

MINUTES OF THE SELECT COMMITTEE ON WATER
February 3, 1981

The Select Committee on Water convened on Tuesday, February 3, 1981 in Room 436 of the Capitol at 2 p.m. with CHAIRMAN AUDREY ROTH presiding. All members were present, with the exception of REPRESENTATIVE BRIGGS.

The continuation of HB 194 was opened by REP. ELLISON. He suggested amending the bill as follows: On line 6 (part of the title), strike: "REPEAL OR", and on line 12, strike: "or repeal", line 15, strike: "repeal or". He offered these amendments in response to John Scully's request from the previous hearing of the bill on January 27, 1981.

PROPOSERS FOR THE AMENDMENTS

PETER JACKSON, representing Western Environmental Trade Association, said that he approved of the suggested amendments.

OPPOSERS FOR THE AMENDMENTS

There were none.

PROPOSERS FOR THE BILL

None gave testimony.

OPPOSERS: ELLEN DITZLER of the Montana Environmental Information Center testified in opposition to the bill. (EXHIBIT I). ABE HARPESTAD, representing the Department of Environmental Science (DES) stated the bill expresses a lack of trust in legislative judgment. He also feels it is a duplication of effort. PAT OSBORNE of the Northern Plains Resource Council doesn't feel HB 194 addresses the problems that occurred during the Yellowstone water controversy.

QUESTIONS FROM THE COMMITTEE:

REP. CURTISS asked if the board left unappropriated water in both the Upper and Lower Yellowstone. LEO BERRY of the DNRC replied "yes." REP. CURTISS asked if someone was present who could speak on the subject. GARY FRITZ, also of the DNRC, said there is more water in the stream left unappropriated than has been reserved. He said the reservation has been changed and feels there is adequate water in 8 out of 10 years. REP. CURTISS said that in the public hearings, it seemed that there wasn't enough and that, under the permit system, "junior users" were getting more water than "senior users." GARY FRITZ (DNRC) said that, in 8 out of 10 years, there is enough water. Most Conservation Districts would disagree with that, he said. REP. CONROY asked about the "modification" part of the bill. He wondered if it might do the opposite of the sponsor's intention. REP. ELLISON said there was some weakness in that part of the bill,

but that there was the right of appeal in the courts. REP. THOFT asked if REP. ELLISON would still like the bill, sometime in the future when conditions were not as favorable. REP. ELLISON said the option of appealing through the courts should address complaints. He said that one hearing may have already taken place. REP. THOFT asked what one would do if the board didn't respond favorably. REP. ELLISON again said to appeal. REP. ASAY asked if there was a procedure at this time for the legislature to review the application. GARY FRITZ and LEO BERRY said there was presently no review. REP. THOFT asked if a bill could be introduced to override the action of the board. LEO BERRY said that was a difficult question to answer as it is a very complex legal issue as to whether or not a property right has been delegated to the Conservation Districts. He didn't know if the legislature could come in and reallocate the reservations the board had made. That issue has never been adjudicated. REP. KEMMIS wonders how this bill could improve anything about the Yellowstone situation. REP. ELLISON commented that some of the cities were unhappy about that as well as the agricultural community. He feels this bill will allow review and provide a system of checks and balances. REP. ROTH pointed out that Section 85-23-16 provides for strict guidelines to follow in reserving water. REP. KEMMIS said these reservations were drawn up after a great deal of study. He doesn't feel the legislature would be as knowledgeable as those who drew up the reservations. REP. ELLISON feels the legislative review process would work now and for the future when the needs would probably be different. REP. KEMMIS asked if a reservation of a Conservation District could be converted into a diversionary right. GARY FRITZ said the board could modify or revoke a reservation only if it could show that the water has not been put to use in the intended manner. He also pointed out the difference between a water permit and a reservation. REP. KEMMIS asked if a bank is likely to grant a loan to a Conservation District that has only a provisional water right. REP. ELLISON said that is all that is available.

REP. THOFT asked if the bill would delay a project needing money because of having to wait for the legislature to convene. LEO BERRY said it could.

