

MINUTES OF THE SELECT COMMITTEE ON WATER
February 10, 1981

The Select Committee on Water convened at 1 p.m. in Room 436 of the Capitol on February 10, 1981 with CHAIRMAN AUDREY ROTH presiding. All members were present.

HB 551.

REP. KEMMIS opened the hearing on HB 551, introduced at the request of the Department of Natural Resources and Conservation (DNRC). The bill is intended to establish a public interest criterion for issuance of water rights. The legislation is based on a concept now used in most western states that use a permit system of water appropriations, he said. HB 551 requires that the DNRC consider the public interest before granting rights for large water requests for agriculture, or industry. Another provision of the bill is a required feasibility determination. The most important feature of the bill, he said, is requiring the DNRC to consider the "effects on the quality and potability of water of existing beneficial uses in the source of supply" (Section 1(6)(iii)). Adverse impact on surrounding land must also be considered, KEMMIS said.

PROPONENTS:

LEO BERRY, Director of the DNRC, stated that the bill was suggested by the Water Policy Review Advisory Council and supported by the DNRC. Currently, he said, there is nothing on the books that allows the department to look at any public interest criteria to see whether the water permit should be allowed. HB 551 would allow the Department to consider the public interest for water right applications that are for 3,000 or more acre feet per year and 5 cubic feet per second or more when the application is for more than 50 percent of the median monthly flow. (EXHIBIT I)

WILLA HALL, representing the League of Women Voters, testified in favor of HB 551. As a member of the Water Policy Review Advisory Council, she felt the provisions of the bill would safeguard public interests by protecting senior appropriators, the quality and quantity of water, the possible damage of property by contributing to saline seep, and the affect of wildlife and recreation.

PATRICK SWEENEY, Staff Director of the Northern Plains Resource Council and a member of the Water Policy Review Advisory Council, testified in favor of the bill. He feels this bill addresses several of the considerations that are not currently addressed in the state law. He noted a water request in 1979 of 348 cubic feet per second for municipal, agricultural and industrial purposes on the Yellowstone River at the confluence of the Powder River. He stated that issuing a permit of this type was difficult because the law was not specific enough as to the way in which the DNRC should consider the request. He also said the burden of proof is clearly with the DNRC in this bill. He felt the last section of the bill to be quite restrictive and thought the committee might wish to consider amendment.

TERRY MURPHY, President of the Montana Farmers Union, stated he can see some useful proposals in the bill. He said that he had been a strong proponent of SB 523 (in the last session) which asked for legislative review of requests of over 3,000 feet. He thought that this bill (HB 551) would be a logical follow-up to that bill.

ELLEN DITZLER, representing the Montana Environmental Information Center, felt that existing water users should be protected, and that new water users should have the rights this law would give them. It would also make the administrators of the law more responsible, she said.

OPPONENTS:

BILL ASHER, representing the Agriculture Preservation Association, Park County Legislative Association, Sweet Grass Preservation Association and the Stillwater County Agriculture Legislative Association, stated that all four groups wish to be on record as opposing HB 551 (EXHIBIT II). He also stated that Ray Beck of the Montana Association of Conservation Districts would also like to be on record as opposing HB 551. (See EXHIBIT III)

VERNON WESTLAKE, representing the Agriculture Preservation Association and the Sweet Grass Preservation Association, feels that if HB 551 were enacted it would inhibit growth. He said he felt that new users would not be granted rights to use water. He wondered where the public interest would end, and felt that the bill was an attempt to guarantee the establishment of instream flows. (See EXHIBIT IV)

CHARLIE PEIRSON, a rancher from Park County, testified that the bill would bring the "public, a non-aligned interest" into the water reservation process. He also opposed the size of appropriation being specifically for large water users. He said the existing users are already protected by the present law, and also felt this was the wrong type of law to address the saline seep or water quality consideration. (EXHIBIT V)

ROBERT ELLIS, Montana Water Development Association, stated that he holds a water right and is Chairman of the Board of Water Users in the Helena Valley. He said that he feels the present law is adequate, and gives everyone a chance to question a permit or to concur with it. He feels it would be a disadvantage for an applicant to have to stand up in public and ask for the permit. As to the economic feasibility, he felt that a person should have a right to take a financial risk if they choose. He said that saline seep could not be predetermined. (EXHIBIT VI)

CHARLIE CRANE, Montana Water Development Association (MWDA), disagreed with the retroactive applications and the economic feasibility portions of the bill, and opposed it for those reasons.

