

SUBCOMMITTEE ON WATER RIGHTS  
Minutes of August 12, 1977, Meeting

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403

The meeting was called to order at 9:00 A.M. The following members were present: Senators Galt, Bergren, Boylan, Turnage, Representatives Scully, Day, Ramirez, and Roth. The following other persons were present: Robert Person, Director of Research for the Legislative Council; Willa Hall, League of Women Voters; John H. Morrison, Montana Water Development Association; Duke Gilbert; Ronald F. Waterman, Burlington Northern; Ronald J. Guse, L. Ralph Saunders, Rhett Hurless, and Laurence Siroky, Department of Natural Resources and Conservation; Jennie Lind, Western Environment Trade Association; John Delano, Montana Railroad Association; Steve Williams, Anaconda Company; Chuck Parrett, Morrison-Maierle, Inc.; John Bell, Hubert G. White and Robert E. Miller, Montana Water Development Association; and Louise R. Galt.

Professor Frank Trelease then presented a seminar on Water Law for the committee.

Trelease: Start out with the idea that water is a resource. Think of another resource. It is a resource that you can't get along without, a very precious resource -- one that we want to make sure is put to its highest and best use. I think it is a pretty essential precious resource. I couldn't live without it; I'd make a poor fish. This resource is called land.

How do we treat our land resource? We give it out as property. We square off identifiable parcels of it, put fences around it and give it to people. You do the best you can for number one with that land. All of his neighbors are working for themselves in the same way, and every piece of property owned in Montana is doing this. Everybody's self-interest is called into play and we don't ask Willie to make sacrifices for the public good or do this because it's good for the state. You add all these goods up and you come out with what you might call the optimum use. Close enough anyway.

If you think of land then as a resource which is available for use, and which we are going to give property rights to so that people can use them and can produce wealth with them, and the theory that we are going to get the best optimum use for society in this fashion. We are going to find that there are different uses for the same land, and how are we going to make sure that it is the best use. How do we know that Willie is going to make the best use of it.

We don't really try to control that too much. But we do happen to have some variations on it. We may have new and better uses. If this piece of land is near a city, let's say, maybe its best use is for a farm, maybe its best use is for subdivision, maybe its best use is for a factory site. How do we decide that? Do we have a land bureaucrat or a land commission or something to decide what is the best thing to do with the land? What we do is let people do what comes naturally. You do have a subdivider who thinks that he could make more from a piece of land than a farmer makes. But across from him is an industrialist. He is looking for a factory site. He is going to say that that is a pretty nice factory site. It is near town,

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near a railroad, etc. How do we decide then what is the best use of that land?

We get the parties around the table, and we start bidding. The farmer knows how much he can make off that as a farm. Someone offers him more money than this land is worth to him as a farm. He is going to see who offers him more, the subdivider or the industrialist. If it is higher than his mental pile of what he knows he can use the land for as a farm, he is going to grab the biggest pile and retire to Phoenix. The land will move to its highest and best use. We know it is the highest and the best use because the guy can pay for it. We know it is better than the farm use because the farmer is willing to sell out.

We provide then that when we want to make sure that the land property rights move to the highest and best use, we make them firm and fixed. That farmer wouldn't have anything to sell if he didn't have a title. He has a firm title to his land. It runs to him and his heirs forever, according to the old inscription on the deed. That doesn't mean that it is going to stay as a farm forever. We give him a firm, secure property right, but one that is also transferable. On the other hand, we may find that there are some people who could get hurt by this deal. As I said this is near the city. It may be near your beautiful residence in the city. If they put a factory next to your residence, it would depreciate your property and you would not be getting any money for it. There would be a spillover effect on me. A fellow who is not a party to this deal between a farmer and an industrialist could get hurt by this deal. To protect him, then, we pass zoning laws. We say that the best use of this land will be for residential purposes. We are going to zone this district R-1. This means that the industrialist is now pushed out of the market and we are going to prevent sales to him. We could still let the farmer sell to the real estate man if he is going to develop it into a residential area of the R-1 classification.

There are going to be situations then when we are going to control what uses can be made. Again, think land. We can control water in these same ways. When it is desirable, when other people are going to be affected by uses being made of it.

Furthermore, there are going to be some situations when we want the public in on this and what do we do with land? Suppose that we need the land for a public purpose. We need to build another school. Normally, we try to buy the land but the farmer won't sell. We get a condemnation suit and under the power of eminent domain we force a sale at what is fixed as a fair market price.

So it is with water. When we ask someone to give up water for a public purpose, normally we would pay him for it.

I say it is simple. The concept is simple. The application may be tough.

One of the biggest problems -- I was given a list of problems

last night which I left home -- is the problem of adjudication. What are you trying to do with this? You are trying to treat your water like land. You've got a piece of land. You want to sell it. You go down to the Courthouse and you find a deed, record of a deed, record of U.S. land patents and particular land descriptions from which you can identify that land to the finest possible line between it and the neighboring land. You could measure its quantity and you can, by studying the records, determine who owns the land, and exactly what is owned and exactly what the status of the title is.

Now suppose that you want to transfer water. What have you got to sell? I think in Montana there are very, very few water rights that you wouldn't be gambling on. If you are asking the buyer to gamble, he is going to discount the value of that. So that right from the very start, if you don't have good water right records, he doesn't know what you have to sell or what you've got, you don't know how valuable it is, and to the extent that it is possibly risky, then you are losing a good part of its value. You may have the best water right in the world, but if you don't know it and if you can't prove it to your buyer, you don't have very much. This is regardless of whether you are selling the water with the land or whether we are talking about one of these other transfers on which we will have more to say later.

There is one need for adjudication and that is to make sure that we can identify our property.

There are considerable other advantages. If you know what your water rights are, you avoid a lot of litigation. If you are going to go along as the situation has been described to me, where there are simply no records of water rights and people have been using water rights in a particular way, there is a change in the pattern or an argument as to whether or not they are doing it in the right way, what's your recourse? You have nothing but a lawsuit. Lawsuits are expensive. I'm in the business of training lawyers and you would think I would be in favor of litigation, but really the best laws are those that need the least enforcement. We have law courts mostly for fire-fighting purposes. Ninety percent of law is like the rest of the iceberg. It's there but you never see it.

You write a check. What's this mean. This means that the bank has some of your money. You write a letter to the bank telling it to pay somebody else. Why? Because you owe that somebody else. Why? Because the law says that if you incur a debt for something he did for you or sold you, you must pay. He could sue you but you don't wait to get sued for the grocery bill and the gas bill, etc., every month; you pay your bills because the law says you've got to. You pay your bills by writing a check. The bank pays the check because it's got your money and the law says it's got to pay your money to whomever you direct it to by writing your check. All of this law goes on as the foundation of our contracts, our regular daily transactions; it is the basis of our economic life. The easier and

7

smoother the machine works, the better off we are. Good laws are laws that operate smoothly without a lot of lawsuits. A lawsuit is a fire. Something went wrong with the system so we have to ring the bells and the sirens and go to a lot of trouble and expense to settle this situation and get things to operate smoothly again.

If you have got good water rights and good water right records, then you start to get squabbles about the neighbors, you don't rush to court, hire lawyers. You look at the records. It is clear or ought to be clear on the record who has the water right, who gets the water under these circumstances and what the answer ought to be. There are lots of advantages to an adjudication of this fashion.

I'm not telling you anything that you don't know, I guess, and I am already doing something that I didn't intend to do and that is to lecture. I can't lecture all day. I'm doing all the talking. I shouldn't be because I don't know what you want to listen to. On this subject on adjudication you've got some experience. You've had these court lawsuits. I think that most of you know that those don't work out too well. Al Stone has been here before and Al has been beating that drum for a long time. You've made an attempt at this in the 1973 act and things seem to be working slowly. Is that about right?

Rep. Scully: Could you compare for us the different methods that have been used in the other states to arrive at adjudication process?

Trelease: Start with Colorado. Colorado started way back in 1879. They divided their rivers into basins and then the basins into districts. In every district they set out to have a lawsuit which was not really a lawsuit but it was a judicial proceeding in which everybody came in and it was a lawsuit in which we were trying to get everything on record. Your claim is decided sort of against the world. The attempt was to compare every claim against every other claim to make a record of those claims and their relationship to one another.

Have we got everybody that ought to be? Have we got all the water users? Well, they evolved a procedure for publication. Again, it's like land. You know you can quiet title your land even though you can't find everybody who may have a claim to it. Some people may be dead, gone, maybe they are living outside the state. You just don't know where they are. So you serve them by publication and you tell them that if they have any claims to come in and present them. You give them the best possible notice but if they don't get notice, that is too bad. You have to sacrifice something. If you didn't sacrifice them, then everybody else would not accomplish their objective which is to get this firm title.

So the Colorado system not only gave notice to every water user that they could find and serve but they gave public notice and excluded anyone who didn't show up and file his claim.

This was really pretty good except that you were doing rivers by pieces. So they developed a scheme for putting the pieces together and I might get my right adjudicated in this section along with Bob, but then John lives in the next section of the river. When his right got adjudicated we would have a period of time in which to go up and claim that he got too early a right and we could object to that claim. So they had various methods of coordinating these things.

It wasn't too bad a system except that it was sort of a lawsuit basis, and it was done by lawyers in court. Colorado at the same time developed an administrative system for distributing water. Once the court had adjudicated these things, the court didn't enforce this decree at all as is done in Montana. They set it up as a state engineer and he had water commissioners that would go out and enforce these decrees. The water commissioner worked for a bureaucrat not a judge.

The engineer had an assistant named Elwood Mead. Wyoming was about to become a new state. Wyoming hired Elwood Mead from Colorado and he came up to Wyoming and became the territorial engineer. He said that in Colorado they were trying to find out how much water everyone had and they were trying it like a lawsuit. They say to a farmer, "How much land do you irrigate?" He says, "I'm irrigating 160 acres, a quarter section." "How much water are you using?" "Well, I'm using 10 cubic feet per second." They put another fellow on the stand and he says, "Well, you know that first guy, Jones, he says that he is irrigating that whole section but there is a hill in the middle of it, there is a swamp on the other end of it, and I don't think he's got 100 acres under irrigation there. He says that he is using 10 cubic feet per second. That ditch is all clogged and it's got a narrow spot and I don't think you could run two cubic feet per second." "Now, there is the evidence, Judge; what is your answer?" They leave this up to the judge and what can a judge do? Elwood Mead said he was an engineer and that if he wanted to know how much land is irrigated, he could go out there and measure it down to a hundredth of an acre. If he wanted to know how much water was in the ditch, he didn't need to listen to people lie about it, he could measure and tell you within two or three percent how much water in cubic feet per second is in there. He persuaded Wyoming to go into a different system which was to administratively set experts to work to measure the stream, the land, and make initial determination of how much water is being used by each person, etc. In Colorado they claimed that there was a different duty of water for different crops or for different types of land. In other words, even assuming that you had a hundred acres for everybody you might get different amounts of water for this guy because his soil is sandy whereas this fellow had a loam soil and this fellow used his land for certain kinds of crops that didn't take as much and so on. Elwood said that one cubic foot per 70 acres would be just right for most irrigated hayland in Wyoming. Everybody gets the same definite amount of water.

They set about going around the state such as Montana is doing now. They adjudicated the Little Laramie first in 1892; they finished off

in the Big Horn basin in 1922. So it took them 30 years to get all of the state adjudicated. This adjudication was supposed to happen only once. After that this was to get the rights that existed before 1890. Any rights to come into existence since then were under the permit system such as you have. When a fellow had completed the works under a permit, applied the water to a beneficial use, he asked for a certificate and you gave him a little adjudication of his right only and you just added that to the bottom of the list of priorities that had been determined in the big proceedings.

