

MINUTES

**MONTANA SENATE
53rd LEGISLATURE - REGULAR SESSION**

COMMITTEE ON NATURAL RESOURCES

Call to Order: By Chair Bianchi, on February 12, 1993, at 7:05 p.m.

ROLL CALL

Members Present:

Sen. Don Bianchi, Chair (D)
Sen. Bob Hockett, Vice Chair (D)
Sen. Sue Bartlett (D)
Sen. Steve Doherty (D)
Sen. Lorents Grosfield (R)
Sen. Tom Keating (R)
Sen. Ed Kennedy (D)
Sen. Bernie Swift (R)
Sen. Chuck Swysgood (R)
Sen. Henry McClernan (D)
Sen. Larry Tveit (R)
Sen. Cecil Weeding (D)
Sen. Jeff Weldon (D)

Members Excused: None.

Members Absent: None.

Staff Present: Paul Sihler, Environmental Quality Council
Leanne Kurtz, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing: SB 346
Executive Action: None.

HEARING ON SB 346

Opening Statement by Sponsor:

Senator Bill Yellowtail, SD 50, stated SB 346 offers the opportunity for compromise on both sides of the instream flow issue. He said SB 346 affirms that water rights are private property rights, with all the accompanying responsibilities. Senator Yellowtail stated SB 346 allows voluntary transfer of offstream rights to instream uses through agreements between willing buyers and willing sellers. Senator Yellowtail reminded

the Committee that under existing law, the owner of a water right can sell, lease or give his or her water to any other offstream use, such as irrigation, industrial, municipal or mining purposes, "as long as such transfer won't adversely affect other [water users]." Senator Yellowtail said a person must apply to the Department of Natural Resources and Conservation (DNRC) for approval of a change of purpose, point of use, or point of diversion. In the application, the water user must submit evidence that the change will not adversely affect any other water user. He noted water users can file objections if they feel they will be adversely affected. Senator Yellowtail said SB 346 will allow a water right owner to change the use from offstream to instream, as long as other users are not adversely affected. He added it will also allow anyone to "buy, rent or accept as a gift the water right to be used [for] an instream purpose." Senator Yellowtail said the philosophy of the bill is expressed in line 15 of the Statement of Intent, noting it is the bill's intent to discourage water resource speculation and the unauthorized out of state transport of Montana's water. Senator Yellowtail said SB 346 defines instream use and said the bill does not propose to create any new water rights for instream flow purposes. Referring to page 11, line 13-16, he stressed that the adverse impact provision would continue to apply if SB 346 passes. Senator Yellowtail summarized that the bill does not:

- take away existing water rights
- allow transfer of water out of state
- take away private property rights
- establish minimum stream flow
- impose the public trust doctrine as it pertains to minimum stream flow

Proponents' Testimony:

Gary Giem, rancher from Twin Bridges, said he was part of the group that met to discuss the drafting of SB 346. He stated SB 346 allows water users to object if they foresee adverse impacts on their irrigation. Mr. Giem stated SB 346 preserves the prior appropriation doctrine and private property rights. He said the bill would provide water to chronically dewatered streams and maintain critical spawning areas. He added SB 346 would "give instream flow people an incentive to want to participate in storage." Mr. Giem said he does not think much speculation will result from the bill.

Jay Barnosky, rancher from Sheridan and president of the Ruby River Water Users Association, said he was part of the same group to which Mr. Giem had referred. He urged the Committee to support SB 346.

Ron Collins, Mount Powell Fish and Wildlife Association, discussed the money spent to clean the Clark Fork River, adding the river runs dry in the summer just a couple miles away from

the superfund site. He stated SB 346 would allow "one small avenue to possibly put a little water in that dry river and make those millions of dollars spent [cleaning the Clark Fork] worthwhile."

Alan Carroll, rancher from Twin Bridges and member of the Montana Stockgrowers Association, said he disagrees with the Association's position on SB 346. He said agriculture will suffer if a compromise is not reached soon.

Kathy Hadley, representing the Montana Wildlife Federation, said SB 346 was developed by a coalition of southwestern Montana ranchers and conservationists formed by Senator Bianchi. She said SB 346 reflects a consensus of the various interests involved in the coalition. Ms. Hadley said SB 346 does not allow for new water appropriations for instream uses; it only allows for changing of existing appropriated water rights to instream flow rights. She said existing water laws do not adequately protect all legitimate uses of Montana's water, adding over 2,000 miles of Montana's streams are dewatered each year.

Stan Bradshaw, Montana Trout Unlimited (MTU), distributed to the Committee a letter from Hunter Coleman (Exhibit #1), a summary of how instream flow legislation has been used in other states (Exhibit #2), and an article from the Montana Standard dealing with instream flow (Exhibit #2A). Mr. Bradshaw said SB 346 "allows one more potential purchaser for a water right in an already existing marketplace." He said it imposes the same obligations on a transferred instream flow as is now imposed on consumptive use transfers. He said he does not agree with those who claim SB 346 ignores the possibilities of storage. Mr. Bradshaw stated SB 346 will not result in a massive transfer of water away from agriculture because the transfer is dependent on a willing seller and willing buyer. Mr. Bradshaw added SB 346 is not needed everywhere in the state. He said SB 346 is about enfranchisement, and added Montana's fisheries resource should be protected in the water allocation system.

Dianne McDermid, Medicine River Canoe Club president, read from prepared testimony (Exhibit #2B).

Alan Rollo, Great Falls resident, read from prepared testimony (Exhibit #3).

Robin Cunningham, Fishing Outfitters Association of Montana, said SB 346 will promote property rights and protection of water resources.

Jim McDermid, Great Falls resident, read from prepared testimony (Exhibit #4).

Bruce Farling, Clark Fork Coalition, said he is a member of the Upper Clark Fork Basin Steering Committee and the Blackfoot Challenge, two organizations formed to build bridges between

interests that have traditionally been at odds. Mr. Farling said SB 346 is one tool to help deal with a contentious natural resource issue in Montana.

Murray Carpenter, Missoula resident, said SB 346 is good business for Montana, relieving the state of being the sole entity capable of leasing or reserving water for instream flows.

Ted Doney, Helena attorney specializing in water law, said he is taking a risk in supporting SB 346, as most of his clients probably oppose the legislation. Mr. Doney discussed how SB 346 differs from last session's instream flow proposal. He said the existing law is inadequate, and water reservations do not help because "they are so junior in time." Mr. Doney stated SB 346 does not substantially change existing law. He said the bill eliminates the requirement that one must have a diversion to have a water right in Montana. Mr. Doney noted SB 346 cannot be implemented without a willing buyer and willing seller, and added DNRC is denying some requests for changes. Mr. Doney said risks associated with passing SB 346 are minimal because the water users on a stream will be the guardians of the bill's implementation.

Jerry Manley, president of the George Grant Chapter of Trout Unlimited, urged the Committee to support SB 346.

Art Whitney, Montana Chapter, American Fisheries Society, submitted prepared testimony (Exhibit #5).

Jim Kehr, president of the Prickly Pear Sportsmen's Club, said his organization supports SB 346.

Pat Simmons, Bozeman resident, read from prepared testimony (Exhibit #5A).

Tim Border, Gallatin Wildlife Association, stated SB 346 offers benefits to sportsmen, the agricultural community, and fish and wildlife.

Fred Easy, member of the Prickly Pear Sportsmen's Club and the Helena Chapter of Walleyes Unlimited, urged the Committee to pass SB 346 for Montana's fisheries.

Tony Schoonen, Skyline Sportsmen, expressed support for SB 346.

Chris Marshion, Anaconda Sportsmen's Club, said there are a number of chronically dewatered streams in the Anaconda area, and current law does not allow the means to work with other water users to solve the problem.

John Roylance, Whitehall resident, said if SB 346 passes, water will no longer have to be diverted to be recognized as a beneficial use. He said Montana's tourism and recreation industries are highly dependent on instream flows. Mr. Roylance

discussed how insufficient instream flow affects hydroelectric generation. He stated 97.6% of the water removed from streams is controlled by less than 5% of the population. Mr. Roylance said a less disruptive solution to the instream flow dilemma could not be designed.

Pat Roylance, Whitehall resident, discussed the role water plays in Montana's economic health. She added her job depends heavily on tourism, noting non-resident travel generated about \$432 million in labor income in 1990.

Stan Frasier, Helena resident, discussed the consequences of dewatering the Aral Sea in the Soviet Union.

Alan Schallenberger, Helena area outfitter and wildlife biologist, expressed support for SB 346.

Janet Ellis, Montana Audubon Legislative Fund, expressed support for SB 346.

Kirk Evanson, vice-president of the Missouri River Flyfishers and member of Montana Trout Unlimited, told the Committee about a stream on the Missouri that is critical spawning habitat and frequently dewatered. Mr. Evanson stated SB 346 would provide the opportunity to pay the water right owner to leave some of the water in the stream.

Sam Babich, representing Skyline Sportsmen, urged the Committee to pass SB 346.

Joe Gutkoski, Bozeman resident, stated that a publication of the Department of Fish, Wildlife and Parks indicates 2,477 miles of streams are dewatered every year, regardless of the rainfall. He added 1,237 miles are periodically dewatered. Mr. Gutkowski submitted a written statement (Exhibit #5B).

The following proponents submitted testimony, but did not speak at the hearing:

Paul Roos (Exhibit #5C)
Greg Tollefson (Exhibit #5D)
Jennifer Martin (Exhibit #5E).

Opponents' Testimony:

John Bloomquist, Montana Stockgrowers Association and speaking on behalf of the Montana Wool Growers Association, read from prepared testimony (Exhibit #6).

Ed Lord, president of the Montana Stockgrowers Association, and president of the Flint Creek Water Users Association, summarized his prepared testimony (Exhibit #6A).

Lorna Frank, Montana Farm Bureau, said SB 346 is a better instream flow bill than last session's legislation. She said the bill could be improved if it included language addressing water storage. She added the Farm Bureau firmly believes that storage is the answer to instream flow.

Henry Bedford, chair of the Deadmans Basin Water Users Association in Musselshell County, said he supports instream flow, but opposes SB 346. He said Montana is historically dewatered and it is through the efforts of agriculture that water, wildlife and fisheries abound in the state. Mr. Bedford said he does not want to see water treated as a commodity.

Brian Severin, Highwood rancher, said he opposes SB 346 because it is not specific about reaches. He stated water right holders should not be held responsible for what nature does to the flow of a stream.

Steven Christensen, representing Bitterroot Valley irrigators and the Bitterroot Valley Stockgrowers Association, stated the reservoir system keeps the Bitterroot River from drying up. He said the adverse effects provision does not make the bill more palatable because it is difficult to monitor adverse effects.

John Matovich, Montana Stockgrowers Association, said he is concerned about large-scale water marketing.

Mark Kambich, Big Hole resident, mentioned the effects of instream flow legislation on the tax structure of the property involved.

Brian Weidenaar, member of the Agriculture Preservation Association and representing the Montana Seed Potato Growers, said the organizations oppose SB 346 because it would take away their water rights without compensation. He said current water laws are sufficient to meet the needs of all Montana water users. Mr. Weidenaar noted seed potato growers rely on late season water for irrigation, adding the seed potato industry generates over \$2 million in profits.