REP. ELLISON closed the hearing on HB 194.

SB 59

SENATOR STEVE BROWN, of Helena, opened the hearing on the bill. He stated that the bill was originally referred to the Senate Agriculture Committee. The present law permits a stock owner to dig a pit of 15 acre feet or smaller. His parents encountered a situation where a pit was built on adjoining property and then asked for a permit, saying it was to be used for stock watering

purposes. It later became apparent that it was for recreational uses, primarily as a duck hunting pond. Subsequently, it was leased to an individual who wanted to mine for sand and gravel. He dug a trench about 18' deep and about 10' wide along the boundary of his parents' property. Previous to this, the Browns had experienced a high water table and had constructed a drain ditch so that it could become usable pasture; but now, with the adjoining trench, water is reappearing on their property. It is felt that the pit may have disturbed the ground water aquifers and may cause a long-term problem. He feels that this may occur in other instances and, for this reason, is introducing SB 59 which requires that a permit be first obtained before a pit is built. (EXHIBIT II) He feels that small parcels of land are especially likely to encounter problems of this type. SEN. BROWN said agricultural groups favor the bill and the Senate passed the bill with only one no vote.

PROPONENTS:

There were none.

OPPONENTS:

There were none.

EXECUTIVE SESSION

HB 324. REP. BURNETT said he felt the two bills just heard could be combined. He suggested that the SCS should be available to engineer a project, such as SEN. BROWN discussed in the hearing on SB 59. REP. CONROY asked LEO BERRY if he thought the two bills could be combined. LEO BERRY said he didn't feel they were compatible, but felt they expressed opposite intents. Further discussion of HB 324 was postponed at this time.

HB 269. REP. McLANE read her proposed amendments to HB 269. (EXHIBIT III) She then moved the amendments be accepted. REP. HUENNEKENS suggested that the amendments be addressed one at a time. REP. McLANE moved that Amendment 1 be accepted by the committee; it was seconded and PASSED UNANIMOUSLY. She moved that Amendment 2 be accepted by the committee; it was seconded and PASSED UNANIMOUSLY, as were Amendments 3 and 4. REP. McLANE moved that HB 269 DO PASS AS AMENDED. The motion was seconded and passed UNANIMOUSLY.

HB 324. HB 324 was again brought up for action by the committee. After the committee took a moment to study the proposed amendments (EXHIBIT IV), REP. CONROY, referring to page 2, asked about revocation of a water permit. LEO BERRY said the only time the permit would be revoked would be if the pit was interfering

with some other water right. REP. CURTISS asked for Legislative Researcher BOB PERSON to read MCA 85-2-113 for the committee. Bob read it and explained that it outlines the general duties and powers of the Board. REP. KEMMIS asked if the first section provides for the granting of a provisional permit. Leo Berry said it makes provision for provisional permits. They are subject to final determination. He felt this bill would not apply only to small impoundments, but to any water permit. He said all permits are provisional until a hearing is held to determine if there will be any adverse effects of other water rights. In this bill, there is an attempt to change that law by exempting stock ponds of 15 acre feet or less, but not to stop the appeal process. Ninety percent of the applications are not objectionable, he said. REP. KEMMIS asked if anyone could go to court, not just one who wants a 15 acre-foot impoundment. FRITZ thought that the language applied only to the small stock pond, but thought it should be researched. REP. HUENNEKENS felt the small stock ponds had been reinserted when the intent was to exempt them. LEO BERRY said he felt the bill, as it was written, would definitely conflict with SB 59, and that is why he came up with the amendments. The intent is for a person to get a permit as quickly as possible, he stated, so that the SCS can help with the engineering of the project. REP. KEMMIS asked if a provision couldn't be written to have the permit remain provisional, until a time has elapsed to have others raise objections. FRITZ said the time frame was left open to allow objections at any time that adverse effects were determined. Most nearby property owners would discover adverse effects right away, he said. REP. THOFT said that in his part of Montana, stock ponds are affecting the water rights of others, and asked if FRITZ thought he had a legitimate concern. FRITZ said that is also Senator Brown's concern and the reason SB 59 was introduced. FRITZ explained that HB 324 would allow the building of a 15 acre-feet pond and the permit being issued promptly. He stated that Senator Brown's bill adds one more stipulation: If your land holdings are less than 40 acres in size, you have to have a permit before you start the stock pond. He felt that to fully address the problem, a statute would have to require a permit for each and every pond, which he didn't think was necessary. REP. CONROY moved the amendments be passed. REP. KEMMIS expressed concern about the amendment dealing with the rights of others. REP. HUENNEKENS felt the amendments in Section 2 amending 85-2-314 specifically dealt with that problem. CHAIRMAN ROTH asked if the committee thought that might present a continual problem. REP. KEMMIS felt it would and suggested that the