That is a much more sensible system I would say as a theoretical professor. I would guess as a generality that water is better administrated in Colorado than Wyoming. Why? Well, it is a little hard to explain. I think it is a question of money. One reason why it took Wyoming so long to get these adjudications was the money end of it. The State Engineer, the board of control -- a five-man board headed by the State Engineer. He never had quite enough money to really go out and make these surveys that he was supposed to make. He found out he had to rely on what he was told and rely on the neighbors to check up on neighbors. It took him a long time and they really didn't do the job exactly right or as well as they should have in theory. On the other hand, in Colorado, they had these judges that got to be pretty expert and knew their jobs and began to be a lot more careful about their decrees than they had been back in the early days when Mead got disgusted with their lawyer system. You are using these judges in the same way you are using the engineers. The judge knows that it is not very smart to try to figure out how many acres are being irrigated on a swearing contest in court. He said why didn't someone bring in an engineer. So the parties started to bring in their own engineers. The courts began to get the help of these private engineers. The Wyoming State Engineer, although he doesn't have anything to do with this water adjudication -- he has lots of people working for him who go out and are in charge of the water and distribute it. They are on top of it pretty well. Colorado gave their State Engineer enough money to do the job right. In the end the fact is that on paper Wyoming has the best system; in the field Colorado has the best system. There is no right answer to this as to the best way to do it.

There are lots of ways to skin this cat. If I understand the problem here, what you've got is that you are starting out the way Wyoming did, 80 odd years later, with a small staff that is going to one small valley which seems to be a trouble spot. In Wyoming it was the Little Laramie; in Montana it is the Powder. It is going to take quite a little time to finish that. Then you are going to move this team somewhere else and somewhere else and it is going to take a long time. There is one problem you've really got the problems with. In the end it doesn't make any difference whether you dribble your money off over a 50-year period or spend it in ten. Let's get five times the number of teams and get operating in all basins at once. It is going to be about the same amount of money to get the job done. Maybe all you need is a little more money and a bigger bureaucracy.

Rep. Scully: Do you think it is necessary to adjudicate the waters in Montana at this point? Some feel we should just not do anything.

Trelease: The longer you wait the harder it is to do the job. When was Montana really settled in the agricultural fashion? When were the first ranches and farms settled? There are not very many people around who can remember that, and you are going to have some pretty horrendous problems establishing priorities and dates and the facts that occurred a long time ago. The longer you wait the harder it is going to be to get them. I would imagine you are running into this in the Powder River. How do you really establish these facts. You may have to have some sort of a block priority, up until about 1922 or 1924 because about there you are going to pick up where the memory of man is still reliable.

Rep. Roth: Is the full reason for adjudication just to prove that so and so has so much water that is used beneficially?

Trelease: Yes, but proof of that is useful in many ways, in the case of sales and in the case of disputes. In California, for instance, they have had a system that on paper looks good, except they haven't used it very much. They used it in Northern California a fair amount. Northern California is a different place. If you took Interstate 80 that runs from Reno to San Francisco through Sacramento, where I now live, and look north, you wouldn't recognize yourself as being in California at all. Up north you are in a ranching, farming, woods and mountains area and there are almost no people. They have little towns like Marysville, Eureka and Redding. No big cities. Up there they have adjudicated their water rights. You get down into the central valley and you've got irrigation you can't believe and no adjudicated water rights. What do you need them for?

They've worked out a different system in California, one that I'm pretty sure you're not ready for here. They have solved their problem institutionally. In California they used to have riparian rights. No one knew what those were. There was no way to adjudicate a riparian right because it varied with the season of the year and the amount of water in the stream, etc. So now they are all organized into public districts and they are organized into districts that take from the Bureau of Reclamation. Now you have this huge area which is served by these tremendous canals. No one has his own canal. You have a sublateral on the lateral. The lateral feeds your irrigation district. The irrigation district supplies water to you and now you have a public utility situation. What kind of water right do you have in your kitchen? You don't know and you don't care because water comes when you turn the tap.

These districts, however, have to have water rights. They do have priorities between the districts. Even there those have been consolidated to a very large extent into something called California State Water Plan for one thing or the United States Bureau of Reclamation Central Valley Project which is another thing. Both of

those mean that even the districts have sort of equal priorities. Now, in California when they are having the worst draught in its recorded history, most of those central valley farmers are on even basis. They are all getting a certain percentage of water of their normal supply. They don't have any priority, riparian or sharing or anything like this. It is just a question of when there is not enough water for everybody, everybody will take a percentage.

The original appropriations and the original riparian rights have all been swallowed up. When the district was created, and you could do this here, suppose that it would be worthwhile to dig two huge canals from the Powder where it enters from Wyoming into Montana and then laterals off to every rancher. You might at that point form an irrigation district. You have to figure out the assessment of benefits received. The fellow with the earliest water right will say that he doesn't receive any of your benefits except that he is relieved of the nuisance of handling his own ditch. He would have gotten water anyway. On the other hand, here is a person who had a pretty shakey water right but now his right is firmed up. We are going to charge him quite a bit more. In California all those individual water rights got adjusted in the money they had to pay their districts. Now they are all wiped out and equal.

That might be one way you could go in some places in the state.

Sen. Boylan: We've got every one of these in Montana. We've got adjudication, irrigation districts, etc. Why do we have to change what is already written and adjudicated to take care of someone downstream who is having a problem. Why do we have to upset something that is already on paper, whether or not it is exactly. We still have manner of records in some places in the State of Montana. Other places we don't. Every time you go to take care of someone downstream you are taking someone else's adjudicated rights or say that we are over-adjudicated and over-appropriated and all these things. Unless you actually contain the water what do you do with it. It flows by and leaves. We put a moratorium on the water and now we sit here and do nothing while other states downstream are making use of this water. What's the relationship between other states and us? How do we write a law that will protect ourselves and get the show on the road?

Trelease: What is the moratorium?

Rep. Day: There was about a million acre feet shown on the Yellowstone River back in 1974. At that time, it wasn't sure what water was in the Yellowstone; they didn't know how it was going to affect the water users' rights. So the Governor asked for a moratorium on that for anything over 20 cubic feet per second or 14,000 acre feet of storage annually to be taken out of the river.

Trelease: So applications for permits are held up on this. Is that what it is?



Rep. Day: All the applications for permits over that amount, 20 cubic feet per second or 14,000 acre feet storage, were set aside for three years in order for the Department of Natural Resources to make some determination of what water was available in the river and also to help implement the 1973 Water Use Act which has a clause in there that allows for reserving water for future use. Right now they are holding hearings in Billings. We had to extend that moratorium. In order for these applications for reservation to be acted on at the present time they are holding hearings in Billings on these reservations. I would like to hear some comments from you as to what your opinion is on reserving water and what legal right do you think we will have on that; if the states downstream will still have an opportunity to develop water and override these reservations or do you think they are going to hold up over downstream use of this water the same as the water use permit or adjudicated rights?

Trelease: Those are very good questions, but I would like to hold them for a minute and stay on the adjudication. I will talk about the downstream rights.

Rep. Day: A water use permit under the 1973 Water Use Act has a time in right from the time it is applied for. These were deferred to the time that this moratorium was in effect. An application for reservation's time in right is from the time it is approved. This is the reason that these applications for water use permits need to be held in abeyance until they have had time to act on the applications for reservation to get the reservation's time in right ahead of the permit.

Trelease: Now I didn't know that. So your reservations will really be a method of sort of accomplishing the permits. Your permit dates, not the reservation dates, will probably be the effective ones.

On the other states. Montana is an upstream state. Everything you've got is in the Missouri basin except for the Yellowstone tributaries and you've got those settled by compact with Wyoming. There is a little bit of other water trickling in from Wyoming but not much. You've got some international water. The main drain for the state, of course, is the Missouri and that is all handled federally. You've got the Fort Peck Reservoir. Is that used in any sense for irrigation? It was originally a river regulation for mostly flood control and navigation but it has been supplemented by so many of the big dams down below that what is Fort Peck used for now?

Rep. Day: I think Burlington Northern has an application in for permit on Fort Peck for industrial and agricultural use. That is the only one that I am aware of.

Trelease: Is it being held at a pretty steady level? It's not even used for Federal navigation purposes I suppose.

Rep. Roth: It was really just a Federal work project when it began -- something to put people to work.

Trelease: To get on with the adjudication to the extent that you may eventually get into some sort of a squabble with the Dakotas about the amount of water that is used. When you get over there you approach the humid area, a place where normal rainfall is going to supply most of the water and what you are going to be using the water for is supplemental and draught prevention. Of course, there is a big question whether it is worthwhile doing it and they have been arguing that in Congress and with the President for a long time.

I would hazard a guess that the downstream claims, because of the tremendous amount of storage and everything that they have, are not likely to be too heavy. I would say on the other hand that there are plenty of reasons why it seems to me that there are advantages in knowing what your Montana rights are just within Montana for Montana's purposes. You may not see the necessity of it. I can see that down by Glendive the water gets pretty skinny now and then and we begin to wonder. When are you two guys going to start arguing in the courtroom? There could be some tremendous lawsuits. The problem with these lawsuits in Montana is that they might settle the rights between you and Willie but what about all the rest of us up and down the stream. You get us all into court and you still might forget somebody. That somebody could come into court later. That is what Al Stone has done. He has shown how even on one little creek down near Deer Lodge they have fought for almost 100 years now. They have had 18 or 19 lawsuits, 8 or 9 trips to the Supreme Court and you still don't know for sure. You start getting into that kind of business on a stream the size of the Yellowstone, and you have got real problems.

I think I have given most of the advantages of adjudication. I think everybody ought to know what his rights are; you ought to avoid litigation; and you ought to have a basis for transfers and shifts in use.

Rep. Scully: What is to prohibit (back to Paul's question, assuming that you take the position that adjudication isn't necessary because we are all doing real well, and then also throw in the facts that the majority of the State of Montana does not have records of more than the majority of the water users in any one area) another state in our five-state region or a municipality in another state from buying someone's water right or coming in and asserting the water right?

Trelease: I would say that there is nothing. Something like an energy company or someone acting for an energy company could come in now and make a very large claim and figure that they have got enough lead time to start a lawsuit against everybody, and maybe prove up. This could be a tremendous expense. I think you might be awfully close to it.

The question of expense and who bears the expense. Is this something that ought to be borne by the water user or is it something that the

State ought to provide or should it be shared? I think that most of your problems are money and let's talk about different ways it could be done.

I understand -- is this the bill you were speaking of this morning -- that in this bill you would ask or tell the water user to supply some engineering data. What's happening on the Powder now is that your administrative agency is now providing getting this data itself, at state expense. You know how expensive that is. I would say that this sort of sharing is certainly reasonable. There would be both state and a large contribution by the water user. On the other hand you could ask the water user to pay more for it. Lawyers are awfully expensive and you could get into lawsuits that cost a lot of money.

If an energy company comes in and says that they are going to build some coal gasification plants that need somewhere between 50 and 100 thousand acre feet per year and they are going to start a lawsuit to quiet title our claim to that with a 1977 priority, they could maybe get away with it, if you had that lawsuit as a method of adjudication, in which case everyone on the river would have to go to court, hire a lawyer. It would be a process that would take years and my guess is that it would cost ten times as much as we are talking about. I would also like to suggest this -- that money in Montana is money in Montana and it doesn't make a tremendous lot of difference whether it is in the individual's pocket or the State treasury. It is all going to come out in the wash someway and it is going to cost the State. It is going to be expensive. It would cost less I think if it were efficiently done by an administrative agency. Who pays the cost is for you fellows to decide.

