

MINUTES

MONTANA SENATE 53rd LEGISLATURE - REGULAR SESSION

FREE CONFERENCE COMMITTEE ON SENATE BILL 310

Call to Order: By Senator Steve Doherty, on April 14, 1993, at 11:20 a.m.

ROLL CALL

Members Present:

Senator Steve Doherty (D)
Senator Jack (Doc) Rea (D)
Senator Lorents Grosfield (R)
Representative Shiell Anderson (R)
Representative Ray Brandewie (R)
Representative Bob Bachini (D)

Members Excused:

None

Members Absent:

None

Staff Present:

Bob Person, Legislative Council
Michael Kakuk, EQC
Sylvia Kinsey, Secretary

Discussion:

Senator Doherty said he believed the purpose of today's meeting was to find out what the issues of contention were and list them for general intent. He said the meeting today would be short, trying to find the issues we need to have the parties work on. He asked Representative Anderson to recap the action.

Representative Anderson said the House Agriculture committee heard the debate and decided the Senate amendments would subordinate all late claim files and were too harsh. For various and sundry reasons people couldn't get their claims filed on May 30, 1982. In the House Agriculture committee they had amended the Senate version which allowed for the protection of those areas concerning the federal McCarran amendment, basically the amendment would be void if there was some trouble with the federal McCarran amendment which would jeopardize our state water adjudication process, water compact agreements, those water rights that had already been used as part of the agreements would be subordinated. The timely filed users, if they were to place objections for a late file claim and were successful, the attorney's fees and Court costs including witness costs could be awarded to the objector in that case. He said this went through the House on a 73-27 vote and

came back to the Senate where the House amendments were defeated 27-23. As he understands the bill as it stands now, it is supporting all those late claims. There is an amendment "kicking about" that would allow for late postmark claims but it was never offered on the House floor or in the House committee. There are between 1200 and 1300 late claims that would fall into the postmark category and there was talk of allowing these provided the postmark date was within the time limit.

Senator Doherty said there are a lot of ideas and they would try to gather those up and see what might be agreeable to the whole Senate and House.

Senator Rea said he would be interested in seeing the proposals put forth at this time.

Representative Brandewie said he had some amendments he would propose at this time and handed them around. (Exhibit 1) He said his objection to the bill as it came out of the House is primarily against reopening water claims, particularly in western Montana where there are a lot of new owners. He said 99% of the people who filed, got in on time. He sympathized with the people who had postmarked April 30, 1982 and feel they should probably be admitted through a compromise but the compromise should be made so narrow that we don't have a lot of bogus claims. He said it was the person who had a timely claim and was the defendant who would have to spend money to protect his rights and he did not want this to happen.

Representative Bachini said he did not believe anybody wants to take away anybody's water rights and maybe there was a way to do it. He had three amendments he would submit at a later time for the committee to consider. He said the burden of proof would have to be on the late claimants. He believed the committee was trying to find a middle of the road way to address this and not open it wide open which would cause a lot more problems. He would like to listen to some sort of compromise. Those who have a concern should present it to the committee and we should listen to the Attorney General's office (AG) and see what ramifications we might have to deal with.

Chair Doherty said he would like to have some brief comments of about five minutes from the AG's office and then from the people who have been the main opponents and proponents of the bill. Representative Anderson talked about the McCarran amendment, issues to the water compacts, the timely filing claims, and postmark dates, and he said Representative Brandewie has come up with some amendments. The process that would help is for anybody who has amendments to give them to him, as Chair, and he would make sure that anybody who wants a copy of any proposed amendment gets copies well in advance of this committee doing any executive action.

