

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

6 (4) (a) The department may not adopt an order reserving water unless the applicant establishes to
7 the satisfaction of the department by a preponderance of evidence:

8 (i) the purpose of the reservation;

9 (ii) the need for the reservation;

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

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

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

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

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

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

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

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

24 (iii) the supply and sources of water available to the applicant in the state where the applicant
25 intends to use the water; and

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

28 (d) When applying for a reservation to withdraw and transport water for use outside the state, the
29 applicant shall submit to and comply with the laws of the state of Montana governing the appropriation,
30 lease, use, and reservation of water.

1 (5) If the purpose of the reservation requires construction of a storage or diversion facility, the
2 applicant shall establish to the satisfaction of the department by a preponderance of evidence that there
3 will be progress toward completion of the facility and accomplishment of the purpose with reasonable
4 diligence in accordance with an established plan.

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

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

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

23 (b) Upon actual application of water to the proposed beneficial use, the authorized user shall notify
24 the conservation district. The notification must contain a certified statement by a person with experience
25 in the design, construction, or operation of project works for agricultural purposes describing how the
26 reserved water was put to use. The department or the district may then inspect the appropriation to
27 determine if it has been completed in substantial accordance with the authorization.

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

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

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

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

12 (d) The department may by order subordinate a water reservation to a permit or a certificate for
13 ground water development of 35 gallons a minute or less issued pursuant to this part if:

14 (i) the permit application or the notice of completion of ground water development was accepted
15 by the department before the date of the order granting the reservation; ~~and~~

16 (ii) the effect of subordinating the reservation to one or more permits or certificates for ground
17 water development of 35 gallons a minute or less does not interfere substantially with the purpose of the
18 reservation; and

19 (iii) in the case of a certificate for ground water development of 35 gallons a minute or less, the
20 reservant does not object to the subordination.

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

24 (10) The department shall, periodically but at least once every 10 years, review existing reservations
25 to ensure that the objectives of the reservation are being met. When the objectives of the reservation are
26 not being met, the department may extend, revoke, or modify the reservation. Any undeveloped water
27 made available as a result of a revocation or modification under this subsection is available for appropriation
28 by others pursuant to this part.

29 (11) The department may modify an existing or future order originally adopted to reserve water for
30 the purpose of maintaining minimum flow, level, or quality of water, so as to reallocate the reservation or

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

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

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

19 (14) ~~Nothing in this~~ This section vests does not vest the department with the authority to alter a
20 water right that is not a reservation.

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

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

27
28 **Section 2.** Section 85-2-331, MCA, is amended to read:

29 **"85-2-331. Reservations within Missouri River basin and Little Missouri River basin.** (1) The state
30 or an agency or political subdivision of the state or the United States or an agency of the United States that

1 desires to apply for a reservation of water in the Missouri River basin or in the Little Missouri River basin
2 shall file an application pursuant to 85-2-316 no later than:

3 (a) July 1, 1989, for reservation of water above Fort Peck dam; or

4 (b) July 1, 1991, for reservation of water below Fort Peck dam and in the Little Missouri River
5 basin.

6 (2) Subject to legislative appropriation, the department shall provide technical and financial
7 assistance to other state agencies and political subdivisions in applying for reservations within the Missouri
8 River basin and the Little Missouri River basin.

9 (3) (a) The department shall make a final determination in accordance with 85-2-316 on all
10 applications filed before July 1, 1989, for reservations of water in the Missouri River basin above Fort Peck
11 dam.

12 (b) The department shall make a final determination in accordance with 85-2-316 on all applications
13 filed before July 1, 1991, for reservations of water in the Missouri River basin below Fort Peck dam and
14 in the Little Missouri River basin.

15 (c) The department shall determine which applications or portions of applications are considered
16 to be above or below Fort Peck dam.