In New Mexico, I think, substantial portions of the cost are assessed as court costs to the water users. So even if the state first spends the money, the water user must pay when he gets his certificate.

Let's go into this reservation business and the interstate problem.

The interstate law stems from some decisions of the U.S. Supreme Court. When a river flows between two states each state is going to be entitled to an equitable share of the benefits of that river. You can decide this by lawsuit. You can decide this by compact.

Most of the states in the 1940's and 50's decided that these interstate lawsuits were not very desirable things, so they settled by compact. I think that the main interstate water that comes into Montana is in the Yellowstone Basin including the Powder and all that has been solved by an interstate compact with Wyoming. There is a little bit of the Little Missouri that isn't covered. That's not important.

Most of your worries would be downstream. There is some talk about out-of-basin diversions and that these were once posed as a threat.

A Federal 10-year moratorium was mentioned. There is a section in the Colorado River Act of 1968. This was primarily an authorization bill for the Central Arizona Project. There were some other projects mentioned in it. One thought that has been in the minds of people who live along the Colorado River is that there isn't enough water in it. Is there some way of importing water into the Colorado River Basin. The general direction they always look is up north to the Columbia River. The Columbia flows about ten times what the Colorado does and nearly all of it goes into the ocean. There is very little consumptive use compared to the total amount and they use a lot of it for power. In Idaho they use a lot of consumptive use and some in western Oregon and Washington, but not so much. Not much in relation to the whole. So it has always been thought that here is 150 million acre feet per year going into the Pacific Ocean and why couldn't we bring a little over the mountains and solve all of the problems of the Colorado River Basin.

Senator Jackson has always fought those. The northwest people say that it is their river. The Bureau of Reclamation has said that it is a United States river and that perhaps it could be used anywhere in the United States. Jackson put in what is called the Jackson Amendment to this Colorado River Act and which I call the only thought control measure ever enacted by Congress. It says:

"It is provided for a period of ten years from the date of this act the secretary shall not undertake reconnaissance studies of any plan to the implantation of water into the Colorado River Basin from any other natural river drainage lying outside the states of Arizona, California, Colorado, New Mexico, and those portions of Nevada, Utah, and Wyoming which are in the natural basins of the Colorado River."

That says that the Secretary of Interior can't even think about that.

If other states would develop uses so great that they would claim future uses in Montana, then one of the best things that you can do is to establish what are the real uses in Montana, get the claims to uses settled at the earliest possible minute. I think you've got the machinery here. One is the adjudication of past rights and the other is this reservation statute which would enable you to establish valid claims. It doesn't have to be a use but it has to be a valid claim to the water.

Sen. Boylan: Do you think we should do it quickly or take our time?

Trelease: I wouldn't wait too long. Montana is already talking about various uses for the water out of those dams. Remember those dams are primarily for flood control and federal navigation control but they are built so that navigation isn't going to interfere with upstream uses. The power claims could be made as prior to new upstream claims and this is really what the Northwest is claiming. They say that the Columbia is one of the hardest working rivers.

It bounces over all of these dams and through all these power plants. It is one of the hardest working rivers in the United States. The power claims that are being established at Garrison and Oahee dams are important. Both the state and Federal governments are moving toward the consumptive uses. There is a lot of talk that the way to solve Wyoming's coal problem -- Wyoming's coal is in the driest part of the state, up in the northwest -- might be a big pipe from Oahee Dam. There is another Federal irrigation project out of Oahee Dam and back many years ago when the Missouri Basin survey commission was operating there were plans showing how much of South Dakota could receive supplemental water from Oahee and it was a tremendous amount. There is another plan that the water from Yellowtail might flow down into Montana through the Big Horn, then be taken out and pumped around the Big Horn Mountains which peter out there and then back down into Wyoming. There are various possibilities. All I can say is that although the Supreme Court says that the claims among states will be adjusted according to equitable apportionment, they do say that the equities are with the first developer. They never said that was the law, but that is the way they act.

Rep. Scully: A record of the development and use of water would definitely assist Montana citizens in that determination?

Trelease: That is correct. There is another facet to this adjudication and that is that the Federal Government would not make a plan for taking water out of Montana without considering the effects on Montana water users. How many water users are there? What would the effect be? How expensive would it be to pay them off or buy them out? If that were too expensive, that would reflect in the cost benefit analysis and it could be a discouraging factor. Again, the adjudication would help out in that.

That is about as much as I can say about the interstate situation. In summary, for the Federal Government to take into account Montana water rights, for other states to respect Montana water uses, for establishing negotiations of compacts -- all of those are fairly good interstate reasons for adjudicating and knowing what Montana water rights are.

I'm not saying that there is an emergency, but the longer you wait the more chance there is that these other things could be done to Montana's detriment.

Sen. Boylan: Do any states have priority rights of domestic, agriculture, recreation?

Trelease: Very few. Let's hold that up.

Rep. Day: Do you have any knowledge of any portion of a compact that agrees to like the various states and approved by Congress being set aside by the court? The Yellowstone River Compact is challenged in Federal court now -- one section on interbasin transfer.

Trelease: No. I sort of hope that goes because that is a funny one. I never did figure out exactly why this is. We used to have a State Engineer in Wyoming named Clark Bishop. Clark got irked at some sort of interbasin transfer and he put that clause into that compact with the hope that it would lead Wyoming internal law. He couldn't get the legislature to pass a law like that so he tried to pass it by compact. If Wyoming were to use its share of the Powder for agriculture in the basin there is no objection. If they took it over into the coal fields, I have never figured out how there is any real objection to Montana. But it is in there. I don't know how that is going to come out.

Rep. Day: Under the Yellowstone River Compact Montana and Wyoming have divided up the water. North Dakota was just a signer of the compact and there was no provision for their taking any set amount of water. Now a company in North Dakota wants to divert the water in Montana and transfer it into North Dakota.

Trelease: That is sort of a hole in the compact. That is like almost any situation where parties get into a dispute over a contract. They say that they have to interpret the contract, find out what they intended. This means that they never intended anything at all. They never even thought about the problem and we've got to figure out some way to solve it. I can't guess as to how that is going to come out.

Rep. Ramirez: If the issue is the equitable distribution of water between two states and at least so far that has been decided on actual use, then when we talk about reservations are we really gaining anything if we try to reserve water for future consumptive uses. If it is still future use and we are not going to be using it for some years, is that really going to protect us from some claims by another state? My second question is that when we reserve this water for an instream use aren't we just guaranteeing the downstream state the right to get in there first and start using that and acquiring a prior right?

Trelease: The Supreme Court, faced with not very many cases, has always pretty much respected existing uses and given them a sort of a preference. They haven't talked that way but that is what they have actually done. On the other hand, one of the major reasons for compacts is to avoid the rule of priority and this is what is done, for instance, on the Yellowstone. Wyoming has a claim of 42 percent or something like that of the Powder. Let's say that Wyoming is now using only 20 percent. Suppose that north of the state line Montana starts using 70 percent. Wyoming then uses up to its complete 42 percent. That is going to cut into your 70 percent, right? You wouldn't have any complaint there because the compact has actually served to insulate Wyoming against the prior claim, against the rule of priority. So a compact is one way then of avoiding the rule of priority. Could one state do it unilaterally? I was telling Mr. Scully that we don't have anything like this reservation law in Wyoming but we do something like this. We have an application for a permit, and we tell the State Engineer

not to grant us that permit. Just file it. We will put a temporary filing number on it. Until it is granted, we can't proceed with the work. I don't want to proceed with the work. If it ever is granted, the statute says the priority will relate back to the date when I applied. We've got some temporary filings that are almost 40 years old now. The Bureau of Reclamation back in the 1930's actually filed on some reservoir sites for possible projects and this permit has never been granted. If they were granted, theoretically they would get that 1937 priority. There may be a lot of users in the meantime who would have gotten later permits.

We are going to clean this up and get rid of some of this. We twist our laws to get this kind of thing. To the extent that there were some things like that in the Wyoming side of the Yellowstone and its tributaries, I think that all of those got counted as appropriated water although there were no permits. They are putative tentative water rights and I think they count in the appropriated water and not in the unappropriated water that is divided between the states. I think that this can be done by compact, can it be done unilaterally by one state? I think that if the State of Montana said that it is reserving for future use foreseeable, but uses that have to be postponed, so much water, and this is done in good faith for foreseeable real need, then if another state comes in and uses up so much that it encroached into that reservation, you have a very strong equitable claim, would you not, that the lower state was on notice of the reservation. They went ahead and built anyway; they didn't ask by your leave; they didn't try to negotiate. I think the reservation, remembering that what we are talking about is equitable apportionment, I think the reservation certainly improves the equity standing of the State of Montana.

Rep. Ramirez: That is good for consumptive use reservations, what about instream flow reservations?

Trelease: You are not going to make these reservations unless you are convinced that the best use for the Montana water is to leave it in the stream. There is more and more thinking like that. Let's assume that for some good reason we have decided that it is in the public interest to make this reservation and that this is a better use of the state's water than to take it out of the stream and make gas out of coal with it or grow corn with it. This has been decided so that is a given fact. Then you not only accomplish that purpose by leaving the water in the stream, you also guarantee the downstream state some water which they are now comfortable in feeling that they don't have to rush in and develop because Montana has already said that the best use they can make of it is to leave it here. We can therefore count on it. We are less likely, then, to make excess demands on Montana. It seems to me that you get a benefit within the state and you get a benefit downstream as well.

Rep. Ramirez: The key to it then is to try to make sure that you anticipate all of your consumptive uses. If you leave water in the

stream now, and other states rely upon that and gain rights, at a later date you decide for one reason or another that we are able to take more water out of that stream and put it to consumptive use, at that point we are not going to be able to do it in all likelihood.

Trelease: Your reservations get reviewed every ten years. If it were a perpetual reservation, it would operate the way you said but maybe I should change my answer. If I were down in the Dakotas and there was a block of water that was coming into my state from Montana because of an instream reservation, but I knew that every ten years the board was going to look at that and decide whether to cut it off or not, I might try to build up a use for that water to claim that cutting it off was in interference with my rights. I don't know. That is a pretty hazy thing.

Rep. Ramirez: I'm just trying to get some idea of what problems we might have down the way. But it is possible that it might be harder for us to change those reservations ten years from now or more because in the meantime other states are going to be possibly acquiring some rights to keep us from changing the rules.

Trelease: That is a possibility, yes.

Rep. Roth: Is this every ten years review just to deal with interstate?

Trelease: No. I'm reading you Montana statute, 89-890, the last section. This is the reservation statute:

"The board shall periodically but not less than every ten years review existing reservations to insure 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."

Rep. Roth: All reservations?

Trelease: All reservations under this statute. Only reservations are reviewed, not adjudications. Adjudicated water rights are good in perpetuity unless abandoned.

Along these lines we are getting close to something else. There has been a big flap about the United States Water Resources Council, so-called Water Resource Policy Study. In his environmental message, the President made a few statements last May 23 about Federal water projects and he made an offhand remark:

"Water is not free; it is a precious resource. As with our energy problem the cornerstones of future water policy should be wise management and conservation. Irrigation efficiency, water pricing, groundwater management, and thoughtful land use decisions will help institute lasting protection from drought and lessen the need for expensive new water projects."