Chris Tweeten, Chief Deputy AG, said he was involved in this bill

from the beginning. He referred to amendments (Exhibit 1) that the executive branch agencies have concurred in. There were some technical changes in those amendments, but the primary substantive change is found for what are called the postmarked claims. Those are claims that were not received by the Department of Natural Resources and Conservation (DNRC) by the 5 o'clock April 30, 1982 but for which there is evidence those claims were postmarked prior to that deadline or notarized and submitted prior to that date and for some reason were simply not received. On the issue of postmarked claims, they think there is reasonable basis for providing postmarked claims with some additional level of remission that are not available to those in general because postmarked claims were all prepared prior to the deadline. That excludes the possibility of these claims that were dredged up later on in the process. The claimant took the necessary steps to submit that water right prior to the deadline but simply because of a misunderstanding, or whatever reason, they were not received. It is important to bear in mind that the postmark claimants still need to be treated as late claimants with respect to water rights compacts that have been negotiated and also in respect to any proceedings that have gone on in water Court. We don't treat the postmark claimants as though they were filing a claim, but as late claimants, and extend to them the additional level of protection with respect to their late claims over and above those other people who are not postmark claimants. He urged the committee's concurrence in these amendments.

Representative Bachini remarked that Mr. Tweeten had said these amendments with the postmark claim would not give them their original priority date but would give them preference over the others.

Mr. Tweeten said as the bill came out of the Senate, there were four or five conditions on late claimants as a condition under which the claimants would be allowed back in. One of those was that they were subject to all prior proceedings, another was they would come in without rights to subject water rights compacts that were reached and a definite right to claim protection of any subordination rights that had been reached in respect to federal reserve water rights in this compact. One of them was the subordination requirement the Senate Bill contains. Their proposal would keep those first two conditions in place with respect to the postmark claims. They still would come in subject to all the prior proceedings and still would come in without standing to object the compacts, without the right to be protected by the compact coordination provisions. They would not come in subject to the other subordination language that is in the bill. Their priority date would not be subordinated to all who filed claims, that would be the additional offering to the postmarked claims.

Chair Doherty asked what the position of the executive branch agencies was on the McCarran amendment, water compact, and the other issues. Mr. Tweeten said they don't think this approach

poses any additional McCarran problems with respect to the right for challenging the jurisdiction of the state Court. We have spoken with the Representatives of the Interior Department but do not have a firm commitment from them at this point, but Mr. Aldrich, the solicitor for the Dept. of Interior, has told us he is not troubled by the idea of letting the postmarked claims back in with respect to the position of adequacy. He said the problem could be that because Montana is letting some claims back in and putting them back in priority, possibly ahead of some federal rights, because of that, our process is not an adequate forum for providing protection for federal rights in the adjudication process. The Supreme Court has indicated that if the Court makes a finding and the state forum is not adequate to protect federal reserve water rights, then a concurrent action can be filed and would proceed in federal courts to adjudicate the federal reserved rights. The problem we are more concerned with in regard to the jurisdiction issue is that some court at some time might, as a result of what the legislature does here, find there are a few cases where there is not an adequate forum for protecting federal rights and federal lawsuits that are in existence now in Montana, might be revitalized and restarted. We might be forced to defend our rights in two forums at the same time. They do not think the postmark approach creates that problem for us.

Senator Bachini asked about the time limit on this and was told the proposal they have is that the evidence that the claim was in fact postmarked on April 30, 1982 or before. Also the claims on which there was no postmarking, if the claim was prepared and notarized prior to April 30, 1982 and physically received by the department by May 7.

Senator Rea asked what the difference was between 2 weeks and 2 years. Mr. Tweeten said the reason this is a rational basis for providing this information for the postmark claims is because by the time the deadline arrived, they had prepared the water rights, prepared the claims and they had submitted their material to the department. It is just a misunderstanding on their part as to whether postmarking would be considered binding. They feel that is a rational basis on determining between that group and people who developed their late claims down the road and had not been prepared to make them on the day the deadline passed.

Duke Gilbert, Water Rights Attorney, Dillon, said he thought the House amendments are the only workable way to provide the people of Montana any benefit from this bill. They may need some minor adjustments and he could understand the Representative's concerns about somebody running in a bad or fictitious claim. He did not believe that is the way the bill is set up and is not a particular danger to any extent. The fact that there is a new owner can not create a new water right and new people coming into the area should not increase the number of claims because the original water rights existed in '73. He said the claims may not have been divided, but there should not be any new rights. He

said there will be very few that are water use rights for which there would be no ancient document of their use and of their ownership. The concerns of the McCarran amendment problems are a very low. He said his understanding of the bill is that people have to show that there is a good and valid reason for letting them in. That good and valid reason might be other than that DNRC published bad instructions and instructions that were outdated went on forever. Some of the other issues are also valid and should be treated as such. The bill provides that those water rights had to be valid, existing and in use in 1973.