Jay Chamberlin, irrigation project manager from Dillon, said he was part of the coalition assembled to formulate instream flow legislation. He said he is concerned about return flow, and distributed a handout detailing return flow on the Beaverhead River (Exhibit #7). He noted the information in the handout was generated by the U.S. Geological Survey and the Bureau of Reclamation. Mr. Chamberlin said SB 346 would force water right holders to protect their rights more often. He added he is also concerned about the administration of the law if SB 346 passes.

Vernon Westlake, Agricultural Preservation Association, read from prepared testimony (Exhibit #8).

Leonard Blixrud, Teton River Water Users Association, expressed

opposition to SB 346, noting he is concerned about measurement and reach.

Ron Kelley, Deer Lodge Valley water user, said if SB 346 passes, junior appropriators would not be able to defend their water rights. He added DNRC is ineffective in assisting objections. Mr. Kelley said SB 346 should be amended so a person who wanted to sell a water right would have to sell it at the point it is being diverted for agriculture and no further down the stream.

John McDonald, Flint Creek Valley irrigator, stated about 80% of the taxes available in small western Montana counties is generated by the use of water. He said he does not think a person should be "allowed to sell or lease any more water than he can prove he consumes." Mr. McDonald said the "purchaser [of water] should be liable for the amount of taxes that water generates." He added SB 346 would open the door to endless litigation.

Jo Brunner, executive director, Montana Water Resources Association, stated most of MWRA's concerns have already been articulated. She noted MWRA supports the current leasing program. Ms. Brunner stated the majority of MWRA members do not support the sale of water for instream flow, but they recognize the need to share a water right.

Robert Story, Montana Association of Conservation Districts, discussed his prepared testimony (Exhibit #9), adding the Association does not necessarily oppose the notion of instream flow.

Robert Lane, rancher and conservation district supervisor from Three Forks, said he should not have to spend his money and time to protect his water if his neighbor wishes to sell a water right.

Jack Perkins, president, Deer Lodge Valley Conservation District, discussed possible effects on the tax base if SB 346 passes. He said he is concerned about irrigated land turning onto dry land pasture. Mr. Perkins said instream flow legislation should be postponed for a few years while the leasing program continues.

Jess Kilgore, Gallatin County resident, said he is concerned about return flow.

Chet Sinnema said if SB 346 passes, he will be out of the irrigation business.

Informational Testimony:

None.

Questions From Committee Members and Responses:

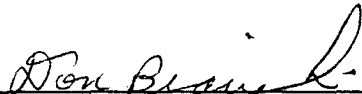
Senator Weeding asked Mr. Bloomquist to give an example of a scenario where an irrigation right is transferred to a downstream municipality. Mr. Bloomquist said he has never dealt with that sort of transfer, but said the amount that would be transferrable to the municipality would be the amount historically consumed by the irrigation water right.

Closing by Sponsor:

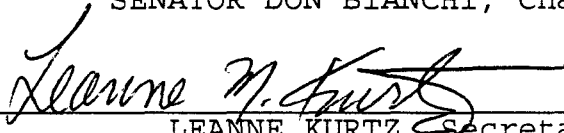
Senator Yellowtail said SB 346 is a real compromise. He said an objection process is in place which allows a water user to challenge a change that would affect return flows. Senator Yellowtail said a person should not be forced to irrigate if he does not want to or cannot afford it. He stated under current law, irrigators can sell water to an entity downstream, and the water must stay in the stream until it reaches that entity. Senator Yellowtail asked what the difference is between that situation and instream flow. He discussed a bill heard in the Taxation Committee regarding the valuation of agricultural land, noting he defended the irrigators who were concerned about having to pay more taxes. Senator Yellowtail said some of those same interests expressed concern during the hearing on SB 346 about the tax base for the local communities if water is taken off the land. He said SB 346 would only work when there is a buyer willing to pay the price. Senator Yellowtail stressed that a water right is a private property right. He added SB 346 would not result in anybody losing a water right. He directed the Committee to page 1, lines 24 and 25, stating it is legislative intent that SB 346 "satisfies the public trust demand." He said if SB 346 passes, it can be used as a primary argument for the illegitimacy of a public trust suit that may someday be raised. Senator Yellowtail said that between 1973 and 1991, there were 62 changes in purpose of use, 641 changes in place use, 1,661 changes in place of diversion, 195 objections, and 53 hearings on those objections. He concluded that present law "covers all of these situations that are imaginable," and said he hopes both sides of the issue have been able to move towards a middle ground in the course of the hearing.

ADJOURNMENT

Adjournment: 9:50 p.m.



SENATOR DON BIANCHI, Chair



LEANNE KURTZ, Secretary

DB/lk

ROLL CALL

SENATE COMMITTEE Natural Resources DATE 2/12/93

NAME	PRESENT	ABSENT	EXCUSED
Bianchi	✓		
Hockett	✓		
Bartlett	✓		
Doherty	✓		
Grosfield	✓		
Keating	✓		
Kennedy	✓		
Swift	✓		
Suysgood	✓		
McCernan	✓		
Tveit	✓		
Weeding	✓		
Weldon	✓		

February 12, 1993

Mr. Chairman and members of the Committee:

I write to you concerning Senate Bill 346, which if passed would allow the change of previously appropriated water to and from instream uses. I strongly support passage of this bill.

Senate Bill 346 recognizes that instream flow appropriations are valid and legitimate uses of Montana's water resources. I believe that instream uses qualify as a "beneficial use" of water as it is defined in section 85-2-102, MCA. As such, a person or organization that wishes to change appropriation rights voluntarily to instream uses should have equal opportunities as a person or organization wishing to change an appropriation right to another "beneficial use."

Two significant points of SB 346 are

- 1) the changes to instream uses are voluntary, and
- 2) instream changes must follow the existing change in appropriation rights process.

These provisions will ensure that no appropriated water will be changed to instream uses against the will of the rights holder and that instream use changes will receive no special consideration by the Board of Natural Resources and Conservation.

I believe that SB 346 in no way threatens the water protected by previously granted water rights, nor does it undermine the spirit or substance of Montana's water laws. I urge you to pass SB 346.

Thank you very much for your time and consideration.

Sincerely,



Hunter Coleman
909 Broadway
Helena

SENATE NATURAL RESOURCES
EXHIBIT NO. 1
DATE 2/12/93
BILL NO. SB 346

SENATE NATURAL RESOURCES

EXHIBIT NO. 2
 DATE 2/12/87
 BILL NO. 78240

INSTREAM FLOW LAWS OF OTHER WESTERN STATES

Montana Trout Unlimited
 Compiled by Clay Landry

State	Authorized	Transfers of Existing Rights	New Appropriations	Instream Right Holders	Speculative Activity	Activation of Statute
Alaska	1980	Yes: In reservations form	Yes: In reservation form	Any Public or Private entity	None	No transfers 11 new approp.
Arizona	1919	Yes: For Recreation and Wildlife	Yes	Public entity only	None	4 transfers 8 new approp.
Colorado	1973	Yes: To Colorado Water Conservation Board	Yes: To CWCB	Colorado Water Conservation Board	None	5 transfers 1,232 new approp.
Idaho	1978	No	Yes	Idaho Water Resource Board	None	No transfers 49 new approp.
Nevada	1988	Yes: established by a court ruling	No	Any Public or Private entity	Possible but none	3 transfers No new approp.
New Mexico	has not yet addressed the issue of instream flows.					
Oregon	1987	Yes: with approval by Water Resource Comm.	Yes	Department of Water Resources	None	1 transfer 533 new approp.
Utah	1986	Yes	No	Division of Wildlife Resources	None	1 transfer no new approp.
Washington	1967	No	Yes: minimum flow requirement	Department of Ecology	None	No transfers 472 new approp.
Wyoming	1986	Yes	Yes	State of Wyoming	None	No transfers 7 new approp.

Coalition of environmentalists and ranchers develops instream flow bill

By Perry Backus Standard Staff Writer

SHERIDAN — A coalition of ranchers and environmentalists will be watching the Legislature closely next week as it begins review of a proposed bill to allow purchasing water for instream uses.

For almost a year, this unlikely group sat down at a table and worked at developing a consensus on what has been a volatile issue.

During the last legislative session, the "wrath of agriculture" swooped down on Helena to protest a proposal to allow for purchasing of instream flows in Montana's rivers and streams, said Stan Bradshaw, Montana Trout Unlimited's resource director.

That bill was defeated, but the issue didn't disappear.

After a group of mostly Madison County ranchers met with Sen. Don Bianchi to discuss the possibility of developing a joint effort to write a bill on purchasing water for in-stream use that was acceptable to both sides, a coalition of ranchers and interested environmental groups was formed.

Both Bradshaw and Sheridan-area rancher George Swan remember there was some posturing during the first meetings, but soon the two groups began to trust each other and serious discussion followed.

"As we got to like each other personally, pretty soon we were talking in a positive manner," recalls Swan. "We were able to come up with a bill that basically did not affect anyone adversely."

The bill, which will be introduced next week, would allow instream flows to be transferred through a willing-seller/willing-buyer transaction, said Bradshaw.

Currently, there is a pilot leasing program that allows for instream leasing of water by the Department of Fish, Wildlife and Parks. The pilot program was developed during the 1989 legislative session.

That program sunsets in 1999 and allows for leasing on only 10 Montana streams, Bradshaw said.

Bradshaw anticipates critics to say the pilot program is only four years old and should be allowed to run its course.

The pilot program allows only the state agency to obtain leases and doesn't allow landowners to do as they wish with their water, Bradshaw counters.

Landowners for years have said water rights are the same as property rights, said Bradshaw. Under this proposal, landowners essentially would gain the right to do as they wish with their water, he said.

Swan agrees, saying that opposition to leasing instream flows often depends too much on emotion and not enough on fact.

"This finally gives us a definitive right to the

But if we have the opportunity to put something together that's good for everyone, why don't we do it?

water," he said.

The proposed legislation would allow landowners the "right to buy and sell water," Swan said. "Up to this point, we haven't had the right to sell water on the open market."

That doesn't mean the water will be stripped from the land, he said. It would just allow landowners another option to use the free-market system to decide where the highest priority is for that water in the stream or river, Swan added.

There are a number of "myths" that have circulated about the anticipated effect of an instream flow leasing bill, Swan said.

For instance, many think that an instream flow bill would allow out-of-state interests to buy up Montana's water and the state could dry up, he said.

"That just can't happen," Swan said. Anything over five cubic feet per second must have legislative approval and must meet 15 to 20 conditions before the go-ahead could be granted.

Another myth is that under existing law, water could be sold for agricultural use only, Swan said. Current law says the only thing landowners can't sell their water for is instream flows, Swan said.

"That doesn't make any sense," he said. "What is more compatible with agriculture than instream flows."

"When you sell your water to Pegasus Gold, there's no offshoot use for agriculture. When it goes to mining or for municipal use ... it's shot ... it's gone."