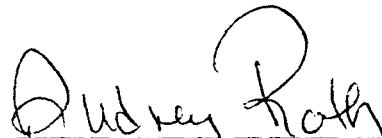
SCS be contacted for an opinion. He suggested striking the suggested amendment to 85-2-314.

The amendment's motion was seconded and PASSED.

REP. CONROY moved DO NOT PASS AS AMENDED.

It was seconded and PASSED.

The meeting was adjourned at 2:40 p.m.

A handwritten signature in cursive script, reading "Audrey Roth". The signature is written in dark ink and is positioned above a horizontal line.

AUDREY ROTH, CHAIRMAN

rj

VISITORS' REGISTER

HOUSE

Water

COMMITTEE

A/B 194

Date 2-3-81

OR _____

[illegible]

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR LONGER FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

VISITORS' REGISTER

HOUSE

COMMITTEE

Date _____

SPONSOR

[illegible]

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The Montana Environmental Information Center

• P.O. Box 1184, Helena, Montana 59601 (406) 443-2520
• P.O. Box 8166, Missoula, Montana 59801 (406) 728-2644

TESTIMONY BEFORE THE HOUSE WATER COMMITTEE REGARDING HB 194
February 3, 1981

Madame Chairman, members of the Committee, I am Ellen Ditzler. I speak on behalf of the Montana Environmental Information Center, a statewide public interest group with over 1300 members.

Our testimony on HB 194 addresses two simple points: sensible government and a balanced approach to economic development in Montana. Both policies are presently embodied in the Water Use Act and the water reservation process.

The first point - sensible government - has been addressed by others who have testified. Further conditions on water reservations would largely duplicate a process that is extensive, lengthy, largely scientific and legal, and already has the policy guidance of the Legislature. HB 194 would add another layer of government on water reservations and a tremendous layer of work on legislators.

At best, the Legislature could find the time and resources to evolve an independent body of data on which to base its decisions on water allocation. At worst, making a water reservation provisional and subject to change or repeal could be a bit like writing the rules, letting the teams play out the game, yet holding open the option to, in the end, change the score.

More importantly, HB 194 could undermine the opportunity for economic development in Montana's agricultural, municipal and recreation sectors.

The Water Use Act and reservation system are policies of growth which allow Montana to protect and expand its economies without access to water resources being a limiting factor to development. A water reservation is a water right, but differs in that it is an appropriation that doesn't require the immediate application of water to a beneficial use, but guarantees that water right for future use.

To illustrate this point, I quote Professor Al Stone of the University of Montana Law School and an expert on water law. In this case, Professor Stone refers to the potential development of a municipal water reservation, such as in Billings.

"A city ought to be able to obtain a water right for something in excess of what it is using right now so as to provide for future growth...That certainty is one of the

purposes of a (water) reservation."*

The same can apply to a conservation district that wishes to have some guarantee regarding water rights for future expansion.

If HB 194 were in effect, that certainty could be weakened and delayed as much as 20 months. Holders of a "provisional" reservation (e.g. a conservation district) would not know for 20 months if they can proceed to expand their irrigation operations until their reservation is finalized - or even modified or repealed by the subsequent session of the Legislature. This could cause delay and insecurity for those who wish to begin preliminary work, such as applying for bank loans, on using reserved water.

Because of its possible effects on water rights, economic development and the realistic limitations of time and work in the Legislature, we respectfully ask that the committee recommend a DO NOT PASS on HB 194. Thank you for considering our comments.