On the basis of those few words the Water Resources Council has undertaken a study. The chairman of this is Andrus, the Secretary of the Interior. The fellow who is ramrodding it is really Guy Martin who came from Alaska and he is Assistant Secretary for Land and Water. In other words, he is kind of the fellow in charge of the Bureau of Reclamation and the Bureau of Land Management and all the federal water projects.

The Water Resources Council is composed of the Bureau of Reclamation, the Corps of Engineers, the Department of Agriculture and several other agencies that have some sort of peripheral interest in water. They are the big operators.

The National Water Commission was a different outfit and they made a four-year study about four years ago and they really went into it. Here they identified some problems and threw together some options. From May 23 until July 13; they didn't have a lot of time to operate. This shows in a very hastily drawn report and there are a lot of fuzzy things in it. One thing they did. ( I worked for Guy Martin last year and I know something about how his mind works. He is very much the bureaucrat; the government control man; he doesn't believe very much in property rights. He wanted to be on top of the Alaskan water and he wanted the say, the continuing say. All of these thoughts are very visible in this paper.) "There are water-related laws and management practices that may impair the recognition of environmental values." He cites several things. One is "the concept of beneficial use and diversion in water law systems frequently not evolved to include instream flow needs in certain offstream environmental uses."

Remember that one of the ultimate things in all these criticisms is maybe the Federal Government could take over water law. In your 89-890, your reservation of water, you have really taken care of that, if you use it right. You can use your Montana law to pull the teeth of a Federal recommendation that they move in. One of your reservations can be what we are talking about -- to maintain a minimum flow level throughout the year or such periods or for such length of time as the board designates. Let's face it, we are living in time when we've got many more people than we used to have, we have different kinds of demands for water than we have had in the past, and to perpetuate the past forever is a hopeless task. One of the biggest problems is that in the past who cared if we dried up a river. We had lots of rivers. No one was using them anyway. That simply isn't true anymore. You haven't got many rivers left. It used to be that if you wanted to get some free-flowing water, you had to get on the train and go to Yellowstone. What do you do now? You jump in your car and drive 90 miles. You have all of these people with all of this access and all this new leisure and wealth. We now are using our water for amenities as well as for the good old hardworking pioneer idea of growing things. If your water laws don't take into account this fact, you are going to be in trouble. You are going to be in trouble with the Federal Government, for one thing. You have the

law here. How you use it is going to be your responsibility. You have half the law here that's going to take care of it. Then you have another law and I don't quite understand how this works.

You have a law that says that certain types of state action require an environmental impact statement. You have a little state environmental protection act, haven't you? The only thing is, I don't see how it is enforced because the criteria for issuance of permits doesn't have anything in there about this. Unless you work it in through the back door somewhere.

To get into permits. When you are issuing a permit with their unappropriated waters and their source of supply, the rights of a prior appropriator will not be adversely affected. Both means of diversion are constructive or adequate. Both are of beneficial use. The proposed use will not interfere unreasonably with other planned uses or development for which a permit has been issued or for which water has been reserved. There is nothing in there that says it shall not be issued if it is contrary to the public interest. This permit business was invented by that engineer that I told you about earlier, Elwood Mead, in Wyoming. Elwood moved on to be Commissioner of Reclamation. (He was the engineer that wrote the water laws of the west. He has a pretty good monument. You have all heard of Lake Mead behind Hoover Dam. It was named for him.) Elwood was a pretty smart boy and he said the state ought to have the power to deny a permit if it is contrary to a public interest. No one knew too much what that meant. You got into some situations like this. Here was a fellow who wanted to build a dam in the Big Horn Canyon down in Wyoming and the only trouble is that it would flood out the site of the railroad bed for the Burlington Railroad which had plans to go up there. The Big Horn Basin (this was back in 1907) was isolated from the rest of the state. If you could build a railroad in there, it would improve communications and allow its settlement. This fellow's name was Boysen. He had a good idea, it was a beneficial use, he wanted to build a dam that would produce power and also use the water for irrigation down into the basin. The State Engineer said he wouldn't issue that permit. I will put a condition on it that says that you can't build a dam higher than would not interfere with the railroad.

The State of New Mexico adopted this point of view. Two men showed up almost at once. One filed an application for a project, an irrigation project, without a reservoir. Another one filed an application for a bigger project with a reservoir that would overlap. Which was the better project? The court of New Mexico said that they were not going to be bound by the fact that one of these applications was filed first and grant that one automatically. We are going to determine which one of these would be in the public interest. Which is the best project? In Utah they had something like this. A fellow wanted to make a power drop. He wanted to take the water and lead it into a pipe and let it come down and meanwhile keep it pretty much level, but then the canyon drops fast and pretty soon we have a big head of water. The only

trouble is that's a continuous flow of water and if you use the water for that continuous flow, you could get a big reclamation multi-purpose project which would help out all sorts of things. So the Utah court said that although this power project was filed first, it was for beneficial use, we are going to deny it.

You don't have that. It seems to me that if it is unappropriated and for a beneficial use, you don't have a reservation, you have to issue the permit. Suppose it will cause problems with the environment. Suppose it is not the best project. Suppose there is a better project. Suppose it will interfere with a good development. You don't have any discretion here -- you don't have any way of denying the permit. I think you left out the two most important words in the permit system and that is that you can deny in the public interest.

Sen. Boylan: If you can deny it in the public interest, then you have all these injections that anybody can stop it.

Trelease: I don't know how they can stop it anyway.

Rep. Roth: Does this diminish the personal right then?

Trelease: No. We are talking about unappropriated water. We are not going to interfere with anybody's current use. All we are going to say is that in the future when we give out these new property rights, we are going to make sure that they are the best, that they are in the public interest. It means that if we have two inconsistent applications, we will choose the best one. If we have one that will cut the heart out of a big project, maybe we will deny it. If we have one that will really muck up the environment, destroy all sorts of wonderful recreation and other things, for not very much gain, gain to very few for very little, you have no way of saying no to those people.

Rep. Ramirez: The problem I see is in making it practical. There isn't too much agreement in this state as to what is in the public interest. There is quite a divergent opinion on that -- as to what direction the state should be going. It seems to me that you would need something more than this standard of public interest. You need criteria, and it might be very difficult to agree on what those even might be.

Trelease: I wrote a water law for Alaska and I put in a regular cost-benefit formula. Cost-benefit formula doesn't help very much because you get all these intangible values in there. At least you say what should be thought about. Let me say this, that the State Engineer in Wyoming has never denied a permit on environmental grounds and ten years ago he swore he didn't have the power. Now he grudgingly admits that he probably does. It would take a big case for him to do it. Wyoming is like Montana. They have the pioneer, work hard, irrigation ethic strongly ingrained there. On the other hand, he is now recognizing that there could be something

here. You could put in the Alaska thing. The Alaska law says that the commissioner shall issue a permit if he finds that, and then it has a list like yours. The last one is the proposed appropriation is in the public interest. That is a finding that he has to make. In determining the public interest the commissioner shall consider: (1) the benefit to the applicant (that's the farmer, the irrigator, or the what not); (2) the effect of the economic activity resulting from the proposed appropriation (this is the recognition that what is in the private interest is in the public interest); (3) the effect on fish and game resources and on public recreational opportunities; (4) the effect on public health; (5) the effect of loss of alternative uses of water that might be made within a reasonable time if not precluded or hindered by the proposed appropriation (there is your Utah situation where the power drop could interfere with the multi-purpose project); (6) harm to other persons resulting from the proposed appropriation (that is sort of a catch all that means that you've got to take into account the effects that may occur on your neighbors). The intent and ability of the applicant to complete the appropriation. You could deny permit to the person who has a scheme that will likely fail.

This isn't socialism or anything. This isn't environmentalism. Remember, this is 1890 law devised quite a while ago that Wyoming has lived with and nearly all the western states have this phrase in their laws. It hasn't been used much up to now but it is a valuable thing that could be used more and more as we have less and less unappropriated water with more and more claims for it. I think it is a serious lack.

Rep. Ramirez: Were you reading from the Wyoming statute?

Trelease: No. The Wyoming statute has the word public interest in it. The Alaska statute does what you suggest -- spells these things out.

The citation for this is 46.15.080. I will leave this report with you.

What I am trying to say is this: That there are an awfully lot of people who love Montana who don't live in Montana and they come here and you welcome them and sell them rooms for the night and gasoline, etc. The tourist industry is one of your biggest. These are people of the United States, and if the Federal Government were to become afraid that Montana was going to live in the past and bar up her rivers and do nothing but allow for future irrigation, etc., the feds could come in and say that they need this. I don't think this is going to happen, but you don't know how the mind of the federal bureaucrat operates. To the extent that Montana does drag its feet and doesn't protect its own. I know that Montanans love their fishing and their mountains. To the extent you don't recognize that they are now scarce goods desired by many, many people and their values have changed. If you don't recognize those new values, you could be inviting the Federal

Government to come in and run your business for you. I'm not saying stop the world. Make sure what you are doing is best. Make sure you don't spoil everything.

I don't see any way in which, if I were head of the department, I could put a condition on this. If I thought of it first, I could try to get the department to give me a reservation of water. Suppose this were my favorite fishing hole. I could get the Isaac Walton League to try to get the department to make the reservation. But the minute that is heard of someone else could rush in there with a permit. His permit will date from his application. My reservation will date from the time it is granted and it hasn't had time to be granted yet. So there is no way you can protect that. The reservation will do the job for some cases but not all.

There are lots of ways that these are compatible. For one thing, most of the things that we are talking about are high on the head-water. Even some of the downstream things really can be protected in other ways. One of my old fishing holes was the Laramie River after it gets down on the plains. It always had fishing water in it even during the heavy irrigation season because one of the first rights was way downstream. As long as the Oasis Ditch was still in priority you had to let water run down to it, and that was the water I fished in. There was a beautiful minimum flow law just using the old irrigation priority of our system. The minimum flow in order to give water to the Oasis Ditch was my fishing hole.

The Federal Government literally calling on one power or another -- either the navigation power on a big mainstem, even the navigation power on some of the little streams now. The thing that is raising a lot problem is the so-called Federal reservation. Leaving the Indians out of this for a minute, let's talk about the Federal reserve right. What Federal reservations have you got in Montana? You've got the national parks. How much in the way of big land have you got? National monuments, Glacier Park, what else?

Until a few years ago no one thought that there were any water rights in these things. Then they extended the notion of the Indians' reserved right. When the Federal Government reserves the land, which means sets it aside for a particular purpose, withdraws it from settlement, then it also reserves enough water to accomplish the purposes of the reservation. How much is that? The answer is that we really don't know. We have had some cases that established the principle but very few that apply it. There are some cases that have applied it but haven't gotten very far. One of them is down in Colorado and they appointed a special master there, in their water courts. Remind me to come back to that water court business. They are adjudicating the Federal claims like mad. These Federal claims are Federal rights and Federal property, and if the Federal Government brings the lawsuit to have them determined and fixed, this can be brought in the Federal court. You have such a suit now in your Federal District Court.

On the other hand, the states were granted jurisdiction to determine certain Federal water rights a long time ago in what was called the McCarran Amendment, which meant that in adjudication proceedings such as we've been talking about you just bring in the Federal Government and its water rights, whether acquired by appropriation or purchase or otherwise, could be decided. The Supreme Court had said that otherwise included these Federal reserve rights. So in Colorado they have been adjudicating Federal reserved rights.