Under the proposed legislation, any water sold for instream use would be done in a precise manner and it cannot, by law, adversely affect downstream water users, he said.

The concept that there will be massive purchases of water is "ludicrous. It simply can't happen," he said.

Similar legislation has been in place in other western states for 10 to 20 years and "agriculture hasn't been wiped out" in any of those states, said Swan. Even if the bill is passed, Bradshaw said it won't be a "panacea" for every Montana stream and river with low-water problems.

"This bill will not re-water every stream in the state," he said.

More likely, the bill would be used to address specific problem areas, Bradshaw said. By using the free-market system, there probably wouldn't be a "tidal wave" of selling water for instream uses should the legislation be adopted, he said.

Bradshaw is not sure what reaction the bill will have with mainstream agriculture. The bill is "very similar" to legislation proposed in 1991 that brought 500 ranchers to Helena in protest, he said.

The coalition of ranchers and environmental groups that drew up the bill "is relatively small," he said, and it appears the Stockgrower's Association will not support the bill.

The manner used to develop this legislation was important in that it "lowered the decibel level," Bradshaw said.

The process of developing the coalition forced both sides to take a hard look at the proposed legislation and understand the concerns of each other, said Bradshaw. Swan recalls going into the discussion searching for the negatives about selling water for instream use.

"My first question to everyone involved in agriculture has been 'what's wrong with this bill?'" Swan said. "I wanted to hear a truly good reason on how this bill would adversely affect agriculture."

Swan said he has yet to hear one.

Most of the answers Swan has heard are shrouded in emotion and mostly display a lack of knowledge about current water law, he said. Over the years, when change has come along, those in agriculture often bow their necks and get ready to fight, he said.

"I've always been a fighting man and I'm not saying that I'm out of that mode. But if we have the opportunity to put something together that's good for everyone, why don't we do it?"

"If something comes through that we simply can't live with, then we need to try and get that changed," Swan said. "I just don't think this is the place to do that."

Swan cited laws that changed the way people in agriculture have operated, including the stream access law, state lands access and a law banning anyone from working in a river or stream without a permit.

All of those laws were met with dismay by the agricultural contingent, yet the regulations haven't proven to be the end of the world, he said.

"We can't sit back and dig our heels in any more," Swan said. "If agriculture says it won't go along with anything, then our days are over. We will get swept under the rug."

People in agriculture have to become "the proactive ones," he said. "We have to learn to work together to try and accommodate change and at the same time instill the fact that agriculture is an important part of the reason all of us are living here."

SB

SB 346

SENATE NATURAL RESOURCES

EXHIBIT NO. 2A

DATE 2/12/93

BILL NO. SB 346

Medicine River Canoe Club

Great Falls, Montana

February 12, 1993

SENATE NATURAL RESOURCES
EXHIBIT NO. 2B
DATE 2/12/93
BILL NO. SB 346

Senate Natural Resources Committee
State Capitol
Helena, Montana

Chairman Bianchi and Members of the Committee:

My name is Dianne McDermand; I am the president of the Medicine River Canoe Club in Great Falls. Having a vested interest in water issues, our organization feels that Senate Bill 346 is an extremely important piece of legislation

When our water law was written well over a century ago it served the needs of the society that existed at that time. The men that formulated this law were not *men of vision* who could anticipate the needs of the future. They were very ordinary people like most of us and could not imagine the very numbers of us that would make demands on our water resources. They could not envision the economic value of the recreational aspect of water and they took for granted the aesthetic values because their rivers were not chronically dewatered. Our archaic water laws do not serve the needs of today's society.

A survey by the DFWP shows that 2,500 miles of Montana rivers are chronically dewatered and that 1,200 additional miles are periodically dewatered. (See page three for further explanation.) A dewatered river is not just a matter of a few dead fish. Those narrow, green riparian zones nourish ALL aquatic life plus support 80% of land species. When a stream is dewatered everything that depends on it may die or be displaced.

When a stream has been chronically dewatered, suddenly to be able to release water down that stream does not automatically enable it to return to its previous state. Shriveled insect larvae do not spring to life; dried fish eggs do not miraculously hatch; lifeless vegetation does not automatically regenerate; beaver, muskrat, and otter do not magically reappear in the pools. In fact, recovery can take many seasons. A minimal amount of water should at all times flow down a stream so, even if there is a decline in the populations of riparian dependent species, at least some can survive. A river also serves to sustain the water table and to feed adjacent wetlands, extremely important adjuncts.

Not to be overlooked or diminished in importance is a rivers ability to recharge the human spirit. Free flowing water has a tremendous aesthetic value and the recreational opportunities afforded by rivers (fishing, floating, swimming, camping, bird watching, hiking, etc.) contribute immeasurably to our quality of life, not to mention the economic benefits. Our wildlands and our rivers are a major contributing factor to induce people to visit or to live in Montana.

The adversaries of SB 346 will use different approaches to oppose it; one will be to point to our current water leasing law and cite this as the salvation for all our dewatering problems. This leasing law is inadequate for the task. It is cumbersome to implement and in the four years of the program's existence only one lease has been consummated.

The leasing law's structure makes it possible to address only small feeder streams. In the best case scenario, if all the leases allowed under the law could be implemented, perhaps 30 miles of streambed on very small tributaries might be improved. This would help provide critical spawning access for fish, however the amount of water involved in leasing is likely to be extremely small and would not contribute in any noticeable way to the larger streams into which they flow. The water leasing program can do little or nothing towards solving the disastrous dewatering problems of many of our rivers.

Our current water law serves best the agricultural community who comprise 5% of our population but who account for over 97% of diverted waters. Many of them, especially those terrified of change even though it will not affect their rights, will oppose this bill. At least one will try to support his testimony with a phrase we have heard far too often, "If it ain't broke, don't fix it." Let me assure you, our current water law is very badly broken and desperately in need of repair. I'd like to offer another quote that's far more relevant, an old Indian proverb states, "A frog does not drink his own pond dry," yet that is exactly what we Montanans are doing.

SB 346 offers a trickle of hope at revising our water law to fit the real needs of our people. Please support this legislation.

Sincerely,



Dianne L. McDermand, President
Medicine River Canoe Club
3805 Fourth Avenue South
Great Falls, MT 59405

Ph. 761-0303

EXHIBIT # 2 B
DATE 2-12-93
SB-346

The Montana Department of Fish, Wildlife and Parks has done a survey of dewatered streams in the state. In the initial effort, only streams with fisheries were considered. The Department concedes that some streams may have been overlooked. It was determined that virtually all dewatering is due to irrigation withdrawals with a little due to dam operations.

They have used the following definitions in their report:

DEWATERING - A reduction in stream flow to a point where fish habitat is impacted.

CHRONICALLY DEWATERED - Those streams in which dewatering is a significant problem virtually every year.

PERIODICALLY DEWATERED - Those streams in which dewatering is a problem in drought years (i.e. when snow pack and precipitation are below normal)

The survey I have gives a total of 2,474.7 miles of CHRONICALLY dewatered streams and 1,237.0 miles of PERIODICALLY dewatered streams. This survey, listing precisely each affected reach of stream is available from the Department. The totals may change as the survey is updated but one would not anticipate a decrease in overall affected miles.

12 February 1993

SENATE NATURAL RESOURCES

EXHIBIT NO. 3

DATE 2/12/93

BILL NO. SB 346

SUBJECT: SB346

Mr. Chairmen and committee members,

I am Alan Rollo from Great Falls and I am here in support of SB346. I would like to address this SIMPLE bill that would allow for the transfer of a water right between WILLING parties for in-stream use. There will be many here that will oppose this simple bill primarily due to the lack of understanding of what the bill really says, also the reluctance to change and the last is misinformation, unfortunately.

Lets remember that the amount of water available to the state is relatively fixed, but the number of persons using it increases every day. And the uses of water multiply with technological growth. How do we share fairly the water that too many people need for too many purposes? How do we use it wisely, and maintain it? So is leaving water in a stream a wise use? Think of it from the perspective of what our state law says. The 'public policy of the state is to promote conservation, development and beneficial use of the states water resources to secure the maximum economic and social prosperity for its citizens.' and it even goes on to say 'water resources must be protected and conserved to assure adequate supplies for recreational purposes and for the conservation of wildlife and aquatic life.'

So when we look out across our state and see dried up streams and the barrow pits are full of water, is that water conservation - of course not. We must remember that water is necessary to maintain ALL life on our planet. H.G. Wells statement I feel is so true when he said " American civilization may well be a race between water research and disaster." We must think of the future and act in the present if we are to preserve what we have.

So what is the problem? The primary problem is that instream flow uses are like a poor step-child who has never received the recognition or attention it deserves. Now that child has grown up and it realizes that fish and tourists do not come back tomorrow if the stream is dry today. Every time a stream goes dry or becomes extremely low for just one day, things die and not just fish. The aquatic system does not survive when in competition with anything else, because all other uses degrades its environment. This loss can take years to recover. And in this state, 2540 miles of streams are chronically dewatered every year and an additional 1237 miles are periodically dewatered. The recent droughts are one reason, but even in normal years the streams are still going dry. The statistics show that 98% of the surface water removed is for irrigation with only 20% reaching its intended purpose. We can help with inefficiency by allowing this bill to work. I also hear that ANY water left in the stream or leaving the state is wasted water - well is not nature and water one of the most essential things to life and considered important to ALL of us. Letting SOME water go down a stream means life to all, not death of a rancher.

Another consideration of water left in a stream is it will cost agriculture and the state too much. This cost will be minimal compared to the lost revenue from other activities. We must remember that this bill is between WILLING parties - NO ONE is stealing any water here. The money that a rancher receives from selling a portion of a water right can be used to become more efficient and conserve. This will enhance farming practices while

preserving our streams. So isn't there enough water to share a little, just enough to keep the fish and the whole aquatic system alive. This can be just enough to ensure fishermen and tourists will come back each year.

We talk about bringing industries into Montana, but we are driving away the second biggest industry in the state - tourism. In 1988 it was recognized that non-resident tourism generated over \$1.4 billion in non-resident travel with approximately 30% contributed by non-resident fishing. This equates to jobs and income to the state, which we desperately need. So why do some feel the farming industry is any more important than tourism or any water related activity? Hasn't Montana recognized that tourism is an important industry to the state, otherwise why would the state spend so much on a lawsuit over the Fort Peck water issue. I wonder why recreation is so important at Fort Peck and not in the rest of the state. We spend millions in advertisement telling the nation to come to our state for our great fisheries and scenic rivers, to only have them get here and find the streams dry.

It is one thing for the citizens in this state to agree, for example that it is beneficial to leave water in the streams. It is quite another to get through the conferences, committee meetings, public hearings and often elections that must take place before we can move forward with good water management. Can we make these changes or does it remain that governmental policies are too often determined politics of special interests, rather than by proper water management requirements. Water is THE natural resource most beset by bureaucratic multiplicity, it is also the resource that has suffered actual deterioration in the past decades.

Farming practices must change with the times. Farming has survived here in Montana for a long time and can continue to survive in cooperation with other ideas that benefit the state. Unless competition and conflicts are put aside, unless there is a willingness to cooperate and compromise and this issue is based on it's own merit and feasibility instead of fear, then we surely will not succeed in making the maximum and best use of this limited resource.