17 (4) Water reservations approved by the department under this section have a priority date of July
18 1, 1985, in the Missouri River basin and a priority date of July 1, 1989, in the Little Missouri River basin.
19 If the department ~~issues~~ issued a permit under Title 85, chapter 2, part 3, prior to the granting of a
20 reservation under this section, the department may subordinate the reservation to the permit if it finds that
21 the subordination does not interfere substantially with the purpose of any reservation. If the department
22 issued a certificate for ground water development of 35 gallons a minute or less under Title 85, chapter
23 2, part 3, prior to the granting of a reservation under this section, the department may subordinate the
24 reservation to the certificate if it finds that the subordination does not interfere substantially with the
25 purpose of any reservation and the reservant does not object to the subordination. The department shall
26 by order establish the relative priority of applications approved under this section."
27

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

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Senate BILL NO. 273
Nelson

INTRODUCED BY _____

A BILL FOR AN ACT ENTITLED: "AN ACT ALLOWING FOR THE SUBORDINATION OF A WATER RESERVATION TO A CERTIFICATE OF WATER RIGHT; AMENDING SECTIONS 85-2-316 AND 85-2-331, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

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 of the state or the United States or any agency of the United States may apply to the department 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 that the department 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 a correct and complete application, the department shall proceed in accordance with 85-2-307 through 85-2-309. After the hearing provided for in 85-2-309, the department shall decide

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

6 (4) (a) The department may not adopt an order reserving water unless the applicant establishes to
7 the satisfaction of the department by a preponderance of evidence:

8 (i) the purpose of the reservation;

9 (ii) the need for the reservation;

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

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

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

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

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

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

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

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

24 (iii) the supply and sources of water available to the applicant in the state where the applicant
25 intends to use the water; and

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

28 (d) When applying for a reservation to withdraw and transport water for use outside the state, the
29 applicant shall submit to and comply with the laws of the state of Montana governing the appropriation,
30 lease, use, and reservation of water.

1 (5) If the purpose of the reservation requires construction of a storage or diversion facility, the
2 applicant shall establish to the satisfaction of the department by a preponderance of evidence that there
3 will be progress toward completion of the facility and accomplishment of the purpose with reasonable
4 diligence in accordance with an established plan.

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

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

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

23 (b) Upon actual application of water to the proposed beneficial use, the authorized user shall notify
24 the conservation district. The notification must contain a certified statement by a person with experience
25 in the design, construction, or operation of project works for agricultural purposes describing how the
26 reserved water was put to use. The department or the district may then inspect the appropriation to
27 determine if it has been completed in substantial accordance with the authorization.

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

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

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

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

12 (d) The department may by order subordinate a water reservation to a permit or a certificate for
13 ground water development of 35 gallons a minute or less issued pursuant to this part if:

14 (i) the permit application or the notice of completion of ground water development was accepted
15 by the department before the date of the order granting the reservation; ~~and~~

16 (ii) the effect of subordinating the reservation to one or more permits or certificates for ground
17 water development of 35 gallons a minute or less does not interfere substantially with the purpose of the
18 reservation; and

19 (iii) in the case of a certificate for ground water development of 35 gallons a minute or less, the
20 reservant does not object to the subordination.

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

24 (10) The department shall, periodically but at least once every 10 years, review existing reservations
25 to ensure that the objectives of the reservation are being met. When the objectives of the reservation are
26 not being met, the department may extend, revoke, or modify the reservation. Any undeveloped water
27 made available as a result of a revocation or modification under this subsection is available for appropriation
28 by others pursuant to this part.

29 (11) The department may modify an existing or future order originally adopted to reserve water for
30 the purpose of maintaining minimum flow, level, or quality of water, so as to reallocate the reservation or

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

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

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

19 (14) ~~Nothing in this~~ This section vests ~~does not vest~~ the department with the authority to alter a
20 water right that is not a reservation.

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

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

27
28 **Section 2.** Section 85-2-331, MCA, is amended to read:

29 **"85-2-331. Reservations within Missouri River basin and Little Missouri River basin.** (1) The state
30 or an agency or political subdivision of the state or the United States or an agency of the United States that

1 desires to apply for a reservation of water in the Missouri River basin or in the Little Missouri River basin
2 shall file an application pursuant to 85-2-316 no later than:

3 (a) July 1, 1989, for reservation of water above Fort Peck dam; or

4 (b) July 1, 1991, for reservation of water below Fort Peck dam and in the Little Missouri River
5 basin.