For the national forests for past uses that they are confirming, it amounts to almost nothing. In all the northwest third of Colorado total water uses for forest purposes at the moment are 12 cubic feet per second or something like that and 200 acre feet of storage. That is no water at all. We're talking about the headwaters of the Colorado River, the Bear River, Yampa, even part of the North Platte.

The future uses for forest purposes. They found that the main claims there is still a little bit of water for the campgrounds, some experimental plots, the little settlement around the ranger's cabin. The forest uses to date are minimal and the future uses are minimal with two possible exceptions. In some places, but not in Colorado, it might be possible to claim an irrigation right for the trees. They are afraid of this in the Northwest because, in the Northwest, Mr. Weyerhaeuser has the tree-growing company. Don't think of Weyerhaeuser as a tree-cutting company. Think of it as a tree-growing company. They are actually irrigating and they are growing trees a lot faster than they grow in nature. Could the forest make a claim for water for that? The answer is maybe. It is enough to scare you.

No such claim was made in Colorado although that is the place where some of these questions may be first decided. We don't know.

The second one is reserved rights for minimal or natural flows. These were not decided in Colorado. They decided to argue about them later. There is a big question mark as to the priority date for them. The first forest act was in the 1890's. It said that we were going to set aside forest reserves for timber production and watershed protection. It wasn't until 1960 that the so-called multiple use act was passed where it says one of the uses of the forest will be for recreation and protection of fish and wildlife. Was one of the purposes of the reservation back when the forests were established recreation? We know they were used for recreation but was that one of the purposes of the reservation? The courts are going to have to decide that. In Colorado they took the state position that they were not and therefore any minimum flow laws will have to be claimed as of 1960. Well, all the water was appropriated in Colorado by then anyway. It wouldn't make too much difference.

Rep. Scully: Can one assume from that for our purposes that the fact that Colorado has gone ahead and adjudicated and take that position, it would appear to me, from the outside that that's really been beneficial to them. Number one, if they do it the Federal Government is not going to do it or hasn't yet. They adjudicate this Federal right and include them in their adjudication

and establish that the Federal Government has allowed that so far and that's probably a good thing for them. The second thing is that with the quantity, not very high at this point, they may have gotten away with adjudicating their quantity without consideration of some of the other goblins that you've just mentioned.

Trelease: I think that is the reason that Colorado has jumped on it and they are very much on the ball here. They've been the leader.

Under the McCarran Amendment, the Federal Government can be served like any other party and it would get its right adjudicated like any rancher who gets his rights adjudicated. You've got the state judges in Colorado doing the adjudicating. They have a pretty good idea who they're working for, and they've got the state's interest, not the Federal interest, at heart. They're going to be a little leery about these grandiose Federal claims. On the other hand, you put this into a Federal court or you put this into the hands of the Secretary of Interior, and he is going to put in the biggest claim he can think of. I think there is a very real advantage to having these Federal water claims decided in state adjudications rather than in Federal adjudication.

Sen. Boylan: Do they have district judges or what?

Trelease: They are district judges who are called water judges.

One of the options on the Federal reserve rights part of this Water Resources Council is that we could have adoption by Congress of procedures and criteria by which Federal reserved water rights are to be quantified and a mechanism for management and enforcement. I am on 37958 of the second report.

The former head of the Land and Natural Resources Division of the Department of Justice is Walter Keechel and he put in a bill recommending it to this same Water Resources Council and they published it but didn't approve it. It is just sort of in limbo. They have a bill already for this in which we will take this away from the state and put it all in Federal court. As I understand it the suit that is currently in the court here may get transferred to your state. It's on the Powder. This suit was started by the Indians, the Federal Government for the Crow Indians.

Lawrence Siroky: The Federal Government's position is that if the state is in good faith showing progress toward their adjudication that the decisions have gone in the direction of leaving that with the state, however the state is saying that they will not handle it and that they will take it to the Federal system.

Trelease: The way it happened was this. The so-called Eagle County case in Colorado decided first that the Federal reserved rights should be decided in Federal Court. Then this Walter Keechel that I spoke of decided that he would make an end run around that case

and he would start his own lawsuit first. This got to be known as the Aken case. He sued every water user in southwestern Colorado. He was going to have all this determined in Federal courts. All that the Supreme Court said was that it was a matter of comity when you've got two kinds of courts and the problem is one that affects a lot of state interests, they will give it to the court, not necessarily the one that got it first, but sort of the best equipped to handle the problem. So far they have said that the Colorado courts seem better equipped than the Federal courts. This is all 300 miles from Denver and is very inconvenient to the litigants so we are going to give it back to the Colorado water courts.

In Montana, as I understand it, the Federal suit came first but now there may be an adjudication on this and the Federal judges are being asked to and may transfer it into the state administrative system and it will eventually end up in the Montana court instead of the Montana Federal District Court.

The State of Wyoming had to amend its statute because we didn't have any court proceeding. We had only this administrative proceeding and the McCarran Amendment didn't apply to it. We've appropriated a large amount of money for this lawsuit.

Rep. Scully: If we don't proceed in adjudication, adjudication will be done at the Federal level?

Trelease: That's true. The Department of Justice does not believe what the Supreme Court says. In this Colorado case there were some Indian reservations and the Indians claimed that they weren't included even if the other types of forest reserve rights were included. The Supreme Court said that they are Federal Government rights. They are held in trust for the Indians but still they are Federal rights and come under the McCarran Amendment.

In both Wyoming and New Mexico, the Indians are still fighting tooth and nail. They are still claiming no jurisdiction under the McCarran Amendment. They are still claiming no jurisdiction over the Indian rights. It is hard to see how they can do this on any basis except a sort of a nuisance value basis because, as I said, the Supreme Court said this. Here they are fighting every case as though it was the original proposition with nothing from the Supreme Court.

Rep. Scully: Is it possible that the reason for that is that both in New Mexico and Wyoming situations all you have is administrative process?

Trelease: We now have it in court under the declaratory judgement act, an amendment to the declaratory judgement act.

Rep. Scully: If we were to, as a committee, decide that the best thing to do would be to start an adjudication process and bring an



action to show cause or join the Federal Government, would that protect us from harrassment from the Indian question and from the decisions being made for us by the Feds in Federal Court?

Trelease: That's correct

Rep. Ramirez: Is there any reason why we can't concentrate solely on adjudication of the quantity of the Federal rights, including the Indian rights, and forget about adjudicating all of the other interests?

Trelease: This is where Wyoming is in trouble. I think they can get out of the trouble but they do have the problem. The McCarran Amendment says that the Federal Government can be joined in these adjudication suits and the thought was that they could be forced to come in like any other water user. It assumes that all other water users were there.

In the New Mexico suits, all of the water users are there as well as the Indians and the United States. In some of the Colorado suits they are supplemental proceedings and they are only taking a few of the latest claims and the Federal claims. In Idaho they have some supplemental adjudications.

Wyoming had its adjudications in the past, and they have had no procedure for new adjudications. We now have this and we are hoping that it will be treated like a supplemental adjudication although the Indians are the major claimants in it. One of the arguments that the Federal Government is making is that it isn't a general adjudication; you are going after the Indians alone. That's not really true. We have some others that are going to be adjudicated and we think it's going to be like a supplemental adjudication but this is in the process of litigation now.

Rep. Ramirez: If we want to do this, we are going to have to get into the strongest position possible to keep these proceedings in state court.

Trelease: Everybody's water rights -- Montana water users, cities, industries, Indians, forests, national parks, everything -- should be put on one record so we know who has what right against whom.

Rep. Scully: If we got down to preliminary decrees and handled everybody's water right, including the Forest Service water right, and the one big one left to be handled is the Indians' water right, would it be better to have the western states join and have the Supreme Court declare the position of Congress. It appears to me that no one has acted.

Trelease: I don't think that will work. I think you have really got to go in there and make your mistakes. I think Colorado will make them first because they are there, and Colorado has taken a very restricted pro-state viewpoint already on the Forest Service and I think they are going to take that same viewpoint toward the Indians.

In the first case, the Eagle County case, the Supreme Court said that all these Federal water rights are to be determined by the state courts. The state court can determine matters of Federal law. In a state lawsuit between two citizens of the state, their rights depend on interpretation of Federal law and the state judge determines those questions.

In Colorado they have the Southern Utes, let's say. They are going to claim so much water and the Colorado citizens are going to claim so much water. The water judge could make a decision on the Indian water rights and it could be appealed in the Colorado Supreme Court. In the Eagle County case, the Supreme Court said if the state courts do not respect Federal interests in the proper fashion, this court is available for review. You would appeal the Colorado Supreme Court case to the United States Supreme Court and they would say whether they did right or wrong. That is the kind of decision you have to make.

Rep. Scully: We are better off saying this is what you've got and if you don't like it, appeal it.

#### LUNCH BREAK

Trelease: The Supreme Court said in the first Indian water right case which happened on the Milk River, Winters against the United States, that the Indians were to be turned to agriculture and the arts of civilization. They didn't just say agriculture. Nearly all of those problems about the Indian water rights so far have been over irrigation water because this is the idea also. The Indians are claiming that anything that is usable for the water that can help them into the mainstream of modern life is a reserved purpose. They cite this language about the arts of civilization in addition to the agriculture use.

For instance, I understand that the Crows are claiming not only enough for all the irrigable acres on the reservation but also for all the other purposes. How that is going to come out I don't know. It is another great big question mark.

What's the quantity? In Arizona against California the Supreme Court rejected a claim that was made by Arizona that the Indian water rights should be measured by reasonably foreseeable needs at the time the Indian reservation was started. Most of the time the courts have said that a reserved right depends upon the intention of the government. What was the intention of the government? I think that that is a euphemism. I think that no one is really trying to figure out what was on the minds of the people who entered into the deal at the time. They are just looking at what we need today and what is foreseeably needed in the future. I think you could prove without very much doubt that an awfully lot of forests were created when it was the understanding of everybody concerned that state water law would govern the appropriation and use of water. No one thought that the forest had any reserved rights back in 1900, 1905, 1907, whenever the reservation was made. That doesn't make any difference.

You are going to reserve it for any forest use that we can think of now including maybe these minimum flow rights. In the Northwest the Indians are claiming minimum flow for fisheries, especially salmon but also for fisheries such as you have here. There is some precedent for this. The United States has been held to have a reserved right to maintain a water level in this Devil's Hole for the pup fish. The pup fish is a little worthless animal, but he is unique on this earth and there are not very many of them. They only live in this one hole. The Government has sworn that they are going to protect him. So they are going to protect the level of water in this hole against pumping groundwater from some other place that would lower the level and kill the pup fish. You can interpret that as a flow to maintain a fishing habitat in a national forest if recreation is one of those uses. Certainly in the national park. Maybe for purposes of the Indian reservation.

For instance, the Apaches in Arizona have a lake. They claim a reserved right for that lake, but the lake is used almost entirely for recreational fishing.

The other question is who can use the Indian rights where? Can they, in other words, sell or lease their water rights? My guess is probably yes; my guess is that this is a water right and if they chose to sell it to, let's say, a mining company for coal mining or coal development purposes, they would probably be within their rights. Again, this is a maybe.

There was at the time of Arizona against California, and I think in the record somewhere, the possibility those Indians on the reservation down on the Colorado River would lease both land and water to some big agribusiness corporation that would go in there and farm the land and process the produce right there. Those leases fell through and they haven't been renegotiated. They were in effect then, and it's probable that they can do that.

One other thing, if anything like this happens, there is an awfully lot of Indian land that could take a lot of acre feet per year that is already being used by off-reservation users and what is to happen? The general idea is, of course, these off-reservation users are junior; they don't have any right that's superior; they, therefore, can be cut off without any compensation. This is the Indian's viewpoint.