We must stop looking at each other as the enemy. We must compromise and look at each others ideas. This bill is a compromise - it does not give me everything I want, but individuals from BOTH sides worked hard to come to an agreement. Yes, this bill was worked on by groups on both sides of the issue who tried to resolve our differences.

Lets stand together and be strong enough to say that NOW is the time to try something different. It is time to consider ALL of us as Montana's, a time to share this valuable resource and a time to pass SB346.

Thankyou.

Sincerely,



Alan Rollo
808 52nd Street South
Great Falls, Montana 59405

February 12, 1993

Senate Natural Resources Committee
State Capitol
Helena, Montana

Chairman Bianchi and Members of the Committee:

My name is Jim McDermand and I am from Great Falls. I am speaking today in favor of Senate Bill 346 but, even more importantly, I am speaking for the rivers and streams of Montana.

MONTANA WATER LAW: Laws which say "First in Time is First in Right". This has been the basis for water use in Montana for over 130 years! However, I would like for you to go back even further in history with me; before the settling of the west; even before Lewis and Clark used the rivers as highways of exploration. Who was "First in Time and First in Right" then? --- I believe that the rivers and streams themselves were.

These arteries of the west were not just running water in a stream bed waiting to be diverted so that they could then become beneficial! The water running in those streams was already beneficial, and indeed vital, to the ecosystems that they sustained. This water provided habitat for aquatic insects and plants, which in turn supported the fish, birds, and animals that depend on these streams and riparian areas for their nourishment, their homes, and their very lives.

Now, let us return to the present! What has changed? Certainly not the needs of the plants and creatures I just spoke of, nor their dependency upon the flowing water which determines their very existence. But now MAN is upon the scene and he wants to share this natural resource of running water to make his existence better. This is not wrong, for man himself is a part of nature. But when man goes beyond sharing with nature and exploits this water so that it threatens the stream itself, as well as its dependent ecosystem, then this is wrong!--- and it is happening to a greater extent every year.

I believe in the concept of our water law that says "First in Time is First in Right". But it must extend beyond man's narrow interpretation that it only applies to his diverted and consumptive use of water.--- It must apply to the rivers and streams themselves, and it must be interpreted to mean that they have the first right.--- The right to maintain at least a minimum existence which will support their ecosystems.

Making instream flow a beneficial use of our water through the passage of Senate Bill 346, will provide these streams, that have shared so much with us, the opportunity to flow and to sustain life. This in turn will enhance our lives, and the lives of future generations.

Respectfully yours,

James W. McDermand

James W. McDermand
3805 4th Ave. South
Great Falls, MT 59405

SENATE NATURAL RESOURCES

EXHIBIT NO. 4

DATE 2/12/93

BILL NO. SB 346

Senate Bill 346

Testimony on behalf of the
Montana Chapter of the American Fisheries Society
before the
Senate Natural Resources Committee

Mr. Chairman and members of the committee, my name is Art Whitney and I am here on behalf of the Montana Chapter of the American Fisheries Society. The American Fisheries Society is an international organization of fisheries and aquatic professionals that promote the wise use and management of fisheries and aquatic habitat.

The professionals within our Society may well have a unique perspective concerning the instream flow issue because they have worked on Montana's rivers and streams on a daily basis and are intimately familiar with fisheries issues related to water shortages. In addition, many of our members work closely with the agricultural community through Senate Bill 310, a bill that was itself very controversial during the mid-1970's. Relationships have developed since the passage of SB 310, which have provided fisheries professionals a better understanding of the needs and constraints of Montana farmers and ranchers. Therefore, the American Fisheries Society is committed to finding ways to improve the health of our aquatic ecosystems in a manner that is compatible with the needs of agriculture. We believe that SB 346 will improve stream flows in some areas and that it will do so with the voluntary assistance of agriculture.

Under current water law, the owner of a water right can sever the water right from the land on which it is used, use it somewhere else, use it for another purpose, or even sell or lease it to another person for use somewhere else. The owner can also sell, lease or give his/her water right to another off-stream use such as irrigation, industrial, municipal or mining. Under all scenarios, a water right change process is used to ensure that transfers or changes will not adversely affect other water users. Among the few things a current water right owner cannot do is transfer the water right to an instream use.

Senate Bill 346 simply allows the owner of a water right to sell, lease, or give his right to another for instream use on a willing seller, willing buyer basis AS LONG AS IT DOES NOT ADVERSELY AFFECT THE RIGHTS OF OTHER USERS. We believe that it is reasonable that existing water law be modified to subject instream water rights to the same processes as off-stream rights. This includes retaining the current means of protecting the rights of other water users in the basin.

If adopted, we do not expect this bill to significantly disrupt current water use in Montana, nor do we expect it will solve all of

SENATE NATURAL RESOURCES

EXHIBIT NO. 5

DATE 2/12/93

52 246

our dewatering problems. More realistically, this water transfer bill is another tool to be used to assist with dewatering problems at specific locations and during confined periods of water shortage. Likewise, we do not believe it will result in the removal of irrigation water from large tracts of land.

Finally, we are aware that many water users are willing, if not eager, to help solve some of the dewatering problems in Montana. For those water users who are willing to volunteer their assistance, it is important that Montana water law provide them with a tool to do so. The Montana Chapter of the American Fisheries Society believes that Senate Bill 346 is the best tool available for addressing some of our dewatering problems and for reducing conflict between Montanan's who probably have more in common than they may think.

SENATE NATURAL RESOURCES

EXHIBIT NO. 5A

DATE 2/12/93

BILL NO. SB 346

I AM PAT SIMMONS, FROM BOZEMAN. I HUNT AND FISH, AND AM AN ACTIVE SUPPORTER OF THE GALLATIN WILDLIFE ASSOCIATION AND THE MONTANA WILDLIFE FEDERATION. I AM SUPPORTING THE BILL BEFORE YOU TODAY, SB 346 BECAUSE I AM VITALLY CONCERNED ABOUT THE WATER LEVELS OF MANY OF OUR GALLATIN VALLEY STREAMS AND RIVERS. I WANT THERE TO BE ADEQUATE WATER IN THE STREAMS TO SUPPORT THE FISH AND OTHER AQUATIC LIFE AND FOR RECREATIONAL ACTIVITIES THAT I DO - FISHING AND BOATING. I AM VERY SADDENED BY DE-WATERED STREAM BEDS, SUCH AS COTTONWOOD CREEK NEAR GALLATIN GATEWAY, THAT IS COMPLETELY DRAINED DRY EVERY YEAR.

I HAVE BEEN A LAND OWNER FOR THE PAST TEN YEARS AND THIS PIECE OF LAND HAD SEVERAL NATURAL SPRING CREEKS ON IT. MY PARTNER & I MET WITH THE DEPT OF NATURAL RESOURCES TO DISCUSS FILING WATER RIGHTS ON IT. WE WANTED TO LEAVE THE WATER IN THE CREEKS FOR FISH AND WILDLIFE USE (DUCKS, DEER, FOX), BUT WE FOUND OUT WE COULDN'T DO THAT. WE HAD TO BUILD A POND IN ORDER TO HAVE A WATER RIGHT. WE ALSO HAD TO HAVE SOME SORT OF AGRICULTURAL USE SUCH AS CATTLE GRAZING AND IRRIGATION OF TREES AS OUR PURPOSE. SO WE SPENT LOTS OF TIME AND MONEY BUILDING OUR OWN POND.

I THINK THIS BILL IS A BEGINNING STEP FOR MONTANANS TO START PROTECTING SOME OF MONTANA'S HERITAGE - OUR BEAUTIFUL AND BLUE RIBBON WATERWAYS. IT ALLOWS THE MARKET TO DO THIS WITHOUT DIRECT GOVERNMENT INTERVENTION. IT LETS THOSE LANDOWNERS WHO HAVE WATER RIGHTS, KEEP THE WATER IN THE STREAM FOR THE FISH AS A BENEFICIAL USE, IF THEY WANT TO. I URGE ^{you} TO PASS THIS BILL AND LETS TRY IT OUT. THANK YOU.

Pat Simmons 2/12/93

Joe Gutkoski

304 N. 18th Av. Bozeman MT 59715

587-3242

SB-346

Support ✓

SENATE NATURAL RESOURCES

EXHIBIT NO. SB

DATE 2/12/93

BILL NO. SB 346

Montana is one of the few areas in the nation

where rivers & streams abound.

It is one of the greatest of Montana's natural resources,
as well as a chief attraction for visitors & tourists.

TO: Senate Natural Resources Comm.
RE: Sen. Bill 346

My belief is that one of the largest threats to Montana's environment and the way of life I love is the loss of the economic stability of our farms and ranches. I respect the agricultural community for being generally good land stewards.

Sen. Bill 346 allows water rights holders more options in protecting their water rights and offers them options on improving the bottom line of their operations.

This legislation also offers the opportunity for agricultural, recreational and resource management interests to cooperatively address the long-term viability of Montana's cold-water fishery resource. This serves the interests of all parties involved, as well as the interests of our increasingly valuable fisheries.

442-5489

Paul R. Row

1200 Flowerree

Helena, MT 5960

Paul R. Row, Auditor General

SENATE NATURAL RESOURCES

EXHIBIT NO. 5D

DATE 2/12/93

BILL NO. SB 346

To: Sen. Natural Resources Committee

Re: Sen. Bill 346

This bill makes it possible for a unique and positive cooperative effort to protect Montana's invaluable cold-waterway fishery resource.

The bill protects the private property rights of individual water rights holders, while affording them the opportunity to, by choice, lease or sell those rights for purposes of leaving the water in the stream.

This is a "win-win" situation. I urge the committee to take advantage of it.

Thank you

Gary Tollefson

FREELANCE WRITER/FISHING GUIDE

413 DALY

Missoula, MT 59801

SENATE NATURAL RESOURCES
EXHIBIT NO. SE
DATE 2/12/93
BILL NO. SB 346

NAME Jennifer Martin

ADDRESS 28569 Norris Rd., Bozeman 59715-8155

HOME PHONE 586-7671 WORK PHONE same

REPRESENTING self

APPEARING ON WHICH PROPOSAL? SB 346

DO YOU: SUPPORT OPPOSE AMEND

COMMENTS:

I live on a small hay ranch on the West Gallatin River. I'd like the opportunity this bill provides to send my water right back to the river. I know the river could use it; I've seen how small a trickle it becomes in late summer.

WITNESS STATEMENT

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY

TESTIMONY FOR SENATE BILL 346
AN ACT ALLOWING THE CHANGE OF USE OF WATER
TO AND FROM INSTREAM USES
SENATE NATURAL RESOURCES COMMITTEE
FEBRUARY 12, 1993

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE, FOR THE RECORD MY NAME IS JOHN BLOOMQUIST AND I AM A WATER LAW ATTORNEY FROM DILLON AND THE SPECIAL ASSISTANT FOR THE MONTANA STOCKGROWERS ASSOCIATION. THE MONTANA STOCKGROWERS ASSOCIATION IS AN ORGANIZATION OF OVER 3,500 LANDOWNERS AND WATER USERS LOCATED THROUGHOUT MONTANA. I AM TESTIFYING TODAY IN OPPOSITION TO S.B. 346 ON BEHALF OF THE MONTANA STOCKGROWERS AND HAVE BEEN AUTHORIZED BY THE MONTANA WOOL GROWERS ASSOCIATION TO SPEAK ON THEIR BEHALF IN OPPOSITION.