Respectfully submitted,

Ellen Ditzler
Staff, Montana Environmental Information Center

*from the minutes of the legislative subcommittee on Water Rights, July 8 & 9, 1977.



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SECTION CORNER OF RIGID
IN RAYALL CO. COURTHOUSE

OWNER(S)

ANNAS R. & NINA MARIE
WOFFORD

N 89° 53' 46" E
1322.07'

N 89° 53' 46" E
1322.07'

George G. Brown
Property

1318.85'
S 00° 35' 31" E

1317.77'

Dr. J. Richards
spreads

Ostobares
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ACRES

BRANCH OF THE
BUTTE-AN-GRAND-N-GRAND R.R.

CE 1/8 CORNER, SEC. 8

967.17'

N 89° 56' 42" E, 2640.39'

Bitter Root Stock Farm
Property

SECTION CORNER OF RIGID
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W. R. R.

W. R. R. NORTH-NORTH-EAST

W. R. R. North

George G. Brown
Property

S 00°35'31"E

1318.89'

Ostobaque
Pond

1383
ACRES

W. R. R. North

1317.77'

BRANCH OF THE
W. R. R. NORTH-NORTH-EAST

CE 1/4 CORNER, SEC. 8

967.17'

1320.20'

N 89°56'42"E, 2640.39'

Bitter Root Stock Farm
Property

SONN

VAS P & NINA MARIE
WOFFORD

SECTION CORNER OF ROAD
IN RAYALLI CO. COURTHOUSE

SECTION COVER OF ROAD
IN RAYALL CO. COUNTRY

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Dr. Richards

George G. Brown
Property

E. I. C.
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CE 16 301P. 510.8

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$N 85^{\circ} 56' 42'' E, 2640.39'$

Bitter Root Stock Farm
Property

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Amendments to HB 269

Proposed by the Helena Valley Irrigation District

1. Page 3, lines 10, 11, and 12.

Strike: "Travel and other necessary expenses must be approved by a unanimous vote of the board"

2. Page 5, line 24.

Strike: "\$100,000"

Insert: "\$125,000"

3. Page 6, line 1.

Following: "paid"

Insert: "for such purchase, lease, or contract"

4. Page 6, line 14.

Strike: "employ competent engineers to make"

Insert: "provide"

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OF THE IMPOUNDMENT OR PIT IS LESS THAN 15 ACRE-FEET AND the appropriation is from a source other than a perennial flowing stream. ^{SE 59} As used in this subsection, a perennial flowing stream means a stream which historically has flowed continuously at all seasons of the year, during dry as well as wet years. However, before ^{L14 P2} WITHIN 60 DAYS after constructing the impoundment or pit, the appropriator shall apply for a permit as prescribed by this part. ^{L16 P2} UPON RECEIPT OF A CORRECT AND COMPLETE APPLICATION FOR STOCKWATER

⁷ PROVISIONAL PERMIT THE DEPARTMENT SHALL THEN AUTOMATICALLY ISSUE A ^{L17 P2} PROVISIONAL PERMIT. If the department determines after processing the application ^{L18 P2} A HEARING UNDER 85-2-314 THAT the rights of other appropriators have been or will be adversely affected, it may ^{L19 P2} REVOKE THE PERMIT OR require the applicant ^{L-19 P2} PERMITEE to modify the construction of the impoundment or pit and issue ^{L-20 P2} MAY THEN MAKE the permit subject to such terms, conditions, restrictions, or limitations it considers necessary to protect the rights of other appropriators.

(3) A person may also appropriate water without applying for or prior to receiving a permit under rules adopted by the board under 85-2-113.

Section 2. Section 85-2-314, MCA, is amended to read:

"85-2-314. Revocation OR MODIFICATION of permit. If the work on an appropriation is not commenced, prosecuted, or completed within the time stated in the permit or an extension thereof or if the water is not being applied to the beneficial use contemplated in the permit or if the permit is otherwise not being followed, OR OTHER RIGHTS HAVE BEEN ADVERSELY AFFECTED, the department may, after notice, require the permittee to show cause why the permit should not be revoked OR MODIFIED. If the permittee fails to show sufficient cause, the department may revoke OR MODIFY the permit.