Remember several things. One, it's going to take large projects and lots of money to utilize most of the Indian's water -- not all but most of it. Where are the Indians going to get the money? From Congress. Who's in Congress? Senator Kennedy, but I think he might be outnumbered and I think that he had Senator Muskie very much on his side in some of his earlier pronouncements. I think he may have lost Senator Muskie now that the Indians are claiming most of Maine. They are beginning to understand that maybe we just can't turn the clock back about 200 years. That's too much. We can't do it in Maine and I don't think we can do it with Montana water. What's going to happen? My guess is that where the

Congress is going to be as fair to the Indians as possible that where you can get projects for unappropriated water, they are going to do it. If they need projects for Indians that will take appropriated water, and it is really important to the Indians -- I mean we are trying to preserve a community, a way of life or something like this -- then they may do it but then they would pay for any water they would take just as they would pay for taking the water for any other Federal project.

There are a couple of precedents for this. They are congressional precedents but I think that this is what we are talking about. One is the Indian lands settlement cases in New Mexico where the Indians, the Pueblo Indians, have had these lands and they have sold them off to white men and the white men moved in and homesteaded them, did everything. They ended up without very much land. The government gave the Indians back their land just as they might give them back their water, but they paid for the improvements, and if the white settlers had been on the land for more than the statute of limitations, they paid for the land. So here is the precedent.

Then there is another one. The Colorado River was divided up on the assumption that there were 15 million acre feet per year to divide up. So they have it half to the upper basin and half to the lower basin. Then they made an agreement with Mexico to give them  $2\frac{1}{2}$  million and we find out that if we are lucky there may be as much as  $12\frac{1}{2}$  million acre feet. We have already contracted for  $15\frac{1}{2}$ . The Mexican treaty comes first. It is an obligation of the United States to a foreign nation. They say that Congress recognizes that this is a national obligation and if we ever have to take water from U. S. citizens to give to Mexico, the United States will pay the U. S. citizens for it. There is talk among the New Mexican congressional delegation that looks very strong that they could have a very good position in Congress to have Indian projects that are recognized as national obligations that won't come out of the hide of the local people. I think a great deal of the Indian bug-a-boo is something you really have to be afraid of, but I really doubt that it's ever applied to really dry up many Montana ranches, especially if that means putting Montanans out in the street. I doubt very much that that happens.

But again, everything about the Indians is a question mark.

Rep. Roth: The Congress has failed to take responsible action, haven't they, as far as the tribal jurisdiction goes in relationship to the reservations?

Trelease: I think when this is going to come up is when the Indians get into these adjudications and they are going to get into these adjudications whether they are in the Montana courts or the Federal District Court. The court is going to say that all it can do is read Winters against the United States and Arizona against California and hear what the Indians are entitled to and they are going to give them a paper right to a huge quantity of water. Then it is going to be up to the Indians as to how they are going to

translate that dry piece of paper into water in the ditch. That is when they are going to have to go to Congress and that's when you are going to see this kind of settlement coming up. Congress, I think, isn't about to say that they are going to give all of the western water back to the Indians.

Rep. Roth: They have to decide about the quantitative measures that go to the Indians. As I understand it, both Indians in the state are guessing how much the Indians have.

Trelease: Yes, but I think that even the state's conservative guesses are still quite frightening in the sense that if they were really enforced as legal obligations and translated into water directly there would be an awfully lot of cities, non-Indian users, especially agriculture, that would suffer. What I am saying is that before this could really happen, you would in nearly all cases need a lot of capital and the place to get it would be Congress and Congress would not be about to do this without some sort of satisfactory settlement for everybody.

The Indians say that they don't want money for their water. We sold our land and ended up with nothing. On the other hand, if you say will the Indians trade water they really can't use for benefits they can use -- schools and industries and facilities -- I think that the answer is going to be yes there.

Rep. Roth: There are approximately 5,000 water users in Federal Court in Billings with the Cheyenne and Crow tribes over the problem of quantification of the Indian reserved rights.

Trelease: What I am saying is that those 5,000 people would probably be a lot better off if they were before the Montana state water department. As to how the adjudication will come out I think even the Montana department is going to have to say they have rights because the Indians are legally entitled to this but before the Indians can actually turn that piece of paper into water, there is going to be a lot of negotiating. I don't think too many people are really going to be hurt.

You are going to have some administrative action or some local court action, and there is going to be conflicting evidence. Who believes what? The witnesses say this is the truth. Somewhere in between is the truth. If you are a Federal Department of the Interior, the Bureau of Indian Affairs, you may think the truth is a little closer to here. There is substantial evidence to support either finding. That finding is going to be upheld. It seems to me that it would be a little better for Montana folks to be making those initial decisions than Federal officials.

Sen. Boylan: If the Indians can't put the water to a beneficial use, then that piece of paper doesn't mean much.

Trelease: The central Utah project started out and they knew the Indians had big claims. If those claims were enforced, the central

Utah project couldn't operate. So they entered into what they call an Indian water rights deferral contract. At first the Indians said they wouldn't enforce their rights for something like 30 years. Then when they do enforce them they would enforce them with the idea that they would get in return for nonenforcement an Indian water project and that will be developed in stages. When the last stage of the Indian water project goes into effect, then the Bureau of Reclamation said that that last stage would actually take water away from some of the water that had been put to use in the first stage, which was not by Indians. They would take responsibility for making payments on that. This was a very sensible solution. I think some of the Indians in Utah think they could have gotten a better deal if they would have held out. Now they are trying to upset it but I don't know whether it is really going to work or not. I think they will be held to it.

Rep. Ramirez: What is your opinion as to what the quantity is going to be that the courts are going to ultimately find for the Indians?

Trelease: In Arizona against California they gave them enough to irrigate all of the irrigable land on the reservation without regard to how many people are on the reservation or what the foreseeable needs were. They said the waters were reserved for the land not for particular people. That is the only thing that we've got and unless the United States Supreme Court goes back on that, that is going to be your measure.

Rep. Ramirez: There is probably quite a bit of land on the Crow Reservation that could be irrigated that isn't under irrigation. I don't think that is the quantity that people are worried about; they are worried about the quantity over and above that which might be used to develop all of the coal reserves there.

Trelease: That's the big question mark. The only hint that we have is the master's report in Arizona against California where he said he was going to measure it by irrigable acres. If it is to be used for any other purpose, it will be changed from that agricultural use to the industrial use. In other words, you have got to choose between irrigation and industry. The Crows are now asking for both. Whether they will get it, I don't know. The Supreme Court never said a word about that part of the master's report. You can argue that they never thought about it and they didn't want to decide. They looked upon this as the measure and said nothing because it was unnecessary to say it because they accepted it. I don't know which is right.

To move on to one other little pick-up on the adjudication and how it's done. One thing that I hate to tell you is that if you do all this adjudication, it is not going to last forever. Wyoming's adjudications are not in too good a shape. Colorado has found theirs in bad shape.

In Colorado the early judges didn't really know very much about what they were doing and they issued too much water. They made a lot of

mistakes. Then things change -- ditches wash out, people do different things and change things around and don't tell anybody about it, they don't use their water -- but the records don't change. For instance, in both Wyoming and Colorado you had a set of records that on paper looked fine. But if you looked at what was happening on the ground, it was different. Colorado set about to re-adjudicate all of their water rights. Colorado has a big bureaucracy already operating. They required everybody to file a new claim, make a new statement. They required all sorts of reports from their field men, the water commissioners. They required the state engineer to make up some tentative lists. Then they put these into court and they will make up some final lists. They designated some of their judges as water judges. Up to that time any district judge would have been a water judge for a water case. They selected some special ones for water judges. I am not sure that this is the most efficient way to do it but as I said this morning, you do what will work. In Colorado this particular combination of the engineering features being handled by the civil servants, the legal work by the judges, is a combination they have used for years and they have built on it and it did work. So their transition from their old decrees to their new descriptive water rights which do tell you really what is happening, has been really pretty good. Something like this was recommended in this bill. I am not arguing the merits of it; I am giving you the Colorado experience.

Rep. Roth: They had to readjudicate, though, in Colorado?

Trelease: If they had some fairly recent adjudications, those held up. They just got transferred. They had been adjudicating in Colorado since the 1880's and there were some 3,000 decrees and hundreds of thousands of water rights back in the last century, 70 years old or more. They weren't done very well in the first place and then as times changed and they changed and people did things, they got farther and farther away from the truth. Now, for instance, in Wyoming on the North Platte there is a lot of land that is supposed to be irrigated according to the records and it is not irrigated according to the fact. Some land that is not supposed to have water rights apparently has water rights. We don't know where that came from because you take the aerial photograph and you can't tell very much about who's doing what but you can tell what is irrigated. A lot of people have abandoned or changed the line of their ditches, changed their way of operation. The newer adjudications that were made in the 1920's up in the Big Horn Basin are said to be quite accurate. At that time they knew what they were doing better and they did it more according to the way that the statute said and with considerably more accuracy and considerably less reliance upon just the statements of witnesses.

Sen. Boylan: In the area of Montana where I live we have ditch and canal companies which are non-profit corporations. You have certificates from these companies. It is not actually appurtenant to a piece of land necessarily. They are issued stock from the ditch company to each land.

Trelease: Your water rights are once removed there. Your ditch companies probably have quite good records and their water rights are pretty well known, are big water rights, and are pretty well enforced. They may be flexible within the service area. That is not the problem in Wyoming. I am talking about individual water rights that had to be readjudicated.

On the question of preferences and what you use the water for. There is no doubt but what the big water user is agriculture. They take the big diversions; they are the ones that consume the most. Cities divert a lot but they put an awfully lot back in. Industry -- not really too much is consumed in industry. An awful lot is used. You get a situation in which people have used just about as much water as they can for agriculture. Here we are facing a big population growth. Your cities are growing and you've got new demands for industry. What are they going to do? Well, prior appropriation; let them take their place at the bottom of the priority list -- not if you are investing \$20 million in a coal gasification plant. No one is going to take the tail-end water right and have someone shut him off because they need it for some farm. You are not going to get that kind of investment unless those people know we are going to get the water. How can they get a good water right? Here is where I part company with brother Scully. He says that the bargaining and selling of Montana's water is anathema to him. I say water is property or ought to be, and you want to put water to its highest and best use. If you look at the per unit value that can be created by water, the wealth that is created by a certain amount of water, most agriculture is pretty far down on the list. You are growing hay and low value crops, etc. On the other hand, you put it into a slurry pipe line or into a coal gasification plant and you are creating a very high value. If it is just put on the market then industries can bid higher, the cities can bid higher because they can collect a dime from everybody in the city and have a large amount of money. The water users within the city can afford and are willing to pay for their water. Progress gets accommodated this way.

On the other hand, some things happen that you don't like to see happen. What are they? One, other people can get hurt. For the most part we avoid that by saying that nobody can transfer any water right if it adversely affects the rights of other persons. That is a little bit broader than most western water law. It says that you can't make a change if it adversely affects other persons. What it usually means is that you can't transfer the whole of your diversion outside the water basin, because when you take it out and put it on your riparian fields a great deal of it returns to the stream. Those molecules of water aren't really yours. They get used by you but then they get back in the stream and they get used by the guy downstream. If you take all of them across the hill, you have sold not only your water, but his water also. So we put a stop to that by saying that you can only transfer your consumptive use.

That has always been the law. Now you get some other questions. If you transfer this water away from this piece of land, it is no longer irrigated land. Is your dry land tax considerably less? Your county and your school district lose a little bit, don't they? They may be "other persons".