THE STOCKGROWERS OPPOSITION TO THIS LEGISLATION IS NOT AN INDICATION OF THEIR POSITION ON THE USE OF WATER FOR FISH AND WILDLIFE PURPOSES. THE STOCKGROWERS ASSOCIATION ACTIVELY SUPPORTS THE WATER LEASING PROGRAM WHEREBY THE MONTANA DEPARTMENT OF FISH, WILDLIFE AND PARKS CAN LEASE EXISTING WATER RIGHTS FOR INSTREAM FLOW PURPOSES. THE STOCKGROWER ASSOCIATION SUPPORTS THIS CONCEPT AND THE WATER LEASING STUDY PROGRAM. BECAUSE OF THE MANY UNKNOWN AND INTRICATE RAMIFICATIONS OF INSTREAM FLOW USE OF WATER, THE STOCKGROWERS ASSOCIATION FEELS THAT THIS LEGISLATION IS PREMATURE AS THE LEGISLATIVELY DESIGNATED WATER LEASING STUDY HAS YET TO BE COMPLETED AND ANALYZED.

THE MONTANA STOCKGROWERS ASSOCIATION RECOGNIZES THE CONCEPT OF INTEGRATING INSTREAM FLOW WATER RIGHTS INTO THE PRIOR APPROPRIATION SYSTEM WHICH HAS PROVEN TO BE THE MOST EFFICIENT MEANS OF ALLOCATING WATER IN THE WESTERN UNITED STATES, INCLUDING MONTANA. MONTANA IS BLESSED WITH AN ABUNDANCE OF AGRICULTURAL AND RECREATIONAL OPPORTUNITIES AND THE PRIOR APPROPRIATION SYSTEM HAS PROVEN TO BE THE MOST EFFECTIVE METHOD AVAILABLE TO ALLOCATE WATER AMONG THESE AND OTHER COMPETING USES.

SENATE NATURAL RESOURCES
EXHIBIT NO. ~~58~~ 6
DATE 2/12/93
BILL NO. SB 346

THE CONCERN WITH THIS LEGISLATION LIES IN HOW WATER RIGHTS PURCHASED UNDER THIS BILL WOULD BE ADMINISTERED, AND THE OVERALL EFFECT OF WATER MARKETING TO MONTANA. IN EFFECT, THAT IS WHAT THIS LEGISLATION PROVIDES, AN OPPORTUNITY TO CREATE A WATER MARKETING SYSTEM IN MONTANA WHERE WATER RIGHTS WILL BE BOUGHT AND SOLD AND TRANSFERRED VIA INSTREAM USE TO THEIR VARIOUS DESTINATIONS.

THE MSGA IS COMMITTED TO PROTECT ALL WATER RIGHT HOLDERS; JUNIOR AND SENIOR. THE MAJOR CONCERN THE MONTANA STOCKGROWERS ASSOCIATION HAS WITH THIS LEGISLATION IS THE IMPACT THAT A TRANSFER OF AN EXISTING WATER RIGHT TO INSTREAM USE WILL HAVE ON JUNIOR DIVERSIONARY WATER USES. THE CONCERN STEMS FROM THE LANGUAGE IN SECTION 3 AT PAGE 12 AND THE ASSOCIATED LANGUAGE AT PAGES 18 AND 19, CONCERNING CHANGES IN THE APPROPRIATION RIGHT. UNDER 85-2-402 MCA THE APPLICANT FOR A CHANGE IN AN APPROPRIATION RIGHT MUST SHOW VARIOUS CRITERIA IN ORDER TO RECEIVE APPROVAL FROM THE DEPARTMENT OF NATURAL RESOURCE AND CONSERVATION. FOREMOST AMONG THESE CRITERIA IS THAT THE PROPOSED USE OR CHANGE WILL NOT ADVERSELY AFFECT WATER RIGHTS OF OTHER PARTIES. THE CONCERN THE STOCKGROWERS HAVE WITH THE CHANGE OF EXISTING WATER RIGHTS TO INSTREAM FLOW USE LIES IN WHERE THE INSTREAM USE WILL BE MEASURED.

THIS BILL ESTABLISHES AN UNDEFINED POINT OF MEASUREMENT AS AVAILABLE TO THE INSTREAM FLOW BUYER OF THE EXISTING WATER RIGHT. THIS CREATION OF "REACHES" ASSOCIATED WITH INSTREAM FLOW PROTECTION POTENTIALLY CAUSES AN ADMINISTRATIVE NIGHTMARE FOR ALLOCATION OF THE WATER RESOURCE.

EXHIBIT "A" ILLUSTRATES A CASE IN POINT. WITHIN EXHIBIT "A" WE HAVE 3 WATER USERS, A, B, AND C. "A" HAS A DIVERSION LOCATED ABOVE "B" AND "C", AND IS SENIOR IN PRIORITY DATE. IN THE EXHIBIT, "A"'S WATER RIGHT IS FOR 10 CFS, WHICH IS DIVERTED AT A CERTAIN POINT WITH A RETURN FLOW OF 7 CFS TO THE SOURCE IN QUESTIONS. THE CONSUMPTIVE USE IS 3 CFS OF WATER. UNDER THE PRESENT WATER LEASING SCENARIO ESTABLISHED FOR THE MONTANA DEPARTMENT OF FISH, WILDLIFE AND

EXHIBIT #6
DATE 2-12-93
SB-346

PARKS TO LEASE INSTREAM FLOW WATER RIGHTS (MCA 85-2-436), THE AMOUNT OF WATER CONSUMED IS THE AMOUNT OF WATER WHICH MAY BE TRANSFERRABLE AND PROTECTED FOR INSTREAM USE. UNDER THE EXAMPLE, THE NEXT WATER USER "B" WHOSE WATER RIGHT IS FOR 7 CFS WITH A PRIORITY DATE OF 1900 DIVERTS THE 7 CFS WITH A RETURN FLOW OF 5 CFS. WATER USER "C" WHOSE WATER RIGHT IS FOR 5 CFS WITH A PRIORITY DATE OF 1900 DIVERTS THIS WATER AND CONSUMES APPROXIMATELY 2.5 CFS.

UNDER THE EXAMPLE, SUPPOSE AN INSTREAM FLOW WATER USER PURCHASED "A"'S RIGHT TO THE SENIOR WATER RIGHT FOR 10 CFS AND APPLIED FOR A CHANGE WITH THE DEPARTMENT TO MEASURE THE INSTREAM USE BELOW "C"'S DIVERSION POINT. UNDER THIS BILL THIS POSSIBILITY EXISTS. UNDER THIS SCENARIO, COULD THE INSTREAM FLOW PURCHASER COULD PROTECT 10 CFS AT "A"'S HISTORIC DIVERSION POINT AND ALSO UNDER THIS LEGISLATION MOVE A POINT OF MEASUREMENT BELOW "C"'S DIVERSION TO PROTECT 3 CFS WHICH IS THE AMOUNT HISTORICALLY CONSUMED BY "A" IN THE UTILIZATION OF THE WATER RIGHT? OR CAN THE INSTREAM FLOW PURCHASER PROTECT ALL 10 CFS AT SOME POINT NOT HISTORICALLY UTILIZED?

EFFECTIVELY WHAT THE INSTREAM FLOW PURCHASER HAS DONE IS CREATED A REACH BETWEEN "A"'S HISTORIC POINT OF DIVERSION AND THE NEW POINT OF MEASUREMENT LOCATED BELOW "C" WHEREBY INSTREAM WOULD BE PROTECTED. UNDER THE SCENARIO PRESENTED, THE NEW BUYER COULD EFFECTIVELY PROHIBIT "B" AND "C" FROM DIVERTING THEIR WATER AS THE NEW POINT OF MEASUREMENT FOR THE INSTREAM FLOW RIGHT WITH THE SENIOR PRIORITY DATE WOULD BE BELOW THEIR DIVERSION POINTS.

THE POINT OF THIS EXAMPLE IS TO DEMONSTRATE THAT ALLOWING THE BUYER OF AN INSTREAM FLOW RIGHT TO SELECT A POINT OF MEASUREMENT WILL CREATE MANY ADMINISTRATIVE PROBLEMS AND ALLOW THE INSTREAM FLOW BUYER TO REEK MUCH MISCHIEF ON THE SOURCE IN QUESTION. SHOULD EXISTING WATER RIGHTS BE TRANSFERRABLE FOR INSTREAM USE, THE ONLY REASONABLE MEANS OF ADEQUATELY MEASURING THESE FLOWS WOULD BE AT THE HISTORIC POINT OF DIVERSION. OTHERWISE THERE IS MUCH POSSIBILITY FOR

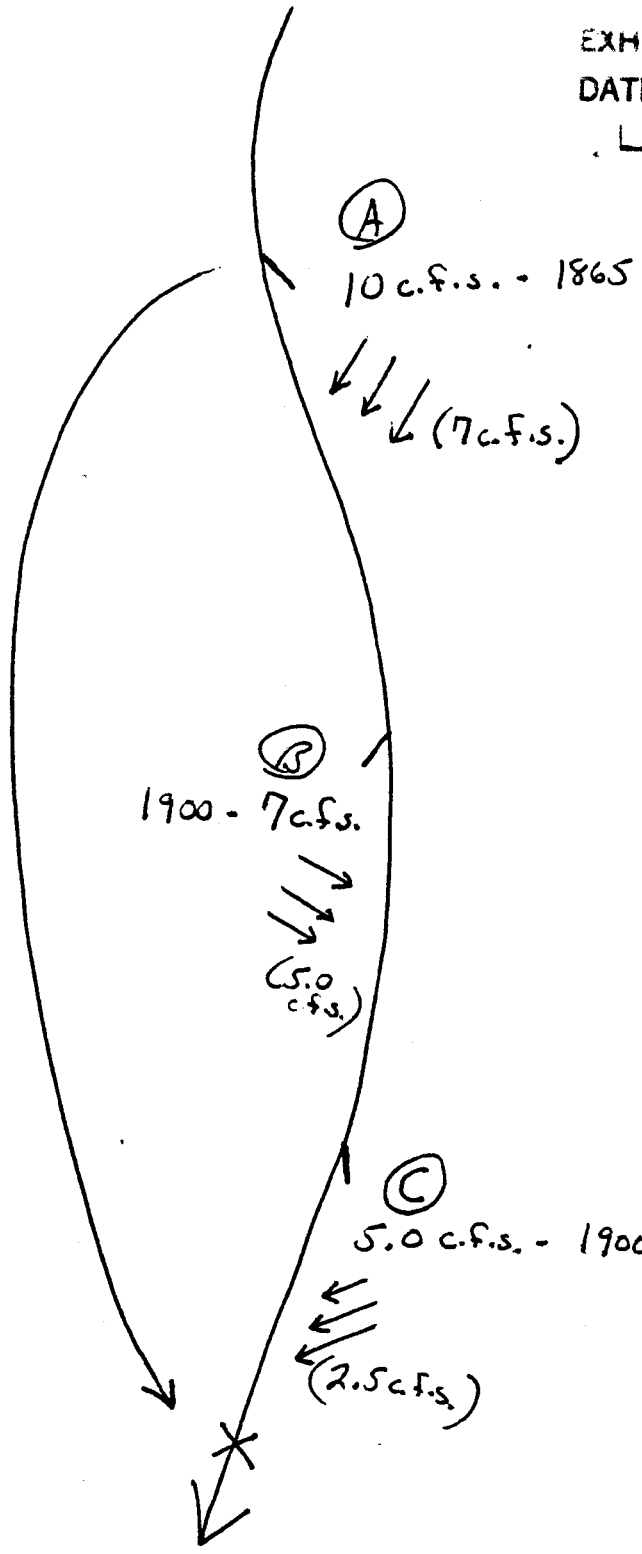
ABUSE OF THE INSTREAM FLOW RIGHTS.