PETER JACKSON, of the Western Environmental Trade Association (WETA) felt it would be difficult to judge "economic feasibility", that experience was the best method of determining that. He gave as an example a Conservation District project, named Dry Lake, designed to hold 3,100 acre feet of water. When the Madison County Conservation district applied for a grant, the project was estimated at \$1,250,000. He then went to a private contractor who bid \$488,000, guaranteed with a bond. In regard to wildlife considerations, he said applicants might have to "transplant a sage grouse" to fulfill that portion of the bill.

JO BRUNNER, representing WIFE (Women Involved in Farm Economy), opposed the bill because of their concern for agriculture. She specifically disagreed with the "5 or more cubic feet per second of water or 50% of the median monthly flow" portion of the bill. (EXHIBIT VII)

ALICE FRYSLIE, a representative of the Montana National Farmers' Organization, presented a prepared testimony to the committee (EXHIBIT VIII) and told of her opposition to the bill.

PAT WILSON, of MontCo, opposed the bill saying the industry she represents is already highly regulated. She felt that there is presently enough opportunity to challenge applications for major water users under the EIS process and under the Major Facility Siting Project regulations. She said that this would make one more process in the development of a project.

QUESTIONS FROM THE COMMITTEE:

REP. HUENNEKENS asked if a public hearing is allowed the DNRC under the Administrative Procedures Act in the granting of a water permit. LEO BERRY said one could be heard if an impact study was done.

REP. HUENNEKENS asked about Section 1 (6)(a) regarding the size limitations of the bill. BERRY said the word "and" should be used in place of "or", on page 2, line 7, and also on page 2, line 8. In regard to the "50%" reference on page 2, line 7, GARY FRITZ, of the DNRC, said that means half of the average flow of a creek.

REP. THOFT asked if the biggest part of the problem is the small water user. BERRY said the DNRC was concerned with both the small and the large water user.

REP. HUENNEKENS asked why the department used "median" rather than "average" in the bill. FRITZ felt that either was acceptable, and thought the Water Supply Papers were rated on a "long-term average".

REP. THOFT asked if there was any provision for appeal, or would the DNRC have total control under this bill. BERRY said there would be appeal.

REP. ROTH asked where the burden of proof would be. BERRY said the DNRC would consider the application and make a decision on it. If the application were to be denied because of clear and convincing proof it would have adverse reaction, the applicant could challenge this denial in court and the Department would have to prove their reasoning.

REP. CURTISS asked if an economic study would be made on each application. BERRY felt it would be a rare case in which a denial would be made on economic unfeasibility. He also said that further funds would have to be appropriated to make this type of study. However, he felt that only 2% of the applications would require it, perhaps only one in two years.

REP. NEUMAN, referring to page 2, line 16, asked if return flows would be considered as to water quality. BERRY said they would be.

REP. ROTH asked if the EIS did this type of work now. BERRY said he knew of only 2 impact statements that had been prepared to date-- one on a large-scale breaking of ground and one on a subdivision. Under the current ruling of the Supreme Court, he said, a decision cannot be made on the basis of an impact statement.

REP. CURTISS asked if the language in regard to the amount of water wasn't inconsistent. BERRY felt it was a different method of approach rather than an inconsistency.

REP. HUENNEKENS asked how many doubtful applications were under study at the present. FRITZ said there were probably a "dozen."

REP. HUENNEKENS asked about "retroactivity." BERRY said it would apply to existing (pending) applications, not to prior water rights. CRANE said that the title of the bill assumes that, but is not clear. REP. HUENNEKENS said the bill was more clear than the title.