There is an Idaho case that says that this can't be taken into account. They passed a law that says that water uses can't be hurt. I think in Montana you are going to have to leave a little behind to take care of the schools and the county government and a few things like this. That could be a little string attached to a pool of the proposed change. There could be some other things. In some kinds of property law we put these strings and say that certain exchanges and transfers can be made but not if they affect people who are not part of the bargaining. We say zoning laws, water use planning, and maybe some other things. At any rate, you are going to have a change in Montana's way of life. That's true but everything changes.

Rep. Scully: How do you justify the buying, selling, or leasing that in the end is detrimental to the state or to its industry?

Trelease: What you are trying to say is that you are trying to preserve the status quo. What you are trying to do is say that everybody has an interest in your property, in what you do with your property. If other people are going to be hurt, they are going to be interested in what you do with your property. So we zone all residential areas so you can't sell it for a factory. On the other hand, if my land is vacant and I am not using it for anything and am out in the country where no one is affected, you can sell it for a factory. Isn't that land just as completely out of agriculture as if you had sold the water right off it?

Rep. Scully: It is to a certain degree. If you treat it like a resource, like coal, then we ought to be able to tax it as it is severed for use.

Trelease: As long as you don't discriminate between the in and out of state users. In the water business this happens: The city of Altus, Oklahoma, needed water and they looked 15 miles away and found a ranch with some nice groundwater. They bought it and drilled some wells and pumped the water to Altus. The only trouble was they crossed the state line because the ranch was in Texas. Texas passed a law that said that you couldn't export water from Texas. A three judge U. S. court said that Texas couldn't enforce that law. It was a restraint on interstate commerce. We don't see any difference between this and laws that say you can't export gasoline from Texas. It is contrary to the interstate commerce clause of the U. S. Constitution.

That isn't going to happen too much and maybe there is an answer. If you could show that the public interest in the conservation and use of Montana water is involved, that Federal court did leave a little bit of a leeway so that maybe you can make a pretty strong argument so you could not approve the change. If you could really show that public interest in Montana is affected. On the other hand, if all you can show is that you are trying to preserve the status quo and block progress and industrialization, I don't think it will work. I know of one lawyer in Wyoming who has said that they have a statute in which these things can be considered and they have to get

of the coal while it is coming and when it is gone, instead of coming out with nothing, they are leaving you something.

Rep. Scully: How do you square that policy with the policy that water is a public resource that's got to be put to the highest and most beneficial use as determined supposedly by the public?

Trelease: Who determines the highest and best use? I told you with land we get that farmer, that industrialist, and that real estate developer around the table and they figure the fellow who can make the most money off that land is going to get it. We are satisfied with that because the only test we have is that the highest and best use is that manufacturer. If that highest and best use means that he could hurt other people then we can zone it against him and push him away from this bargaining table and tell him he can't use the land. What will your criteria be for the highest and best use?

Rep. Scully: It seems to me that if you take the position that water is basically a privileged use item, it is forever entrusted to the public, as opposed to the attitude that the land has -- I'm not really sure that the two are synonomous in their position legally and in society. It is almost getting to the point where society wants to take the land also.

Yet, then we allow the sale and transfer.

Trelease: Are you going to let them do that without making them pay you?

Rep. Roth: They probably would pay. It still would be put, as he said . . . more benefit to a bigger number of people.

Trelease: They aren't going to run you off and put those condominiums there unless they pay you enough money. I could see a park in which you have condemnation and payment of value. I could see condemnation -- you could do the same thing with water. In Wyoming they are very careful not to let this happen but presumably we can condemn land for a park purpose in Wyoming but you can't condemn water for fishing purposes in that park.

Rep. Scully: That's what irritates me, though. We categorically say that and yet every day of our lives we sit there and zone somebody. You zone a piece of agricultural ground that is right next to the city for an "x" use which is condemnation for sure. All we are saying when we put that realtor next to the bargaining table is not necessarily that the public good is served but that the dollar value at the time is served.

Trelease: But the two are close to the same unless you can show that there are people who are not at the bargaining table who are hurt. If other things are equal, we allow the marketing economy to take over. Restrictions are needed when the people affected are not there. If you can really show that there are going to be

enough people affected in the state to hurt future generations or hurt the people that are here, then you certainly don't want all the water in the state of Montana to get sold away from the state. In the meantime for the millions of acre feet that are available in Montana to Montanans, the 15 to 25 that might be needed for steam coal plants, coal-fired steam electric plants, or gasification or slurry pipelines comes out very close to the same.

Rep. Scully: Where does the City of Los Angeles get their water?

Trelease: The City of Los Angeles gets its water from the Los Angeles River which they used up many years ago. They went over to Owens Valley and bought it up on the market. They put it in the Los Angeles aquaduct and then they have gone to the Colorado River and put in the Colorado River aquaduct.

Rep. Scully: Is there another state involved besides Colorado where water was actually sold to the City of Los Angeles for transfer on a priority basis?

Trelease: I think you must be thinking of the Owens Valley and that was all agricultural land.

The Colorado River runs between California and Arizona and California is entitled to an equitable share of that. So they are not taking another state's water.

I don't know of any really large interstate sale. Sale from one state to another.

Rep. Scully: In the Owens Valley situation then, where they have taken the agricultural water and sold it to the City of Los Angeles, what do they do for water?

Trelease: They raise cattle. They changed their use.

Rep. Scully: Regardless of the fact that I found later on that I did need the water and I had sold it, is it an irreversible decision? Not only did I destroy the capability of that piece of land in the future, it seems to me that you are damaging another valuable resource by doing that.

Trelease: You are preventing an alternative use of the water. I don't know. You have two statutes here where you are trying to repeal the law of supply and demand. I don't think the legislature has the jurisdiction. One, you say this slurry pipeline is not a beneficial use. You may be able to prevent that from happening, but if that Texas-Oklahoma case gets followed, that may be down the drain as a restraint on interstate commerce. Second, you say that sales of water or changes in use of water of 15 cubic feet per second or more to industrial uses are forbidden. You've made life a little harder for the legal department of the coal company but not much. I don't know that you've accomplished very much by that one.

Wyoming had an absolute no-change. They put a statute in that said that nobody could change the use or place of use of water without loss or priority. In other words, everybody had to go to the bottom of the line. Before that bill got through the legislature it had two hookers on it. One said "except for municipal use" because the cities knew they couldn't live with that. The other one "for transportation purposes". Why? Because in those days the Union Pacific Railroad was Wyoming's "The Company". You could smell the smoke in the halls of the Legislature. They put in their restriction. I wrote an article that showed how there got to be thirteen exceptions to that law. Every time something really came up and the pressures got heavy, the legislature made a change in the law. You can't repeal the law of supply and demand.

Rep. Scully: Are we looking at a severance tax then on water?

Trelease: If you want it. There again, if you apply it only to those who take it out or use it for out-of-state purposes, it is going to be a burden on interstate commerce and that's unconstitutional. There are a lot of economists who say that this would be a very good idea; take your idea that this is a public use, a public resource, why don't we treat it that way. Why do you give it to someone for free. Why not make them pay a big tax on the water that they use.

Rep. Scully: That's going to be the serious problem, it seems to me, by the people who don't use water. The people in the big city who look out . . .

Trelease: They've already gotten their start in because you say someone introduced a bill that says that water will go to its highest and best use -- its preference. I think this is what's meant by these preference statutes. Preference can mean a lot of different things. One kind of preference is for unappropriated water. I talked about how to sort out the best use from competing applicants for the same water. In a number of states they say this is the highest use and this is the next and this is the next. Those really don't work out. They either incorporate the economic fact or the prejudices of the moment, and in five years they are out of date, or they get in the way one way or another. The other kind of preference is let's put it to use for its highest and best use. You don't want that because someone is going to say its highest and best use is still that productivity, economic productivity, and what that means is taking it away from Montana ranchers and giving it for free to those coal companies. That you don't want.

I say make it property, let it be transferable, let there be restraints on the transfer for persons whose rights are affected. I would put some more in here. I would put a public interest restriction in here and I'd let someone argue about what the public interest is a little bit later.

Wyoming said that there had to be some sort of a cost-benefit analysis. That is not enough. You can always say that you are going to produce

more with the water in the coal business than you are in the agriculture business. I say the best thing to do would be to put these restrictions on it that no one is worse off, that you don't ruin your local economy, and you don't impoverish your counties and school districts, make them leave something behind for the taxes that will be lost, refuse this in certain cases where it would have bad side effects. This could happen. You could have a particular purchase that would have some bad side effects. You could even have some environmental effects.

I told you about the Oasis ditch that keeps my fishing hole full of water. If someone were to buy the Oasis ditch right and eliminate it, that would eliminate my fishing hole. That would be a bad environmental side effect that might be used to block that sort of thing.

What do you want to know about groundwater?

Rep. Day: Do you think there is a possibility of adjudicating groundwater if you have an exemption of metering of all wells up to 100 gallons per minute? How are you going to determine, if you are in a restricted groundwater area, and if you have no means of metering the water, who has how much water?

Trelease: That is a pretty big exemption. That is more than a fifth of a cfs. That's enough to irrigate maybe 20 acres. I would cut the exemption down. It is a lot easier than imposing meters. Meters are expensive and a nuisance but it is one way of doing it. That big an exemption bothers me because theoretically groundwater is a mysterious thing because you can't see it. You get a good groundwater hydraulologist and hydrogeologist attached to your Department of Natural Resources and give them data on the existing wells and let them have the information about the new wells that are being drilled and they will have a pretty good picture of what goes on under ground. They will be able to say if we are approaching the limit of recharge or if we are overdrawing some areas and underdrawing some others; to capture the recharge we need this many more wells in these places. You can very closely approach coming out to where you have just enough wells to capture just that amount of recharge and you have a continuing operation that will go on forever. That is very idealized. You can put a lot of complications in if you feed this into a computer program. They are doing this in New Mexico and to some extent in Colorado. The Bureau of Reclamation has a beautiful one for streams and groundwater in the South Platte area.

Metering is one way to do it.

Rep. Roth: According to the law here, it says that "if a board finds on the basis of a hearing and other information obtained by the department that the withdrawal of groundwater in such an area or subarea exceeds the safe annual yield of groundwater . . ." 89-2915. " . . . and they also may have hearings once the petition has been filed and an order has been made limiting the withdrawal the board may after notice and hearing, as herein provided in this section, modify or revoke its order."

Trelease: Does that include these exempted wells, though?

Rep. Scully: No.

Trelease: So you could go on and drill exempted wells. In a controlled groundwater area are there no exemptions?

Lawrence Siroky: A controlled groundwater area is set for administrative purposes to limit the withdrawal. It applies to all wells in the area.

Trelease: If you are in a controlled area, do you have to get a permit for your little well as well?

Lawrence Siroky: Yes.

Trelease: I'd say that is your answer. Just that you need more controlled areas. Maybe I'm wrong.

What's happening on the preference areas in California? Let me tell you about that because it just gets back to my economic theory.