ESSENTIALLY THE CLAIM BY THE PROPONENTS OF THIS BILL IS THAT INSTREAM USES WILL BE IN COMPLIANCE WITH THE DOCTRINE OF PRIOR APPROPRIATION AND EXISTING MONTANA LAW. WERE THIS THE CASE, THIS LEGISLATION WOULD NOT BE OBJECTIONABLE. HOWEVER, AGAIN IN SECTION 3 ON PAGE 12, THE BILL STATES THAT THE APPLICATION FOR CHANGE IN AN APPROPRIATION RIGHT TO INSTREAM USE MUST, "STATE THE AMOUNT OF WATER TO BE CHANGED TO INSTREAM USE AND POINT OF MEASUREMENT." AGAIN, THE BILL IS NOT CLEAR AS TO THE AMOUNT TRANSFERRABLE OR THE POINT OF MEASUREMENT. UNDER THIS BILL, THE HISTORIC AND RELIED UPON USES OF WATER WOULD BE AFFECTED. THE BILL'S LANGUAGE ALLOWING FOR THE APPLICANT TO STATE THE AMOUNT TRANSFERRED AND THE POINT OF MEASUREMENT IS NOT DEFINED AND CREATES A POSSIBILITY OF PROBLEMS FOR OTHER APPROPRIATORS ON THE SOURCE. ESPECIALLY, JUNIOR WATER USERS ON THE SOURCE IN QUESTION.

FOR THE REASONS SET FORTH ABOVE, THE MONTANA STOCKGROWERS ASSOCIATION STRONGLY URGES A VOTE OF DO NOT PASS ON S.B. 346. THANK YOU FOR THE OPPORTUNITY TO TESTIFY.

Exhibit A -

EXHIBIT #6
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Water right (A)
purchased for
instream use
and the point
of measurement
changed to X.

fault -
Measuring instream
use at X would
preclude (B) and (C)
from using their
water.

Testimony before the Senate Natural Resources Committee on SB 346.

Chairman Bianchi, members of the Committee, ladies and gentlemen, for the record my name is Ed Lord. I am a rancher from Philipsburg and the president of the Montana Stockgrowers Association. I am also president of the Flint Creek Waterusers Association, a Montana DNRC Project in the Flint Creek Valley. As an irrigator, we have Decreed Water Rights, Appropriated Rights and Use Rights. In addition, we use an 1100 Acre Foot contract with the Flint Creek Waterusers Association.

While I am not opposed to the concept of obtaining water for fish, wildlife and recreational purposes in emergency situations, I am opposed to SB 346 in its present form. My opposition stems from two separate and distinct reasons.

1. I am concerned about protecting the water rights of the junior appropriators..

2. I feel certain that this bill will create an administrative nightmare in many drainages.

I realize that the bill attempts to protect existing water rights in Section 3-2a Temporary and after July 1, 1999 of 85-2-402 MCA. However, the only opportunity a water right holder has to object to a change of use is at the time the appropriator makes an application. For various reasons, the potentially damaged water right holder, may not object at that time. Possible reasons might be:

1. He didn't read the legal notices in the paper every week.
2. He wants to get along with his neighbor.
3. He is uncertain how the change may effect his water right.

4. He can't afford the legal help necessary to make a proper objection.

A year or two after the change is approved and damage is obvious, his only recourse is through the court system. As you all know, litigation is a very expensive and time-consuming process.

My second point of apprehension is the administration and implementation of this Bill. For emphasis, let me quote from the Statement of Intent of SB 346, starting on line 22, page 2 and continuing to line 7, page 3.

"The legislature directs the department to adopt rules that effectively and efficiently implement the provisions of this bill. Additionally, the legislature recognizes that enforcement of instream flow water rights will be crucial to realizing the goals of this bill and further directs the department to assist in the development of streamflow measuring plans that will allow enforcement of instream flow water rights. This does not mean, however, that instream flow water rights cannot be enforced without streamflow measuring plans."

This wording places a tremendous burden on the DNRC at a time when they are facing drastic funding reductions. Many questions came immediately to mind and I would appreciate someone answering these questions sometime this evening.

1. Where will the water be measured?
2. Who will call for the water?

4. Who pays for who measures the water?
5. Who determines how much water is lost to seepage, evaporation and plant and tree use?
6. Who determines when junior water users rights are satisfied?
7. Who settles disputes arising from ownership of water?
8. Where does the legal authority rest?
9. Who installs the measuring devices?
10. Who engineers the measuring devices?
11. Who pays for the measuring devices?
12. Who maintains the measuring devices?
13. Who pays for the maintenance of the measuring devices?

I have more questions but I hope these will make my point.

In order to illustrate the practical application of some of these questions, I have prepared a schematic diagram of a typical small drainage. For discussion purposes, lets make the following assumptions:

1. Historically, Fish Creek started with 300 MI and ended at Rolling River with 150 MI in the month of August due to losses from evaporation, seepage, and streambank vegetation uptake.
2. Rancher A appropriated 200 MI in 1885 to irrigate 200 acres.
3. Rancher B appropriated 100 MI in 1890 to irrigate 100 acres using natural flow and Rancher A's return flow.
4. Rancher C appropriated 50 MI in 1895 to irrigate 50 acres using natural flow and Rancher B's return flow.
5. In 1994, Trout Unlimited purchases Rancher A's water right to supplement Fish Creek between its confluence with Rolling River and Rancher A's point of diversion.
6. It takes a minimum of 150 MI to maintain a fishery in Fish Creek.

Assuming that measuring devices are required, where, relative to the diagram of Fish Creek, does the DNRC or the new water right holder install a measuring device? Immediately downstream of Diversion Point A, upstream or downstream of Diversion Point B, upstream or downstream of diversion Point C, immediately above the confluence of Fish Creek and Rolling River or all of the above? Knowing that large measuring devices are very expensive, what type and size device will be installed that can measure 200 MI of water and still withstand the flood waters of Fish Creek?

Who controls the headgates on Fish Creek? Who pays his or her salary? Who determines when and if Rancher B and Rancher C's water rights are satisfied?

Even if all these questions are satisfactorily answered and Rancher A and Rancher B are left whole, Trout Unlimited has still not met their goal of a minimum flow of 150 MI throughout the stream. In light of the uncertainties, I recommend that SB 346 not pass and that low flow problems be solved with stream leasing involving all affected parties or water purchases from State or Federal projects.

Thank you for this opportunity to comment.

Fish Creek Drainage

300 MI

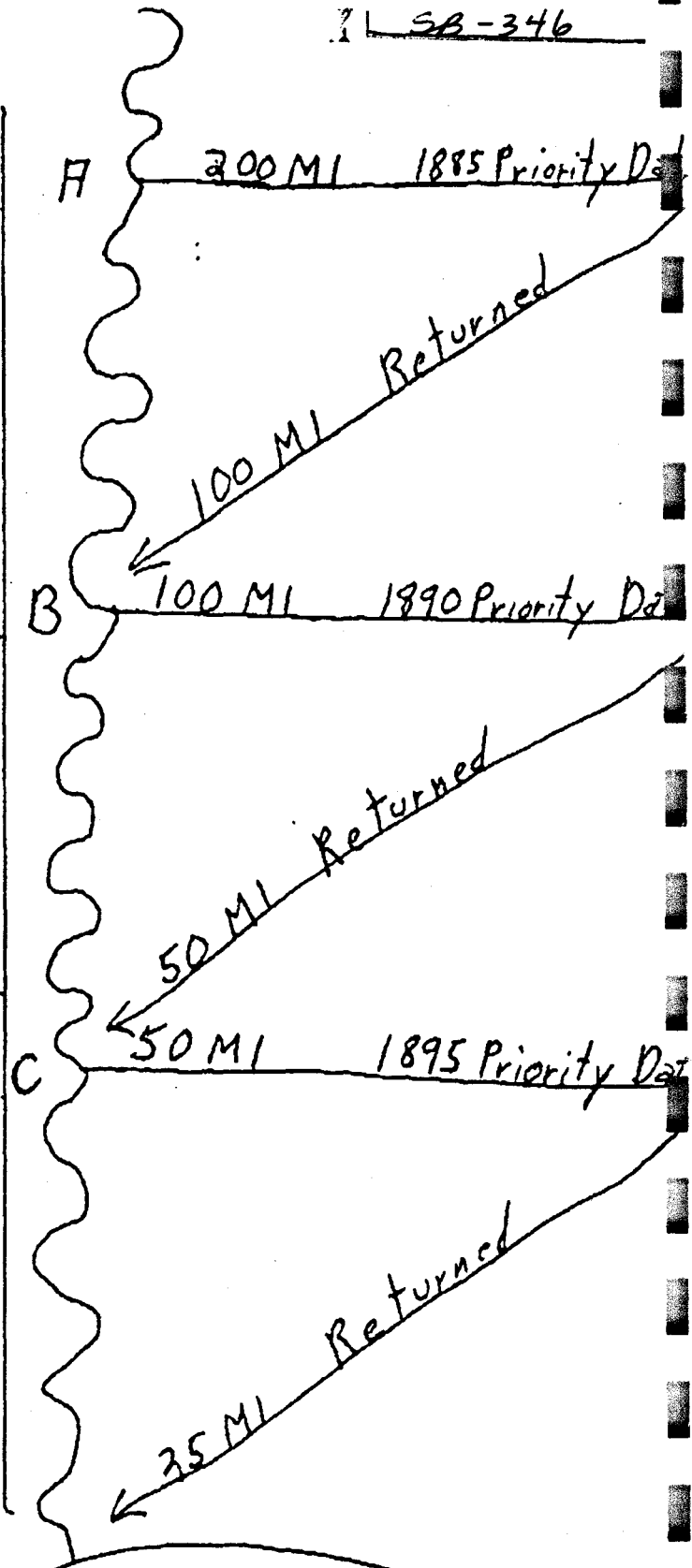
EXHIBIT #6A

DATE 2-12-93

SB-346

Flow Rate Before 1885 Flow Rate After 1885 Flow Rate After 1994

300 MI 300 MI	300 MI 100 MI	300 MI 300 MI
-50 MI Evap.	-50 MI Evap. +100 MI Return	-50 MI Evap. + 0 MI Return
250 MI 250 MI	150 MI 50 MI	250 MI 150 MI
-50 MI Evap.	-50 MI Evap. +50 MI Return	-50 MI Evap. +50 MI Return
200 MI 200 MI	50 MI 0 MI	150 MI 100 MI
-50 MI Evap.	-0 MI Evap. +25 MI Return	-50 MI Evap. +25 MI Return
150 MI	25 MI	75 MI