CHAIRMAN ROTH asked TERRY MURPHY his opinion of that portion of the bill. MURPHY said he supports the bill as defined by BERRY.

REP. KEMMIS asked why BRUNNER thought 3,000 acre feet per year or 5 cubic feet per second were large water appropriations. BRUNNER felt the use of "or" caused the misunderstanding.

In closing the hearing on HB 551, REP. KEMMIS answered concerns of the committee and stated he felt that there were places the bill could be improved by amendment. He then closed.

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EXECUTIVE SESSION:

HB 494.

REP. CURTISS moved for a DO PASS.

The committee discussed proposals of the bill regarding:

- Funds the DNRC felt it needed for administration
- The time limitation for coming up with a plan
- The relationship of Conservation Districts to the DNRC being for consultation and advice
- The Fiscal Note
- The possibility that numerous Conservation Districts would request studies.

REP. KEMMIS moved that on page 3, line 16, following "shall", the committee reinsert the language that was stricken on lines 13 and 14: "within its staffing and budgeting limitations". The motion was seconded and passed UNANIMOUSLY.

REP. CURTISS moved for a DO PASS AS AMENDED on HB 494. The motion was seconded by REP. ASAY. The motion PASSED with one NO vote, REP. NEUMAN.

The meeting adjourned at 3 p.m.


CHAIRMAN AUDREY ROTH

rj

HOUSE BILL 551

TESTIMONY OF THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

AN ACT TO ESTABLISH A PUBLIC INTEREST CRITERION FOR THE ISSUANCE OF
WATER RIGHT PERMITS.

The Department of Natural Resources and Conservation supports House Bill 551 because it would allow the consideration, in very limited circumstances, of the consequences of issuing a water right and provide the authority to deny an application if it were clear that the project would not be in the public interest.

The criteria for issuance of a water right do not allow the Department to consider the benefits to the state and applicant, the economic feasibility of the project, its effect on the quality of water currently put to beneficial use or how the new use may effect saline seep. Yet these factors are important aspects of a water right.

The public interest is a widely accepted criterion in the issuance of water rights; in fact, there is only one other western state that does not use a public interest criterion.

HB 551 would allow the Department to consider the public interest for water right applications that are for 3,000 or more acre-feet per year and 5 cubic feet per second or more or when the application is for more than 50 percent of the median monthly flow. This constrains the possible use of the public interest criterion to about 2 percent of the applications received each year.

The Department can deny a water right application based on the public interest criterion only if it can meet very strict legal tests in proving the application is not in the public interest. The bill was written this way to restrict the use of the public interest criterion to cases where disadvantages of the application totally overwhelm any project benefits.

The Water Policy Review Advisory Council, chaired by Gordon McGowan, recommended that a public interest criterion be added to Montana water law. That council felt the criterion was necessary to ensure that our water resources were put to wise use.

NAME Bruce Adams BILL No. HB 5571
 ADDRESS MANHATTAN DATE FEB 10, 1981
 WHOM DO YOU REPRESENT SEE BELOW
 SUPPORT _____ OPPOSE X AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

REPRESENTING:

Adirondack Park Association
 Pike County Association
 Sullivan County Association
 St. Lawrence County Association

WITNESS STATEMENT

Name Ray Back Date 2/9/81
Address 7 Edwards Helena MT Support ?
Representing MT Assoc Conservation Dist. Oppose ? X
Which Bill ? HB 551 Amend ?

Comments:

The Montana Association of Conservation
Districts would like to be shown in the
record as being strongly opposed to
HB 551

Thank-you

Please leave prepared statement with the committee secretary.

EXHIBIT IV
NAME VERNON L. WYST LAKE BILL No. H.B 551
ADDRESS 3186 LOVE LAKE BUZEMAN DATE 2/10/81
WHOM DO YOU REPRESENT AG. PRESERVATION ASSN.
SUPPORT _____ OPPOSE ✓ AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

(EX)
February 10, 1981

Mr. Chairman and members of the Committee: My name is Vernon Westlake. I am representing the Agricultural Preservation Associations from Gallatin, Park, Sweetgrass, and Stillwater Counties.