California is bailing themselves out in the central valley which is a large irrigated area by groundwater. They are drilling water like mad and they haven't used it very much. They are going to take groundwater out on the theory that they aren't going to use that groundwater permanently but just in cases when they are short of supply. Even so, they are down to a 60 per cent supply and the Bureau of Reclamation has started something they call water banking. It's a kind of a complicated thing that I think could be done simpler. They are going to people who are growing these short term field crops and they grow a lot of things like alfalfa as well as these expensive things like grapes and pears, and saying that (it's a purely voluntary program) if they were to irrigate this year how much would they gross. How much would you really net. Suppose we offer you just a little bit less than that; wouldn't you just as soon take a vacation this summer and sell us your water for this summer? That means that up in Folsom Dam, which is half dry now, they don't have to release water for that man but here is a man whose short supply may not keep his pear orchard alive. He could lose an orchard or a vineyard. It takes a long time to grow these perennial crops. They say what will you offer us for a little extra share. The bureau is acting as a middleman buying from those who have low productivity and selling to those who have a big investment to protect. In this way nobody gets hurt. They are not just telling the farmer who raises alfalfa that he will have no water this year because they are protecting the farmer who has the vineyard. They tell him they will pay him for his water and then they will get their money back from the fellow who needs it more than he does. Something like this gets done in Wyoming in the Sheridan area. I was being told about these irrigation districts where you've got these districts in your shares of stock. The water gets transferred around inside the service area of the district

a little bit by its transferring those stock shares. That could happen there.

We set up some studies in Wyoming and found that on the Big Goose Creek ditch we had some storage water. A fellow with a share of stock was entitled to an acre foot of storage water. If he was growing hay he would probably not make very much, but if he sold his water to someone who didn't have that and was growing beets, this little flexibility becomes valuable.

Rep. Scully: Is that transfer subsidized by the Federal Government?

Trelease: Not in Wyoming. In California it is the Bureau of Reclamation going out and doing the buying and the selling, so it is. On the other hand, it could be done within a district or within a company with them acting sort of as a broker, trying to swap the water amongst their own customers.

Rep. Roth: How did they determine the price?

Trelease: I really don't know that. I don't know very many of the details. I've never seen any laws or regulations on it. It's just been described to me. They call it the water bank. They get some people to put water in and some taking it out.

Rep. Scully: If there are no other questions we'll thank Professor Trelease and take a 15 minute break.

Rep. Scully stated that the field trip that had been scheduled was cancelled and probably wouldn't get back on the agenda unless Lawrence Siroky had some good reasons that the committee should take the trip. Lawrence Siroky had some information and slides that he felt would convince the committee to take the trip. He then introduced Ralph Saunders and Rhett Hurlless.

Ralph Saunders presented the committee with some handouts regarding the problems of adjudication on the Powder River. He discussed the handouts, and the committee decided that there was too much to be handled at this time. They decided to discuss this on a field trip to Miles City which would be scheduled later.

The committee tentatively set the next meeting date for September 30 and October 1 for the field trip. The 22nd or 29th of October would be set aside for Judge Lessley.

Chairman Scully asked that each member of the committee prepare a list of the basic problems as each member sees them for the next meeting. He asked for their reactions formally as to whether the committee should work on the preference system.

Chairman Scully stated that he felt the committee should get press

releases in terms of what the committee is doing and what they intend to do in order to get some public direction. He didn't feel that the Legislative Council should release press information without the permission of the committee.

Chairman Scully asked for a list of people that the committee would like to have address the committee. Some of the names submitted included Henry Loble, Duke Gilbert, the Montana Water Development Association, a representative of the coal council, Charlie Bowman, Mr. Morrison, well drillers, etc. It was suggested that these people have a detailed written statement and just cover the highlights in their talks. The committee suggested limiting them to 10 or 15 minutes in which to give their talks. These talks would be given on the same day of Judge Lessley's talk.

Bob Person was asked what he found out in Washington together with the Water Resources Council report. He talked to Gary Wicks, who is a deputy to the Under Secretary of the Interior for Land and Water, to find someone in the Federal Government the committee could contact to get some of the Federal viewpoint. He was told that Bill Eikenberry, who works in the Department of Interior, would be the best person to contact for information on Indian and Federal reserve rights. He stated that the information would not be very definitive as the new administration has not yet set its policy. He stated that the people in the Department of Interior were not worried about inter-basin transfers because they felt that the new administration was not going to support such large projects, but rather smaller development projects in which their role would be primarily assisting the states in doing state level projects. They said that the state would have more of a burden than they had before.

Chairman Scully asked that if anyone had a position they would like to take on any of these matters, they should call Bob. That one call would trigger a call to the committee. He said that it was still tentatively set to have federal contact prior to making any final decision.

Chairman Scully called for a final determination by the committee as to whether they wanted to go to other parts of the state and have hearings. It was decided to go ahead and have the meetings. It was decided to have the first meeting in Miles City.

Rep. Ramirez was asked for his comments on the Council of State Governments. He stated that the principle issue is Indian jurisdiction that is of concern to the committee. He stated that Utah is having the same problems as Montana in regard to Indian jurisdiction. They identify the four areas of Indian jurisdiction that are giving them problems as: (1) Indian claims to land title; (2) Indian claims to extension of the boundaries of the reservations; (3) what jurisdiction within the reservation boundaries the Indians can exercise; and (4) reserved Indian water rights. The Attorney General of Utah has taken the position that there is a fixed quantity of water reserved for the Indian reservations; it is not something that should be expanded; it is whatever was necessary at the



time to irrigate irrigable acres on the reservation, using the methods of irrigation that were available at that time.

The next item of discussion was a bill currently in Congress to limit the extended control of the Army Corps of Engineers which was recently extended in a court case. This bill puts the corps back to its original position -- interstate commerce navigable rivers -- which puts them part way up the Yellowstone River, part way up the Missouri. A discussion was held as to whether or not the committee should take a stand on this bill, and also a bill which was introduced by Metcalf and which was discussed at a hearing in Great Falls.

Rep. Ramirez, stating that he would not be present for tomorrow's meeting, stated his position on the preference system which was that he was not in favor of the preference system over everything. He also stated that he felt we needed an adjudication procedure so that we could get started statewide in order to get something on file to beat the Federal Government to the punch and take advantage of the McCarran Amendment as long as we have it. He felt that the cost of adjudication should be split between the state and the individual water right holder.

The meeting was adjourned until Saturday morning.

Chairman Scully asked about the reaction to the letter he sent to Sen. Graham. Sen. Graham agreed to have a substitution of our committee member to go to the 5-state water conference in his place very reluctantly. Chairman Scully asked for a motion and discussion to send Sen. Galt to the 5-state water conference with Sen. Graham. Rep. Roth made the motion and it was unanimously passed.

A motion was made and unanimously passed to send Rep. Roth and Rep. Day to the Montana Water Development Association Convention on September 26 and 27, at the Heritage Inn in Great Falls.

The next subject discussed was that of preference systems. Sen. Turnage stated that he felt it was not in the best interest of the state to modify the existing law to establish a preference system. He felt that the law we have now is the most workable. Rep. Scully said that the preference system could be applied both to the permit system and to the reservation system. Senate Bill 359 was discussed. It was discussed whether or not the committee should take a definite stand on the preference system. Rep. Day made a motion that the committee not consider the preference aspect of the water law. The motion was passed unanimously.

Chairman Scully asked the committee to point out any problems that they say, how they felt they should be handled, and if they learned anything from the last two presentations. The reasons for adjudication were discussed. Rep. Day felt that adjudication was a must before the water could be allocated. Rep. Roth stated that first it had to be known how much water was in the stream before it could

be adjudicated. Sen. Boylan stated that there were many variables in a free-flowing stream and it was hard to make a decision. Therefore, there had to be adjudication. It was asked if you once put a water right to beneficial use and you intend to use that again at some future time, do you still have that right if you haven't used it for a period of years. Rep. Scully replied that we have never had a case in Montana of anyone abandoning their water rights. In order to prove abandonment you have to show a person's intent not to use it.

It was asked what kind of a property right is a water right. This was discussed at some length.

Chairman Scully went back to the question of adjudication. He had written down about seven reasons. The first was to get some idea of what we have at the present time. The second was to have a centralized record so that people could go and find out. Next was to settle the local issues in order to protect our agricultural base. Next was to take advantage of the state court system as opposed to winding up in Federal court. Next was to proceed to determine what the government rights were. The variables on free-flowing streams. It is necessary for those people who are living on free-flowing streams to know what adjudication is so that in time when the variables fluctuate, there won't be as expensive a litigation cost to deal with. The next one is allocate within the state the Indian rights as opposed to having the Federal people do it. The last one is to record the uses so that we can reflect back on the beneficial uses of water for future consideration.

Chairman Scully read from the new Constitution, Article 9, Section 3, regarding water right and use. He felt it was another reason for adjudication. This section was discussed. The Legislature is supposed to set up a centralized record system for water rights. It was felt that the committee could compare what the Department of Natural Resources is doing with what is supposed to be done, compare what changes should be made and then let the department make a recommendation as to what amendments they would like to see; let the Fish and Game make their recommendations; the Department of Health make theirs; and then the committee would be ready to sit down and decide what they wanted to write. They would be invited to do this at a later meeting. The Attorney General should also be invited.

It was brought up again by Chairman Scully whether the hearing should be held in Miles City at the same time of the field trip. He and Bob Person felt that the committee should have some options ready to present to the people at the meeting first. A discussion was held and it was decided to reschedule the public hearing.

Chairman Scully asked for more reasons for adjudication at this time. It was agreed unanimously that the 1973 Water Use Act the way it is presently being implemented is not working and there is a need to change, update or alter it in some way.

Sen. Turnage stated that water judges needed to be appointed because

the district courts were not set up to expedite the adjudication matter. It was discussed how the water judges would be selected. Using the Department of Natural Resources to do the research for the court was discussed. The problem of disqualification of the water judge was discussed. Sen. Turnage felt that disqualification should be prohibited in its present form except on statutory grounds -- relationship or personal interest. What rules the water judges would have to operate under were discussed. It was thought that perhaps they would have to establish a set of uniform rules.

The committee discussed water judges' termination and what would happen if any cases arose after their termination. Rep. Roth read a law which stated: "An appeal from the final decree shall be taken as provided by the Montana Rules of Appellate Procedure." Rep. Scully stated that perhaps one could appeal to the Supreme Court if not satisfied after the final decree. He also stated that it would probably work well to allow only those parties that objected to the preliminary finding appeal.

The expense of appeal was discussed. Rep. Roth stated that the entire burden should not lie on the user because they have already spent money on adjudication. Rep. Scully felt that there should be some limits. Rep. Day felt that many taxpayers have no water rights and therefore the people who were having the adjudication done should share the expense. Rep. Scully felt that the costs would be more easily borne by everyone together than one individual to another.

A discussion was held on what would be done to those water rights that the owners wouldn't adjudicate. There was a Constitutional question here that needed to be straightened out.

Rep. Scully stated that the committee had come a long way in determining the court question. He wanted the committee to make a final determination in Miles City. The choices included the present court system, special water judge system, water board, or have the department do it like they are doing it now.

Groundwater was discussed. Rep. Day thought the committee should look into the possibility of changing the wording of the law to read that the metering system would apply only in a controlled groundwater area.

Underlining new additions to old law was discussed. The committee felt this was important so that one could tell what had been added at first glance. It was felt that all new material should be underlined. Bob Person told the committee that they should write a letter to Diana Dowling to let her know about this.

Indian water rights and the reservations the Indians feel that they have were discussed.

It was asked if someone from the committee could attend the Montana Association of Conservation Districts convention November 7, 8, and 9.

This was tabled until the Miles City meeting.

It was stated that McOmber's ad hoc committee had formed a water subcommittee and that they would like to be kept up to date. No one on the committee knew that this subcommittee even existed. It was suggested that they be put on the subcommittee's mailing list.

The meeting was adjourned at 12:15 P.M.

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