Rolling River

EXHIBIT NO. 7

DATE 2/12/93

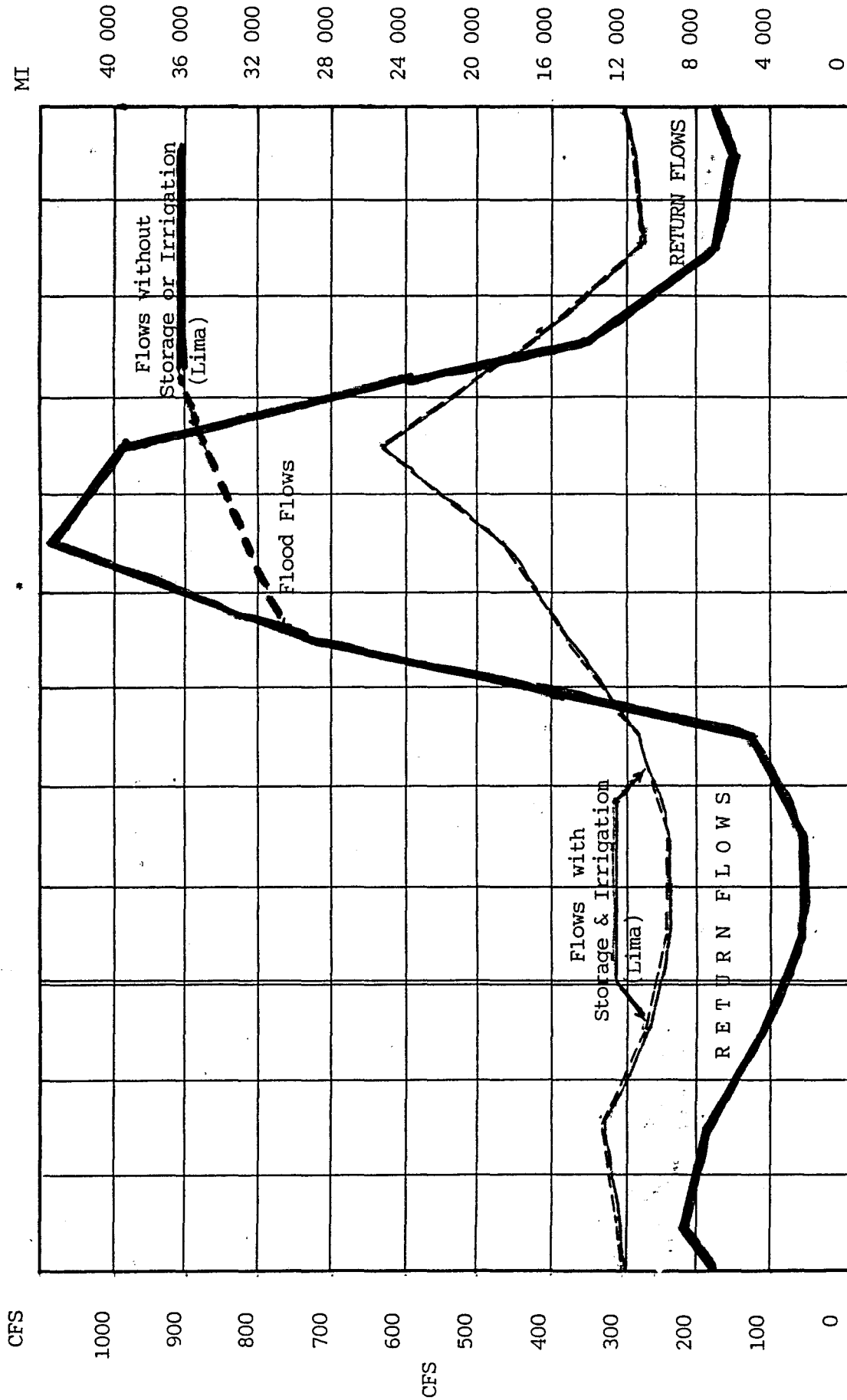
BILL NO. SB 346

IRRIGATION RETURN FLOW STUDY

AT

BEAVERHEAD RIVER SOURCE

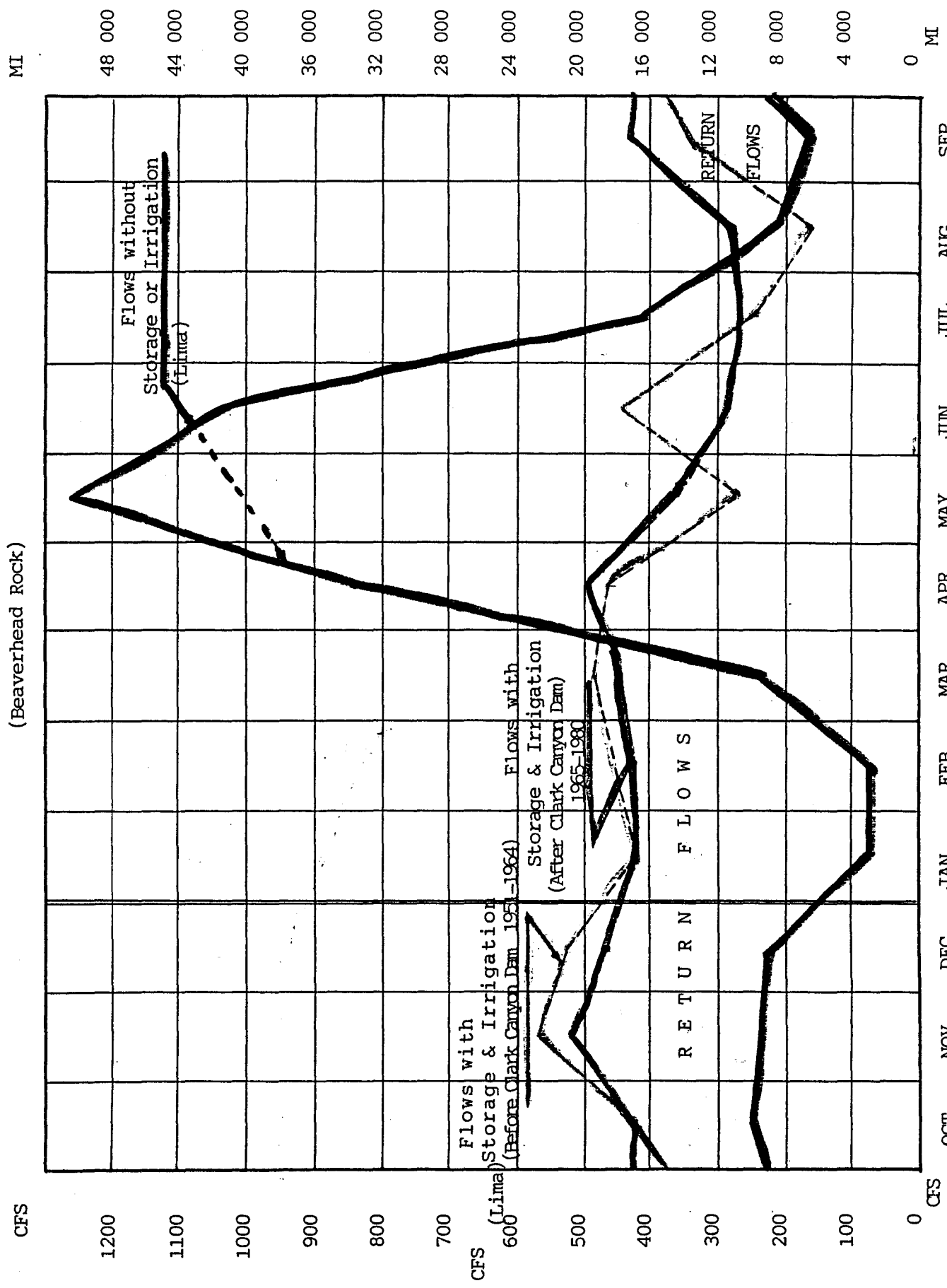
(CLARK Canyon Dam)



IRRIGATION RETURN FLOW STUDY

AT

BEAVERHEAD RIVER MOUTH
(Beaverhead Rock)



February 12, 1993

HEARING ON S.B. 346
SENATE NATURAL RESOURCES COMMITTEE
SENATOR BIANCHI, CHAIRMAN.

SENATE NATURAL RESOURCES
EXHIBIT NO. 8
DATE 2/12/93
BILL NO. SB 346

MR. CHAIRMAN & MEMBERS OF THE COMMITTEE:

For the Record, I am Vernon Westlake, representing the Agricultural Preservation Association in the Gallatin, Madison, Jefferson and Broad-water areas, and also as an irrigator with water rights in the West Gallatin River.

Mr. Chairman, for the Record, we are opposed to S.B. 346.

First, there is no need for this legislation at this time. Leasing of water rights is a viable option, and has been expanded and extended to maintain minimum flow where stretches are subject to de-watering. I suggest to the Committee that water leasing can work.

Our prime concern with this legislation is that it will give instream flow rights a standing, by making instream flow a beneficial use and integrating instream use water rights into Montana's Prior Appropriation System. I want to present an example of the way the agricultural economy will be particularly affected in dryer years.

The information in Lines 24 & 25, Page 1, through Lines 1 & 2, Page 2, of S.B. 346, provide the basis for the public interest criteria. This criteria may be used to maintain a certain flow in the Gallatin River, and would take precedence over senior irrigation water rights that would ordinarily be used to irrigate potatoes, small grains, and a second cutting of alfalfa. This would cause major losses to the producers of potato crops, representing a 20 (twenty) million dollar industry in Montana. In addition, similar losses would be caused to producers of irrigated small grains and alfalfa, as well as to crops such as sugar beets in areas where they are raised.

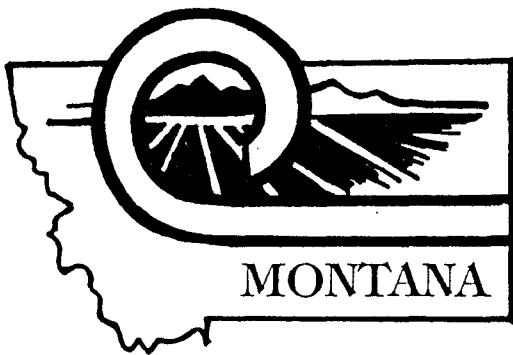
Agriculture is still the major economy in Montana. In dryer years, there would be large decreases in income to agriculture, thus large decreases in tax revenue for the state of Montana. You people know better than anyone that Montana cannot adequately fund its present needs, so let's not bite the hand that feeds us.