Chair Doherty summed up Mr. Gilbert's remarks by saying that the effort to allow 1200 out of the 3,000 by postmarks is a good effort, he was not opposed to that, but Mr. Gilbert wants to get the rest in. Mr. Gilbert didn't think the avenues in this bill will help the people you are representing.

Ms. Rehberg, Water Rights Attorney, Helena, said one of the suggestions Representative Brandewie ran off was one she had been discussing with another attorney who had talked with the Water Court. She commented on the proposed amendments which she had a chance to glance at. She mentioned the postmark people and had talked to some of them. She said yes, they would get in, but she also feels there are other people who have legitimate reasons and they should be allowed in as well. We are seeking individualized determinations and those are determined in the Court and it is difficult for a Legislator to make those kinds of determinations. The postmarks make it subject to all compacts, not just those that have been negotiated as of today and they could go on for years. She thought that issue had been resolved since they had a meeting at the AG's office and went over this. Postmarking does not take care of State Lands. They have 2,000 claims of which they think they could get 600 in within the time frame that is set. It does not take care of the city of Anaconda and there are problems for water rights for municipal use. It does not take care of Havre's water rights which are needed to maintain appropriate instream flows to operate their water treatment plant. It does not take care of a lot of people who would be devastated if they are not allowed in. They are suggesting that the burden of proof rest on the late claimant instead of the preponderance of evidence and they will then have to make a better show. She said those who have a legitimate claim should be able to make that claim. It is difficult for the Legislature to make individualized determinations as to how fair this person's rights are as opposed to the right of that person. She would suggest putting that into the court, have the court review the claims and they could make an initial determination. She made several suggestions and said she would have them drafted and distributed.

Representative Anderson asked Ms. Rehberg if she was referring to the Water Court and she said to the department which would send it to the Water Court for initial review. As this is set up, the late claim procedure is that if a claim comes into the department

the department verifies it and then sends it to the Water Court. At that point the Court could look at it and make the late claimant provide additional information. The Court could have the preliminary test, which is something the Court is adapted to do. They could send out notice of hearing, etc.

Chair Doherty summed up her proposal as saying whenever a person has filed a claim, even though that claim came in late, they can still come in and the Court can determine if this is a valid claim before proceeding and the claimant would pay the whatever the cost would be.

Ms. Rehberg said she was not proposing the deadline be changed, it would be attached to the bill. With State Lands it would be impossible to show the deadline, but up until that time, you still have your set deadline of when the claims had to be filed, but then they would go through a screening process. She said the cost could be worked into it and thought it might be able to take it out of the additional fee which would be required. Most of these claims are non-exempt. When you take those claims out that represents a little over a third of the claims which are exempt. As she understands, those will go through the system, regardless of what happens in this bill. The others, a lot of small claims such as stock water, domestic wells or instream stock water and they are not very significant and it would probably not take long for the Court to do those. In longer ones the Court would take longer and the Court could assess fees to pay the cost.

Representative Anderson asked Chris Tweeten his opinion of this approach. Mr. Tweeten said there is a problem here that there is no easy solution to. If you allow wide open access to the Court, no matter what kind of procedure the state Courts have put on it, the cost is there and no matter where you put the burden of proof examination, it is a burden on the Water Court. The second concern he had, with only the description this morning and no further examination, there is an issue in the Water Court with respect to the appropriateness of the Water Court engaging in reviews on its own motion of claims. The issue is whether the Water Court has the power to look into this claim on its own or whether there has to be some sort of an adversary proceeding brought before the Water Court before they are assigned jurisdiction. The proposal this morning sounded to him that the Water Courts move on an ex parte basis, take a look at these claims and make some sort of judgment without the benefit of having a presentation by the parties as to whether a claim is valid or not. He said he was not sure that was appropriate for the Water Court to do this, nor was he sure how efficient the Water Court could be in carrying out the process without such a presentation.