6 (2) Subject to legislative appropriation, the department shall provide technical and financial
7 assistance to other state agencies and political subdivisions in applying for reservations within the Missouri
8 River basin and the Little Missouri River basin.

9 (3) (a) The department shall make a final determination in accordance with 85-2-316 on all
10 applications filed before July 1, 1989, for reservations of water in the Missouri River basin above Fort Peck
11 dam.

12 (b) The department shall make a final determination in accordance with 85-2-316 on all applications
13 filed before July 1, 1991, for reservations of water in the Missouri River basin below Fort Peck dam and
14 in the Little Missouri River basin.

15 (c) The department shall determine which applications or portions of applications are considered
16 to be above or below Fort Peck dam.

17 (4) Water reservations approved by the department under this section have a priority date of July
18 1, 1985, in the Missouri River basin and a priority date of July 1, 1989, in the Little Missouri River basin.
19 If the department ~~issues~~ issued a permit under Title 85, chapter 2, part 3, prior to the granting of a
20 reservation under this section, the department may subordinate the reservation to the permit if it finds that
21 the subordination does not interfere substantially with the purpose of any reservation. If the department
22 issued a certificate for ground water development of 35 gallons a minute or less under Title 85, chapter
23 2, part 3, prior to the granting of a reservation under this section, the department may subordinate the
24 reservation to the certificate if it finds that the subordination does not interfere substantially with the
25 purpose of any reservation and the reservant does not object to the subordination. The department shall
26 by order establish the relative priority of applications approved under this section."
27

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

29 -END-

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Senate BILL NO. 273
Nelson

INTRODUCED BY

A BILL FOR AN ACT ENTITLED: "AN ACT ALLOWING FOR THE SUBORDINATION OF A WATER RESERVATION TO A CERTIFICATE OF WATER RIGHT; AMENDING SECTIONS 85-2-316 AND 85-2-331, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

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

THERE ARE NO CHANGES IN THIS BILL AND IT WILL NOT BE REPRINTED. PLEASE REFER TO SECOND READING COPY (YELLOW) FOR COMPLETE TEXT.

SENATE BILL NO. 273

INTRODUCED BY NELSON

A BILL FOR AN ACT ENTITLED: "AN ACT ALLOWING FOR THE SUBORDINATION OF A WATER RESERVATION TO A CERTIFICATE OF WATER RIGHT; AMENDING SECTIONS 85-2-316 AND 85-2-331, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

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 of the state or the United States or any agency of the United States may apply to the department 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 that the department 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 a correct and complete application, the department shall proceed in accordance with 85-2-307 through 85-2-309. After the hearing provided for in 85-2-309, the department shall decide

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

6 (4) (a) The department may not adopt an order reserving water unless the applicant establishes to
7 the satisfaction of the department by a preponderance of evidence:

8 (i) the purpose of the reservation;

9 (ii) the need for the reservation;

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

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

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

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

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

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

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

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

24 (iii) the supply and sources of water available to the applicant in the state where the applicant
25 intends to use the water; and

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

28 (d) When applying for a reservation to withdraw and transport water for use outside the state, the
29 applicant shall submit to and comply with the laws of the state of Montana governing the appropriation,
30 lease, use, and reservation of water.

1 (5) If the purpose of the reservation requires construction of a storage or diversion facility, the
2 applicant shall establish to the satisfaction of the department by a preponderance of evidence that there
3 will be progress toward completion of the facility and accomplishment of the purpose with reasonable
4 diligence in accordance with an established plan.

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

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

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

23 (b) Upon actual application of water to the proposed beneficial use, the authorized user shall notify
24 the conservation district. The notification must contain a certified statement by a person with experience
25 in the design, construction, or operation of project works for agricultural purposes describing how the
26 reserved water was put to use. The department or the district may then inspect the appropriation to
27 determine if it has been completed in substantial accordance with the authorization.

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

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

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

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

12 (d) The department may by order subordinate a water reservation to a permit or a certificate for
13 ground water development of 35 gallons a minute or less issued pursuant to this part if:

14 (i) the permit application or the notice of completion of ground water development was accepted
15 by the department before the date of the order granting the reservation; ~~and~~

16 (ii) the effect of subordinating the reservation to one or more permits or certificates for ground
17 water development of 35 gallons a minute or less does not interfere substantially with the purpose of the
18 reservation; and

19 (iii) in the case of a certificate for ground water development of 35 gallons a minute or less, the
20 reservant does not object CONSENTS to the subordination.