For the Record: We oppose H.B. 551.

If enacted, H.B. 551, would provide the means for the advocates of No Growth to stop, or at least make very difficult, new economic development requiring the use of water in the state of Montana.

Agriculture, industry, and other segments of our economy have been operating with the theory that we must use the water or lose it.

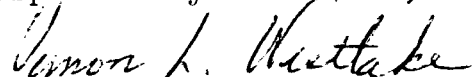
This bill would amend existing Statutes 85-2-311 MCA, to include the Public Interest Criterion for the issuance of water right permits, and would almost guarantee that the users in Montana would lose it.

I should like you to consider where might the Public Interest Criterion stop? Would it stop in Livingston, or Billings, or Glendive, on the Yellowstone, Three Forks or Great Falls, or Glasgow, on the Gallatin, in the State of Montana, or maybe Minneapolis, or St. Louis, or the Atlantic Ocean?

We believe this is another attempt to guarantee the establishment of instream flows that definitely benefits downstream use.

We strongly urge you to defeat this piece of Legislation. Thank you for allowing us to present this testimony.

Respectfully Submitted,



Vernon L. Westlake
3186 Love Lane
Bozeman, Montana 59715

NAME Charles Pierson BILL No. HB 551
ADDRESS Box 965, Livingston DATE 2/10/81
WHOM DO YOU REPRESENT Park County Legislative Assoc
SUPPORT _____ OPPOSE ✓ AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

Because of the small amount of water considered for this application, 5 cfs, this bill would create a great amount of nuisance to farmers filing for new water. An amount of water of 5 cfs is only 200 miner's inches, or about 2 good heads of water to an irrigator.

This bill creates the possibility of a great deal of non-aligned interests to become involved in the water appropriations business

^{will}
^{an amount}
^{incident} This is also not the type of bill to tackle the ^{water quality, or potability} salin ^{seep} problem. The DNRC now does a respectable job of representing public interests. Irrigators and water users throughout the state face a tremendous burden completing requirements of SB 76. Let's not saddle them with a battalion of public interested participants who are neither affected or directly ~~involved~~ involved.

NAME R. A. Ellis BILL NO. HP 551
ADDRESS 1735 S. W. 1st St. Hialeah DATE 2/10/51
WHOM DO YOU REPRESENT Mt Water Development
SUPPORT _____ OPPOSE ✓ AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

NAME Jo Brunner BILL No. HB 551
ADDRESS Helena DATE 2/10
WHOM DO YOU REPRESENT W.I.F.E
SUPPORT _____ OPPOSE X AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments: W.I.F.E opposes This Bill. We feel
it is not in the best interest
of Agriculture!

NAME Alice Fryslie BILL No. HB 551
 ADDRESS Helena DATE 2-10-81
 WHOM DO YOU REPRESENT Montana National Farmers Organization
 SUPPORT _____ OPPOSE ☒ AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

It appears to us that it would be unnecessarily cumbersome to require public hearings and involvement in issuance of a application for a water right permit, for whatever reason.

The statement "will not interfere unreasonably with other planned uses" is so nebulous, so as to create a question in our minds of who will play God and determine "unreasonableness", or who can afford the time involved in a battle of proving clear and unequivocal benefits to the "public" in allowing such water right permits. The further question needs to be addressed that, how many "public" are in the position of being water knowledgeable to the point of completely understanding the detriments or benefits of an action determined feasible on their behalf by the Dept. This bill is a stifler to development and we urge a do not recommendation.

Alice Fryslie

NAME W. A. Ellis BILL No. AB 494
ADDRESS 1735 Sierra rd, Holmdel, NJ DATE 2/10/61
WHOM DO YOU REPRESENT NJ Water Development Assn
SUPPORT ☒ OPPOSE ☐ AMEND ☐

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