Also, we are very concerned with the measurement system, and the adverse effect on junior appropriators. This Bill is severely lacking in ways to address these issues.

I recommend that the Committee kill this piece of legislation, since there seems to be no need for it at this time.

Thank you Mr. Chairman & members of the Committee for the opportunity to be heard this evening.

Vernon L. Westlake
Vernon L. Westlake
3186 Love Lane
Bozeman, MT 59715



MONTANA

Association of Conservation Districts

501 North Sanders
Helena, MT 59601

(406) 443-5711

SENATE NATURAL RESOURCES

EXHIBIT NO. 9

DATE 2/12/93

BILL NO. 53 346

MACD POSITION ON SB 346

OPPOSE

Reasons:

A. SB 346 allows for private ownership of instream flow rights.

1. Since instream flow benefits the public and not just particular individuals, rights should be held by a public entity that is accountable to public wishes.

2. In certain cases, instream flow may not be beneficial to the public. Agency regulation of instream flow keeps in check these instances.

3. Private ownership of instream flows could make it very difficult for conservation districts or other water rights or reservation holders to make any changes in the status of their present rights or to obtain new rights. Public agencies may be less confrontational.

B. Permanent transfer of water to instream flow may be detrimental to the local economic base.

1. Since Conservation Districts are supported in large part by taxes on real property, any erosion of the tax base by lowering the value of the land base in a district (i.e. -- depleting the value of irrigated land because its water was removed) would impact the ability of the district to serve the needs in its area.

2. The permanent removal of water from the land to enhance instream flow only promotes the either/or concept rather than striving to find a way to help all segments of the economy.

3. Although recreation is a growing industry in some areas of the state, it is not a replacement for the traditional industries that continue to provide year-around employment and a stable tax base to support local governments. It is an industry that can expand and compliment the existing economic base in Montana and as such should be developed in a manner that does not weaken existing industry.

C. The present leasing study should be continued.

1. The effect of transferring water from diversionary uses to instream flow or what mechanisms need to be in place to ensure the rights of junior users is not yet known. The leasing study was put into place to find these answers and should be given a chance to work. What is not needed is a rush to change water law to put into place a concept that might create more problems than solutions.

2. Leasing water is preferable to its outright purchase and separation from the land. Leasing allows for both traditional use and new use access to the resource. In most years diversionary users would be able to maintain their operations, but in dry years instream flows could be protected.

3. As leasing becomes more common and its effects are more thoroughly understood, leases will be easier to make and the transfer of water through this method may occur more frequently.

D. Methods already exist to protect instream flow--the leasing study and the water reservation process. Both rely on public agencies to protect the public resource.

E. Outright purchase of water rights to enhance instream flows may be an alternative in the future, but only after study shows that it is workable and actually provides a solution to the problem.

DATE 2/12

SENATE COMMITTEE ON NATURAL RESOURCES

BILLS BEING HEARD TODAY: SB 346

Name	Representing	Bill No.	Check One	
			Support	Oppose
Kathy Hedley	MWF	346	X	
GARY GREN	Self	346	X	
Jay Bamocky	Self	346	X	
Alan Carroll	Self	346	X	
ART WHITNEY	MT. CHAPTER AM. FISH. Soc.	346	X	
Allen Schellenberger	Self	346	X	
DIVIE SCHALLENBERGER	Self	346	X	
ROBIN CUNNINGHAM	FISHING OUTFITTERS ASSN. OF MONTANA	346	X	
Dick Johnson	Self	346	X	
BRIAN SEVERIN	SELF	346		X
Mark Kambach	Self	346		X
John MATOVICH	MSGA	346		X
Ad Settler	MCW	346		X
Jess KILGORE	Stockgrowers	346		X
VERNON WEST LAKE	APA + STOCK GROWERS	SB 346		X
Chet Sinnema	Self	SB 346		X

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DATE 2/12

SENATE COMMITTEE ON NATURAL RESOURCES

BILLS BEING HEARD TODAY: SB 346

Name	Representing	Bill No.	Check One	
			Support	Oppose
Jim Stutzman	MT Wildlife Federation	346	X	
JIM McCOLLUM	Self	346	X	
TARA GALLAGHER	Self	346	X	
Jack Perkins	Stock growers	346		X
John Ryzance	Self	346	X	
Tot Ryzance	Self	346	X	
PAUL J. ROOS	Paul Roos Outfitters	346	X	
Pete Best	T.U.	346	X	
Chris Clancy	Self	346	X	
Row Kella	Farmers	346		X
John Mc Donald	Rancher	346		X
M. La Grange	Phyber	346	X	
J. P. Miller	Self	346	X	
Sam Babuch	Self	346	X	
RON SCHOFIELD	SELF	346		X
Kim J Reincking	unlimited msk West Slope Trout	346	X	

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SENATE COMMITTEE ON NATURAL RESOURCES

BILLS BEING HEARD TODAY: SB 346

Name	Representing	Bill No.	Check One	
			Support	Oppose
David Overton	MWF	346	✓	
Jon Gunnestrans	Boating Supplier/ ^{PRIVATE} Boater	346	✓	
Bradley G. Shugart	Self - Mustang AFS	346	✓	
James Mendell	Self - Medicine River Coalition	346	✓	
William M. Ordner	Self	346	✓	
Bruce Farling	Clark Fork Coalition	346	✓	
Kane Quenemoen	Self	346	✓	
Tim Kamps	self Kamps Seed Farm	346		✓
BRIAN KAHN	in self	346	✓	
Orinda Spence	Self	346	✓	
Dein & Sheri	Self	346	✓	
MURRAY CARPENTER	SELF	346	✓	
Campbell Stinger	Self	346	✓	
Bob Ferguson	Self	346	✓	
Kenneth Carpenter	Self	346	✓	
Vera Perkins				✓

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DATE 2/12
 SENATE COMMITTEE ON Natural Resources
 BILLS BEING HEARD TODAY: SB 346

Name	Representing	Bill No.	Check One	
			Support	Oppose
Vern Francis	Self / Medicine River Canoe Club	346	✓	
DON JELINEK	SAME	346	✓	
Jim McDermand	Self	346	X	
Leonard Blixrud	Teton River Water Users	346		X
Karl Johnson M.B.	Self - Trout Unlimited	346	X	
John Wilson	self	346	X	
Richard Olson	Self	346	X	
LISA BAY	SELF	346	X	
Bill Cobb	self (montana fisherman)	346	X	
Linda McMullen	Rancher	346	✓	
Ernie Smith	"	346	✓	
Janet Ellis	MT Audubon	346	✓	
Al Luebeck	Skyline Sportsmen	346	✓	
John Blomquist	MT Stockman Assoc	346		X
CB Pearson	Charle Fork-Paul Creek Coalitions	346	✓	

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SENATE COMMITTEE ON NATURAL RESOURCES

BILLS BEING HEARD TODAY: SB 346

Name	Representing	Bill No.	Check One	
			Support	Oppose
Jennifer Martin	self	SB 346	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Jim Rechin	MWF	"	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Lorna Drank	Mr. Tom Bureau		<input type="checkbox"/>	<input checked="" type="checkbox"/>
Joe Goutkoski	Self	SB 346	<input checked="" type="checkbox"/>	<input type="checkbox"/>

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Name	Representing	Bill No.	Check One	
			Support	Oppose
Tony Schoonen	Skyline Sportsmen	SB 346	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Tom Bugni	" "	" "	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Bill Holdorf	" "	" "	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Al Luebeck	" "	" "	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Jack Schuman	" "	" "	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Chris Marchion	Aurora Sportsmen	"	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Pat Simmons	GWA Gallatin Wildlife	SB 346	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Tim BORDER	GALLATIN WILDLIFE	SB 346	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Glen Paul	Trout Unlimited	SB 346	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Alan Rollo	Medicine River Game Club	SB 346	<input checked="" type="checkbox"/>	<input type="checkbox"/>
BILL HOLDORF	SKYLINE SPORTSMEN	SB 346	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Steen Phillips	West. Div. Am. Fisheries Soc	SB 346	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Jack Schuman	Skyline Sportsmen	SB 346	<input checked="" type="checkbox"/>	<input type="checkbox"/>
John Burgess	Skyline Sportsmen	SB 346	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Ronald C Bone	T.U.	SB 346	<input checked="" type="checkbox"/>	<input type="checkbox"/>
COREY TOMATSON	WEST SLOPE I.O. ROCK CREEK ADJ. COUNCIL	SB 346	<input checked="" type="checkbox"/>	<input type="checkbox"/>

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Name	Representing	Bill No.	Check One	
			Support	Oppose
JACKIE OVERTON		SB346	✓	
Mark Stahly	Self	SB346	✓	
Kirk Evenson	Missouri River Flyfishers	SB346	✓	
Pon Spoon	MC American Fisheries Council	SB346	✓	
Brian Sanborn	MC American Fisheries Society	SB346	✓	
Denise Vore	MC Am. Fish. Soc.	SB346	✓	
Mark Lere	MT Chap Amer Fish Soc	SB346	X	
DAVID B. YERK	MT Chapt. Am. Fish. Soc	SB346	X	
GEORGE LUKNES	MT Chapter Am. Fish Soc	SB346	✓	
Gracia A Hilde	Self	SB346	✓	
Dianne McDermauc	Medicine River ^{Club} Camp	SB346	✓	
HARRY LAFRIVIERE	GALLATI COUNTY FISH/WILDLIFE	SB346	✓	
Glenda Bradshaw	Self	SB346	✓	
Mary MELANDER	MEDICINE River Camp	SB346	✓	
Larry K. Day	Madison/Gallatin TU	SB346	✓	
Margot Deh	Self	SB346	✓	

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Name	Representing	Bill No.	Check One	
			Support	Oppose
JERRY MANLEY	BUTTE T, U	346	X	
L.F. Thomas	ANACONDA SPORTSMAN		X	
Charles A. Dowd	ANACONDA SPORTSMAN		X	
Richard BERB	SELF-MSDA	346		✓
HENRY BEOFORD	DEAD MAN'S BASIN WATER-USER ASSN	346		X
Robert Story Jr	Mont. Assoc. Cons. Dist.			X
Ed Lord	MSGR	346		X
Steve Christensen	Bitterroot Stockgrowers	346		X
Lewis Reyher	MANHATTAN FARM	346		X
Brian Weidenaar	Montana Seed Potato Growers	346		X
Dennis Simard	Montana Herb Farm	346		X
Robert Lane	Three Forks, Ranch Ag	346		X
Ronald Collins	MT. POWELL FISH & WILD- LIFE ASSOC. DEER LODGE	346	X	
John Cudhouse	MT POWELL FISH & WILDLIFE ASSOC Deer Lodge	346	X	
Steve Collins	MT. POWELL FISH & WILD- LIFE ASSOC. OF DEER LODGE	346	X	
John Cudhouse	MT. POWELL FISH & WILD LIFE ASSOC. OF DEER LODGE	346	X	

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