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

24 (10) The department shall, periodically but at least once every 10 years, review existing reservations
25 to ensure that the objectives of the reservation are being met. When the objectives of the reservation are
26 not being met, the department may extend, revoke, or modify the reservation. Any undeveloped water
27 made available as a result of a revocation or modification under this subsection is available for appropriation
28 by others pursuant to this part.

29 (11) The department may modify an existing or future order originally adopted to reserve water for
30 the purpose of maintaining minimum flow, level, or quality of water, so as to reallocate the reservation or

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

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

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

19 (14) ~~Nothing in this~~ This section vests does not vest the department with the authority to alter a
 20 water right that is not a reservation.

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

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

27
 28 **Section 2.** Section 85-2-331, MCA, is amended to read:

29 **"85-2-331. Reservations within Missouri River basin and Little Missouri River basin.** (1) The state
 30 or an agency or political subdivision of the state or the United States or an agency of the United States that

1 desires to apply for a reservation of water in the Missouri River basin or in the Little Missouri River basin
2 shall file an application pursuant to 85-2-316 no later than:

3 (a) July 1, 1989, for reservation of water above Fort Peck dam; or

4 (b) July 1, 1991, for reservation of water below Fort Peck dam and in the Little Missouri River
5 basin.

6 (2) Subject to legislative appropriation, the department shall provide technical and financial
7 assistance to other state agencies and political subdivisions in applying for reservations within the Missouri
8 River basin and the Little Missouri River basin.

9 (3) (a) The department shall make a final determination in accordance with 85-2-316 on all
10 applications filed before July 1, 1989, for reservations of water in the Missouri River basin above Fort Peck
11 dam.

12 (b) The department shall make a final determination in accordance with 85-2-316 on all applications
13 filed before July 1, 1991, for reservations of water in the Missouri River basin below Fort Peck dam and
14 in the Little Missouri River basin.

15 (c) The department shall determine which applications or portions of applications are considered
16 to be above or below Fort Peck dam.

17 (4) Water reservations approved by the department under this section have a priority date of July
18 1, 1985, in the Missouri River basin and a priority date of July 1, 1989, in the Little Missouri River basin.
19 If the department ~~issues~~ issued a permit under Title 85, chapter 2, part 3, prior to the granting of a
20 reservation under this section, the department may subordinate the reservation to the permit if it finds that
21 the subordination does not interfere substantially with the purpose of any reservation. If the department
22 issued a certificate for ground water development of 35 gallons a minute or less under Title 85, chapter
23 2, part 3, prior to the granting of a reservation under this section, the department may subordinate the
24 reservation to the certificate if it finds that the subordination does not interfere substantially with the
25 purpose of any reservation and the reservant does not object CONSENTS to the subordination. The
26 department shall by order establish the relative priority of applications approved under this section."
27

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

29 -END-

SENATE BILL NO. 273

INTRODUCED BY NELSON

A BILL FOR AN ACT ENTITLED: "AN ACT ALLOWING FOR THE SUBORDINATION OF A WATER RESERVATION TO A CERTIFICATE OF WATER RIGHT; AMENDING SECTIONS 85-2-316 AND 85-2-331, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

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 of the state or the United States or any agency of the United States may apply to the department 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 that the department 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 a correct and complete application, the department shall proceed in accordance with 85-2-307 through 85-2-309. After the hearing provided for in 85-2-309, the department shall decide

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

6 (4) (a) The department may not adopt an order reserving water unless the applicant establishes to
7 the satisfaction of the department by a preponderance of evidence:

8 (i) the purpose of the reservation;

9 (ii) the need for the reservation;

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

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

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

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

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

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

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

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

24 (iii) the supply and sources of water available to the applicant in the state where the applicant
25 intends to use the water; and

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

28 (d) When applying for a reservation to withdraw and transport water for use outside the state, the
29 applicant shall submit to and comply with the laws of the state of Montana governing the appropriation,
30 lease, use, and reservation of water.

