447

2 INTRODUCED BY YELLOWTAIL, REAM

3
4 A BILL FOR AN ACT ENTITLED: "AN ACT ESTABLISHING THE
5 PRIORITY OF APPROPRIATION OF A WATER RESERVATION AS THE DATE
6 OF FILING OF A NOTICE OF INTENTION TO APPLY FOR A WATER
7 RESERVATION IN A BASIN WHERE A NOTICE IS NOT PENDING;
8 ENABLING A POTENTIAL WATER RESERVATION APPLICANT IN THE
9 BASIN TO RECEIVE THE SAME PRIORITY OF APPROPRIATION IF A
10 CORRECT AND COMPLETE APPLICATION IS FILED WITHIN 1 YEAR
11 AFTER THE FILING OF THE NOTICE OF INTENTION TO APPLY;
12 ALLOWING THE BOARD OF NATURAL RESOURCES AND CONSERVATION TO
13 SUBORDINATE WATER RESERVATIONS TO WATER USE PERMITS WITH
14 PRIORITY DATES PRECEDING THE DATE OF THE BOARD ORDER
15 ESTABLISHING WATER RESERVATIONS; EXEMPTING EXISTING WATER
16 RESERVATIONS, THE ONGOING MISSOURI RIVER BASIN PROCEEDINGS,
17 AND ANY PENDING WATER RESERVATION APPLICATIONS FROM THE
18 REQUIREMENTS OF THIS ACT; AMENDING SECTION 85-2-316, MCA;
19 AND PROVIDING AN APPLICABILITY DATE."

21 STATEMENT OF INTENT

22 A statement of intent is required for this bill to
23 guide the board of natural resources and conservation in the
24 subordination of water reservations to junior water use
25 permits. The legislature intends that the board amend the

1 rules governing water reservations to clarify the procedure
2 by which subordination, if necessary, will be undertaken and
3 to ensure that any subordination occurs in a manner that
4 results in a clear order of priority among all permits and
5 reservations for use in the administration of water rights
6 associated with the specific water source.

7 In amending the rules, the board should make clear that
8 the matter of subordination may be considered only after a
9 final decision has been made on all applications for water
10 reservations from a specific water source. If the board
11 determines that subordination should be considered, it may
12 request that the department of natural resources and
13 conservation prepare an analysis concerning the potential
14 for subordination to interfere with the purpose of the
15 reservation and the level at which substantial interference
16 with the reservation would occur. Once the department's
17 analysis is completed, all affected reservants,
18 permitholders, and other interests are to be provided legal
19 notice and the opportunity to appear before the board to
20 present testimony and other evidence concerning
21 subordination. Any board decision on the matter of
22 subordination should be written as an order that includes
23 findings of fact and conclusions of law.

24 After determining the level at which substantial
25 interference with the purpose of a reservation would occur,

1 the board may subordinate a reservation only to permits that
 2 in cumulative effect and in order of priority would not
 3 exceed the established level of interference. The board
 4 should consider priority dates in deciding which
 5 reservations are to be subordinated to which permits in
 6 order to avoid confusion about the priority of right to
 7 water among permits, between permits and reservations, and
 8 among reservations. For example, a reservation with a July
 9 1, 1985, priority date should not be subordinated to a
 10 permit with a July 1, 1988, priority date without the
 11 reservation also being subordinated to a permit with a June
 12 30, 1987, priority date. Also, a senior water reservation
 13 should not be subordinated to a permit without all junior
 14 reservations affected also being subordinated to the permit.

15
 16 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

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

18 "85-2-316. Reservation of waters. (1) The state or any
 19 political subdivision or agency thereof or the United States
 20 or any agency thereof may apply to the board to reserve
 21 waters for existing or future beneficial uses or to maintain
 22 a minimum flow, level, or quality of water throughout the
 23 year or at such periods or for such a length of time as the
 24 board designates.

25 (2) (a) Water may be reserved for existing or future

1 beneficial uses in the basin where it is reserved, as
 2 described by the following basins:

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

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

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

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

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

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

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

20 (3) Upon receiving an application, the department
 21 shall proceed in accordance with 85-2-307 through 85-2-309.
 22 After the hearing provided in 85-2-309, the board shall
 23 decide whether to reserve the water for the applicant. The
 24 department's costs of giving notice, holding the hearing,
 25 conducting investigations, and making records incurred in

1 acting upon the application to reserve water, except the
 2 cost of salaries of the department's personnel, ~~shall~~ must
 3 be paid by the applicant. In addition, a reasonable
 4 proportion of the department's cost of preparing an
 5 environmental impact statement ~~shall~~ must be paid by the
 6 applicant unless waived by the department upon a showing of
 7 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
 17 subsection (4)(a)(iv), the board may not adopt an order
 18 reserving water for withdrawal and transport for use outside
 19 the state unless the applicant proves by clear and
 20 convincing evidence 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
- 14 the 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.

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

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

(8) Any person desiring to use water reserved to a conservation district for agricultural purposes shall make application for such the use with the district, and the district, upon approval of the application, must shall inform the department of the approved use. The department shall maintain records of all uses of water reserved to conservation districts and be responsible, when requested by the districts, for rendering technical and administrative assistance within the department's staffing and budgeting limitations in the preparation and processing of such applications for the conservation districts. The department shall, within its staffing and budgeting limitations, complete any feasibility study requested by the districts

within 12 months of the time the request was made. The board shall extend the time allowed to develop a plan identifying projects for utilizing a district's reservation so long as the conservation district makes a good faith effort, within its staffing and budget limitations, to develop a plan.

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

(a) A reservation under this section shall-date has a priority of appropriation dating from the date--the--order reserving-the-water-is-adopted-by-the-board-and-shall filing with the department of a notice of intention to apply for a water reservation in a basin in which no other notice of intention to apply is currently pending. The notice of intention to apply must specify the basin in which the applicant is seeking a reservation.

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

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

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

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

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

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

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

24 (11) The board may modify an existing or future order
 25 originally adopted to reserve water for the purpose of

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

16 (12) Nothing in this section vests the board with the
 17 authority to alter a water right that is not a reservation.

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

SB 0447/02

1 (14) Water reserved under this section is not subject
2 to the state water leasing program established under
3 85-2-141."

4 NEW SECTION. **Section 2. Extension of authority.** Any
5 existing authority to make rules on the subject of the
6 provisions of [this act] is extended to the provisions of
7 [this act].

8 NEW SECTION. **Section 3. Applicability.** [This act]
9 does not apply to existing water reservations or to water
10 reservation applications filed with the department of
11 natural resources and conservation before October 1, 1989.

-End-