Representative Anderson said it seemed to him it might be difficult to have an adversary proceeding because you may not have an adversary, and it seemed to him the Water Court would be in a position to determine whether these claims were actually

adjudicated claims. He gave the example of taking just the claims that are late filed claims that the Water Court is presently aware of and the person could prove he had acted in a reasonable and timely fashion after he had discovered the error (such as the person who was in jail and when he got out it was too late). We could tighten this up more than it is. He asked if this appeared to be a reasonable compromise.

Mr. Tweeten said they would want to look at the language of the proposal before he could comment. He was still concerned about the propensity that kind of an approach has. He said he would not exclude that possibility without first seeing the language.

Senator Rea told Mr. Tweeten that in the House Mr. Tweeten had stated if you put a date in there on what SB 310 does, on which all claims would have to be in, it should satisfy the McCarran amendment. To his knowledge, they have put a date in there and made these provisions. He asked if he was reading that correctly.

Mr. Tweeten agreed that was what he had said and in respect to the narrow issue of jurisdiction under the McCarran act, that is true. The McCarran amendment has implications beyond it's own language in respect to the state's right to adjudicate water rights. The problem arises in the fact that under the McCarran amendment jurisdiction is concurrent. It gives the state courts the power to adjudicate federal reserve claims, but if the state court has the power, it doesn't exclude the federal court from having the same power.

Representative Bachini said in listening to the proponents and opponents, there are some amendments they are willing to provide to the committee. It would be his suggestion that these two parties get together and work on some amendments they would propose and get those straightened out before presenting them to us.

Chair Doherty said this was an excellent idea and believed the committee knew the issues that had been defined where there is still contention and would suggest the sides get together and come up with amendments and distribute them freely. He said if you want to distribute them yourselves, want to go through him or the secretary, make sure there is one central amendment that depository. We will make sure anybody who wants amendments will get them. He suggested Mr. Gilbert, Ms. Rehberg, Mr. Tweeten and Mr. McIntyre or whoever is on other sides, get their amendments and get the language down within the next 24 hours, pass it around and give everyone a chance to comment on them before we do executive action probably on Friday.

Senator Grosfield said the only issue that came to mind that had not been brought up is the issue of the fee. Apparently the fee was dropped from \$300 to \$100 in the House and he has some concerns about that.

Senator Doherty said we know this is a serious issue. He is receiving phone calls from people who are in danger of losing their water rights and are very concerned about it. He has also received numerous letters from people who don't want the water rights system "tipped over" in Montana. He believed no one wanted to tip the apple cart over, but did want to provide some relief. He asked the parties to let him or Representative Anderson know what kind of progress they are making by tomorrow morning so the committee could meet tomorrow evening or Friday morning.

Representative Brandewie said he believed fees should be commensurate with the cost. He did not know if that meant they should be open, but did not believe there should be any cost to the taxpayer or the state of Montana. There should be some agreement that the claimant should pay for the cost. They get their water rights back and that should be a reward, don't make the state of Montana foot the bill for any of it.

Ms. Rehberg said they tried to split it between cost for the department and if there was an actual hearing in the Water Court, there be an additional cost.

Patty Walker, Glen, said they have a late claim. In 1990 the U. S. filed for a water permit on a spring. They denied the water permit at the water hearing. Two weeks ago the Walkers tried to clean out the spring and they sent the federal marshal out. On Saturday the Walkers received a summons in the mail that they were being sued in federal court. She said it had never occurred to them that they could not use water which flowed through their land, this is their problem and something needs to be done about it.

Senator Grosfield said his personal feeling is he would like to get a bill passed this session. There is a lot of disparity in the kind of bill that comes out, but there is an additional possibility that no bill comes out this session. He said it would be his sense that they would be better off with a bill than without one.

ADJOURNMENT

Adjournment: 12:15 p.m.



SENATOR STEVE DOHERTY, Chair



SYLVIA KINSEY, Secretary

SD/sk

E. Ribert
4-14-93

Amendments to Senate Bill No. 310
Reference Copy

Requested by DM
For the Free Conference Committee

Prepared by Robert Person
April 13, 1993

1. Page 10, lines 24 and 25.

Strike: "For" on line 24 through "interest." on line 25

2. Page 13, line 25 through page 14, line 1.

Strike: "For" on page 13, line 25 through "interest." on page 14
line 1

3. Page 18, line 11.

Strike: "person who failed to file a"

4. Page 18, line 12.

Following: "right"

Insert: "not filed with the department"

5. Page 18, lines 12 and 13.

Strike: "file such claim"

Insert: "be filed"

6. Page 18, line 17.

Strike: "AS" through "COURT."