1 (5) If the purpose of the reservation requires construction of a storage or diversion facility, the
2 applicant shall establish to the satisfaction of the department by a preponderance of evidence that there
3 will be progress toward completion of the facility and accomplishment of the purpose with reasonable
4 diligence in accordance with an established plan.

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

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

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

23 (b) Upon actual application of water to the proposed beneficial use, the authorized user shall notify
24 the conservation district. The notification must contain a certified statement by a person with experience
25 in the design, construction, or operation of project works for agricultural purposes describing how the
26 reserved water was put to use. The department or the district may then inspect the appropriation to
27 determine if it has been completed in substantial accordance with the authorization.

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

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

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

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

12 (d) The department may by order subordinate a water reservation to a permit or a certificate for
 13 ground water development of 35 gallons a minute or less issued pursuant to this part if:

14 (i) the permit application or the notice of completion of ground water development was accepted
 15 by the department before the date of the order granting the reservation; ~~and~~

16 (ii) the effect of subordinating the reservation to one or more permits or certificates for ground
 17 water development of 35 gallons a minute or less does not interfere substantially with the purpose of the
 18 reservation; and

19 (iii) in the case of a certificate for ground water development of 35 gallons a minute or less, the
 20 reservant does not object CONSENTS to the subordination.

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

24 (10) The department shall, periodically but at least once every 10 years, review existing reservations
 25 to ensure that the objectives of the reservation are being met. When the objectives of the reservation are
 26 not being met, the department may extend, revoke, or modify the reservation. Any undeveloped water
 27 made available as a result of a revocation or modification under this subsection is available for appropriation
 28 by others pursuant to this part.

29 (11) The department may modify an existing or future order originally adopted to reserve water for
 30 the purpose of maintaining minimum flow, level, or quality of water, so as to reallocate the reservation or

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

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

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

19 (14) ~~Nothing in this~~ This section vests ~~does not vest~~ the department with the authority to alter a
20 water right that is not a reservation.

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

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

27
28 **Section 2.** Section 85-2-331, MCA, is amended to read:

29 **"85-2-331. Reservations within Missouri River basin and Little Missouri River basin.** (1) The state
30 or an agency or political subdivision of the state or the United States or an agency of the United States that

1 desires to apply for a reservation of water in the Missouri River basin or in the Little Missouri River basin
2 shall file an application pursuant to 85-2-316 no later than:

3 (a) July 1, 1989, for reservation of water above Fort Peck dam; or

4 (b) July 1, 1991, for reservation of water below Fort Peck dam and in the Little Missouri River
5 basin.

6 (2) Subject to legislative appropriation, the department shall provide technical and financial
7 assistance to other state agencies and political subdivisions in applying for reservations within the Missouri
8 River basin and the Little Missouri River basin.

9 (3) (a) The department shall make a final determination in accordance with 85-2-316 on all
10 applications filed before July 1, 1989, for reservations of water in the Missouri River basin above Fort Peck
11 dam.

12 (b) The department shall make a final determination in accordance with 85-2-316 on all applications
13 filed before July 1, 1991, for reservations of water in the Missouri River basin below Fort Peck dam and
14 in the Little Missouri River basin.

15 (c) The department shall determine which applications or portions of applications are considered
16 to be above or below Fort Peck dam.

17 (4) Water reservations approved by the department under this section have a priority date of July
18 1, 1985, in the Missouri River basin and a priority date of July 1, 1989, in the Little Missouri River basin.
19 If the department ~~issues~~ issued a permit under Title 85, chapter 2, part 3, prior to the granting of a
20 reservation under this section, the department may subordinate the reservation to the permit if it finds that
21 the subordination does not interfere substantially with the purpose of any reservation. If the department
22 issued a certificate for ground water development of 35 gallons a minute or less under Title 85, chapter
23 2, part 3, prior to the granting of a reservation under this section, the department may subordinate the
24 reservation to the certificate if it finds that the subordination does not interfere substantially with the
25 purpose of any reservation and the reservant does not object CONSENTS to the subordination. The
26 department shall by order establish the relative priority of applications approved under this section."
27

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

29

-END-