HB 324

A BILL FOR AN ACT ENTITLED: "AN ACT AMENDING SECTION 85-2-306, AND
85-2-314, MCA, TO EXCEPT FROM THE WATER APPROPRIATION PERMIT PROCESS THE
REQUIREMENT FOR APPLICATION FOR A PERMIT PRIOR TO CONSTRUCTING AN
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OF THE SIZE OF THE IMPOUNDMENT IF THE SOURCE OF WATER IS OTHER THAN A
PERENNIAL FLOWING STREAM, AND ALLOWING FOR A MODIFICATION HEARING IF OTHER
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BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 85-2-306, MCA, is amended to read:

"85-2-306. Exceptions to permit requirements. (1) Outside the boundaries of a controlled groundwater area, a permit is not required before appropriating groundwater by means of a well with a maximum yield of less than 100 gallons a minute. Within 60 days of completion of the well and appropriation of the groundwater for beneficial use, the appropriator shall file notice of completion on a form provided by the department at its offices and at the offices of the county clerk and recorders. Upon receipt of the notice, the department shall automatically issue a certificate of water right. The original of the certificate shall be sent to the county clerk and recorder in the county where the point of diversion or place of use is located for recordation. The department shall keep a copy of the certificate in its office in Helena. After recordation, the clerk and recorder shall send the certificate to the appropriator. The date of filing of the notice of completion is the date of priority of the right.

(2) A permit is not required before constructing an impoundment or pit and appropriating water for use by livestock if ^{1-9 P2} the maximum capacity of ^{110 P2} the impoundment or pit is less than 15-acre-feet and THE MAXIMUM CAPACITY

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(2) A permit is not required before constructing an impoundment or
pit and appropriating water for use by livestock if ^{1-9 P2} the maximum capacity of
^{110 P2} the impoundment or pit is less than 15 acre-feet and THE MAXIMUM CAPAICITY

OF THE IMPOUNDMENT OR PIT IS LESS THAN 15 ACRE-FEET AND the appropriation is
from a source other than a perennial flowing stream. ^{SE 59} As used in this sub-
section, a perennial flowing stream means a stream which historically has
flowed continuously at all seasons of the year, during dry as well as wet
years. However, before ^{L14 P2} WITHIN 60 DAYS after constructing the impoundment or
pit, the appropriator shall apply for a permit as prescribed by this part.
^{L16 P2} UPON RECEIPT OF A CORRECT AND COMPLETE APPLICATION FOR STOCKWATER

PROVISIONAL PERMIT THE DEPARTMENT SHALL THEN AUTOMATICALLY ISSUE A
PROVISIONAL PERMIT. If the department determines after processing the ^{L17 + L18 P2}
application A HEARING UNDER 85-2-314 THAT the rights of other appropriators
have been or will be adversely affected, it ^{shall 19 - P2} may REVOKE THE PERMIT OR
require the applicant ^{L-19 P2} PERMITEE to modify the construction of the ^{L-20 P2}
impoundment or pit and issue ^{L 20 shall} MAY THEN MAKE the permit subject to such
terms, conditions, restrictions, or limitations it considers necessary
to protect the rights of other appropriators.

(3) A person may also appropriate water without applying for or
prior to receiving a permit under rules adopted by the board under
85-2-113.

Section 2. Section 85-2-314, MCA, is amended to read:

"85-2-314. Revocation OR MODIFICATION of permit. If the work on an
appropriation is not commenced, prosecuted, or completed within the time
stated in the permit or an extension thereof or if the water is not being
applied to the beneficial use contemplated in the permit or if the permit
is otherwise not being followed, OR OTHER RIGHTS HAVE BEEN ADVERSELY AFFECTED,
the department may, after notice, require the permittee to show cause why
the permit should not be revoked OR MODIFIED. If the permittee fails
to show sufficient cause, the department may revoke OR MODIFY the permit.