7. Page 19, line 17.

Strike: "person who failed to file a"

8. Page 19, line 18.

Following: "right"

Insert: "not filed with the department"

9. Page 19, line 19.

Strike: "file"

Insert: "be filed"

10. Page 19, lines 19 and 20.

Strike: "a claim of an existing water right"

11. Page 19, line 22.

Strike: "a person who may have filed"

Insert: "the filing of a late claim in addition to"

12. Page 19, line 23.

Following: "right"

Insert: "filed"

13. Page 19, lines 23 and 24.

Strike: "from filing an additional claim under this section"

14. Page 20, lines 4 through 7.

Strike: "Within" on line 4 through "those" on line 7

Insert: "The"

15. Page 20, line 19.

Strike: "INCLUSION OF THE LATE CLAIM IN THE ADJUDICATION"

Insert: "date of filing"

16. Page 20, line 20.

Page 21, lines 1 and 5.

Strike: "ASSERTING"

Insert: "filing"

17. Page 21, line 1.

Following: "LATE CLAIM"

Insert: "or the person's predecessor in interest"

18. Page 22, lines 10 through 13.

Strike: "ASSERTING" on line 10 through "OR" on line 13

Insert: "filing a late claim, finds"

19. Page 22, line 15.

Following: "JUDGE"

Insert: "or is otherwise without merit"

20. Page 22, line 18 through page 23, line 16.

Strike: subsections (e) and (f) in their entirety

Insert: "(e) A late claim is subordinate to all federal and Indian reserved water rights established by compact or decree under this chapter.

(f) A late claim that was not placed in the United States mail and postmarked on or before April 30, 1982, or, if there is no evidence of the date of mailing, for which there is evidence of execution on or before April 30, 1982, and actual receipt by the department on or before May 7, 1982, is, in addition, subordinate to:

(i) all timely filed claims finally adjudicated to be valid; and

(ii) a permit or reservation of water issued under this chapter if and to the extent that the person holding the permit or reservation files an objection under this part and proves that the person holding the permit or reservation reasonably relied to the detriment of the person holding the permit or reservation upon the failure of the claimant to file a claim on or before April 30, 1982."

21. Page 24, line 18.

Strike: "\$100"

Insert: "\$150"

22. Page 24, line 20.

Following: "ACCOUNT"

Insert: "for the examination of late claims by the department and for the publication of notices by the department as required under 85-2-213(2)"

23. Page 24, line 22.

Strike: "\$200"

Insert: "\$150"

24. Page 39, line 8.

Following: "SEVERABILITY"

Insert: "-- exception"

Following: "."

Strike: "IF"

Insert: "(1) Except as provided in subsection (2), if"

25. Page 39, line 10.

Following: "EFFECT."

Strike: "IF"

Insert: "Except as provided in subsection (2), if"

26. Page 39.

Following: line 13

Insert: "(2) It is the intent of the legislature that each part of [this act] is essentially dependent upon [section 4], which amends 85-2-221, and that if one part of [section 4], except subsection (3)(f)(ii), is held unconstitutional or invalid, all other parts of [this act] are invalid."

27. Page 39, lines 14 through 20.

Strike: section 11 in its entirety

Renumber: subsequent section

DATE 4-14-93

SENATE COMMITTEE ON Full Conference Committee

BILLS BEING HEARD TODAY: SB 310

Name	Representing	Bill No.	Check One Support Oppose	
Patty Walker	self	SB 310 ⁴ amend.	X	
Jeff Walker	Self	SB 310 ^{for} priority date	X	
Cliff Long	self	SB 310	X	
W. D. [unclear] III	Self	SB 310		
Lyle Richard	Self	SB 310	X	
Peter [unclear]	self	SB 310	X	
Pat McNamee	"	SB 310	X	
Ann Teege	"	SB 310	X	
Marion Johnson	"	SB 310	S	

VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY