

MINUTES OF THE MEETING OF THE SELECT COMMITTEE  
ON WATER  
February 17, 1981

The Select Committee on Water convened at 1:30 p.m. on February 17, 1981 in Room 436 of the Capitol with CHAIRMAN AUDREY ROTH presiding. All members were present except REPRESENTATIVES ASAY and KEMMIS. Due to Chairman Roth sponsoring House Bill 529, she turned the chair over the Vice Chairman Curtiss.

House Bill 529

REP. ROTH opened the hearing on House Bill 529, a bill to require applicants for and holders of reservations of water to maintain minimum flow or quality to prove that sufficient unappropriated water is or will be made available to satisfy the reservation. ROTH said she was sponsoring the bill at the request of the Sweet Grass Conservation District. She explained provisions of the bill.

PROPOSERS:

CONRAD FREDERICKS, Sweet Grass county attorney and representing the Sweet Grass County Conservation District, said the reservation law doesn't require that the applicant show that the water is actually there. This bill requires the applicant to show this, or show that he can make the water available for the reservation, according to FREDERICKS. At times of excess water, provisions could be made for storage of water for use at a later time. The question is whether or not that would be converting instream water or diverting water. He felt it was just delaying the time of the use of water.

RAY BECK, representing the Montana Association of Conservation Districts, feels the bill will strengthen the reservation process. The Association asked that it be shown on the record that they support the concept of House Bill 529. (EXHIBIT 1)

ROBERT ELLIS, Montana Water Development Association, stated that his association supports this type of legislation and this bill. He feels that the storage areas will provide more fishing than the streams it replaces. He mentioned Nevada Lake and a reservoir on the Henry Hibbard Ranch and the south fork of the Smith River that the Fish and Game used for propagating cutthroat trout.

DAVE JOHNSTON, Western Environmental Trade Association, vice president of Local Operating Engineers, supports this bill because it will mean jobs.

BILL ASHER, representing the Agriculture Preservation Association, Park County Legislative Association, Sweet Grass County Preservation Association, Still Water Agricultural Legislative Association, said his groups would like to be on record in favor of the bill.

CHARLES REIN, Chairman of the Sweet Grass Conservation District, said he supports House Bill 529. He said the main two problems in this area are where to get the money to build the off-stream storage and from where to get the water. (EXHIBIT II). He believes that the storage must be built to prepare for future water needs. As a rancher, conservationist and sportsman, he is very concerned with this issue and urged support.

LORENTS GROSSFIELD, a rancher, testified in favor of the bill (EXHIBIT III) as a representative of the Sweet Grass Conservation District and Preservation Association.

MONS TEIGEN, representing the Montana Stockgrowers, testified as a proponent, as did DONALD JOHANSEN of the National Farmers Union, PAT UNDERWOOD of the Montana Farm Bureau and ALICE FRISLEY, representing the National Farmers Organization and the Montana Cattlemen.

OPPONENTS:

JIM FLYNN, representing Fish, Wildlife and Parks, said the bill will limit the stream flow to a less than minimum quantity. He also said the construction cost for offstream storage required by the bill would cost or could cost \$5 billion, covering an estimated 100,000 acres of bottom land. (EXHIBIT IV). He said imposing this restriction without sites and money was unreasonable, and suggested that the water reservation be allowed to operate.

FRAN MERTES, speaking for the Yellowstone Basin Water Users Association, the Northern Plains Resource Council, the Kinsey Irrigation Company and the Custer County Irrigation District (EXHIBIT V), said he agreed with much of what was said by the proponents, but opposes it because he feels it will not accomplish its objectives. He objected to the "requirement" basis provided by the bill. He referred to the term "fully satisfy" on page 3, line 20. He felt the bill would cause low-flow problems and would not protect reservations. He also felt that the cost would be prohibitive.

JOHN SCULLY, representing himself, compared this bill to 25 people jumping on a toboggan at the top of a hill and heading down without first checking to see whether or not it will hold them all. He hoped we don't get to the "bottom of the hill" and find the process is short-lived. He said the bill doesn't provide off-stream storage anywhere that he can see. It only says that a holder of a reservation has to maintain it. There is no appropriation attached, he said, that would allow financing of the bill. Proving there is unappropriated water is necessary and costly. He felt this will damage the reservation system. He also said he felt that the federal government and

the Indian reservations will not give up their water reservations.

LEO BERRY, Department of Natural Resources, suggested amendments to the bill opposing it as it stands. He presented written testimony and an attachment showing the department's proposed amendments (EXHIBITS VI and VII). He called attention to page 3 of the amended bill, saying it was the main amendment.

WILLA HALL, League of Women Voters, said the league opposes the bill because it is discriminatory. She feels that Montana's water belongs to all Montana citizens, feels that better conservation techniques and management and small off-stream storage would serve the citizens better.

QUESTIONS FROM THE COMMITTEE:

REP. CONROY asked Fredericks about the charges made about the costs and ground inundated by the proposals of this bill. FREDERICKS said that there is no requirement for building dams, but allows them to be built. In regard to the reservation system, he felt it would strengthen it, as you would have a solid base by proving the existence of water.

REP. KEMMIS said the bill provides for immediate effective date and that it applies not only to the granting, but to the continuing of reservations. Rep. KEMMIS asked if all reservation holders have to meet these requirements immediately. FREDERICKS said that requirement only applies to reservations that maintain a minimum flow, not to municipal reservations, or conservation district reservations.

REP. KEMMIS asked if the Department of Fish and Game or the Department of Health would immediately have to provide off-stream storage. FREDERICKS said that would be true as the bill is written.

REP. ASAY asked about the Yellowtail Dam in 1977. MERTES said that 1977 was a low flow year when Yellowtail was in existence. It has helped, he said, but hasn't solved all the problems. The requirements of minimum flow were not even met in 1977, according to MERTES, so he feels there should be more off-stream storage, but feels this bill will not accomplish its purpose as there are no sites available.

REP. HUENNEKENS asked if FREDERICKS was aware that much water is lost through evaporation in reservoirs located in high-evaporation areas. As a hydrologist, HUENNEKENS felt that point should be brought up. FREDERICKS said he was aware water was lost through evaporation and seepage.

REP. CONROY asked about the 3.5 million acre feet of water mentioned in the bill. BERRY said that to make up the difference between the low, historic flow and the reservations granted, the bill requires storage be provided for 3.5 million acre feet of water.

REP. CONROY asked if his opposition to the bill was to the storage of water or to the cost of the project. BERRY said there is no funding and that there shouldn't be a requirement that water storage be mandated. REP. ASAY commented that he thought the committee should consider tributary storage, as mentioned by BERRY.

CHAIRMAN ROTH said she disagreed that storage reservations would have to be made immediately. Also, she said that money could be provided at the discretion of the board. The governor's coal tax money could be used for water development, she said, from the legislature on a case-by-case basis, or from the Parks fund. She closed the hearing on House Bill 529.

CHAIRMAN ROTH asked the committee how they felt about the status of the Water Committee. She wondered if the committee wished to introduce a joint resolution to make the committee a standing committee. BOB PERSON said that a standing committee could be formed by amending the House rules by a simple resolution. Interim committees may be set up by various means, he said. Temporary and permanent committees are options.

REP. HUENNEKENS commented that the Senate didn't have a Water Committee, and he felt it would probably be best to have a joint committee.

REP. ROTH asked BOB PERSON to prepare a bill for the next meeting, that would make the Water Committee a standing committee. She also asked about a water oversight committee.

REP. KEMMIS thought a House resolution would be the best way to handle this situation. He said the request deadline for committee bills was yesterday.

REP. CURTISS said the committee should provide for the committee by statute and provide for funding.

REP. ROTH asked for a consensus on making the Water Committee into an interim oversight committee. The consensus was negative. ROTH asked how many would like a simple resolution. The committee unanimously agreed to that.

REP. KEMMIS felt that the purpose of an oversight committee was mostly to oversee the executive part of the government. He thought the problems in scheduling might be eliminated by forming

a standing committee.

REP. HUENNEKENS said there are only a certain amount of interim committees selected and a good case would have to be made to be chosen.

CHAIRMAN ROTH MOVED to present a bill to make the water committee an interim committee. The motion FAILED.

EXECUTIVE SESSION

HOUSE BILL 551

REP. KEMMIS presented amendments (EXHIBIT VIII) to House Bill 551 to the committee and MOVED that they be accepted by the committee. The motion was seconded and PASSED UNANIMOUSLY.

REP. KEMMIS MOVED that House Bill 551 DO PASS AS AMENDED. There was no further action on the motion.

REP. CURTISS felt she needed further time to study the bill and amendments. She MOVED that the bill be tabled until the next meeting. The MOTION PASSED.

The meeting adjourned at 3 p.m.

---

CHAIRMAN AUDREY ROTH

ry

## VISITORS' REGISTER

HOUSE

WATER

COMMITTEE

ILL H 529

Date 2-17-81

SPONSOR

| NAME              | RESIDENCE                    | REPRESENTING            | SUPPORT | OPPOS      |
|-------------------|------------------------------|-------------------------|---------|------------|
| ASHZEE            | MANHATTAN                    | APA-PCLA-SCPA-SCALA     | X       |            |
| HERRI BROEKEMA    | MANHATTAN                    | APA-PCLA-SCPA-SCALA     | X       |            |
| Syd Grosfield     | Big Timber                   | self                    | X       |            |
| Ray Burke         | Helena                       | NH House Cons. Dist     | X       |            |
| Elaine Auestad    | Big Timber                   | self                    | X       |            |
| E. Anderson       | "                            | self                    | X       |            |
| Fran Mertes       | Glendine                     | YBWA                    |         | ✓          |
| Robert Johnson    | Glendine                     | NPRC                    |         | ✓          |
| David F. Johnston | Helena                       | WEFTA<br>Operating Eng. | ✓       |            |
| Colin Tait        | Big Timber                   | self                    | ✓       |            |
| BENE SPILDE       | COOPER LAKE<br>OVERTON MOUNT | SELF                    | ✓       |            |
| Lorents Grosfield | Big Timber                   | self                    | X       |            |
| Ellen Ditzler     | Helena                       | EIC                     |         | X          |
| Leo BERRY         | Helena                       | DNRC                    |         | X<br>amend |
| Donald Johnson    | Switzky                      | NFC                     | X       |            |
| Jim Flynn         | Helena                       | DEPT FWP                |         | X          |
| Pat Underwood     | Bozeman                      | MONTE FARM B.           | X       |            |
| Peter Jackson     | Helena                       | Water                   | X       |            |
| John Sully        | Bozeman                      | Self                    |         | Amend      |
| Alice Fryslic     | Helena                       | NFO<br>Mont. Cottonmen  | X       |            |
|                   |                              |                         |         |            |
|                   |                              |                         |         |            |
|                   |                              |                         |         |            |

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

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

## VISITORS' REGISTER

HOUSE

COMMITTEE

FILE HB 529  
 SPONSOR Roth

Date 2/12/81

[illegible]

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

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

WITNESS STATEMENT

NAME *C. L.* BILL No. \_\_\_\_\_

ADDRESS \_\_\_\_\_ DATE \_\_\_\_\_

WHOM DO YOU REPRESENT \_\_\_\_\_

SUPPORT \_\_\_\_\_ OPPOSE \_\_\_\_\_ AMEND \_\_\_\_\_

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:



WITNESS STATEMENT

NAME Fran Mertes BILL No. 529

ADDRESS 611 N Kendrick AV. DATE 17 Feb '81

WHOM DO YOU REPRESENT Kinsey Irr. Co., <sup>N.P.R.C.</sup> Yellowstone Water Use Assoc., Custer Co. Laws. Dist.

SUPPORT \_\_\_\_\_ OPPOSE ☒ \_\_\_\_\_ AMEND \_\_\_\_\_

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

WITNESS STATEMENT

NAME Charles R. ... BILL No. 527

ADDRESS Big Timber DATE \_\_\_\_\_

WHOM DO YOU REPRESENT South (under) Cons. Dist. - Hwy. Proj. Area - S-14

SUPPORT ✓ OPPOSE \_\_\_\_\_ AMEND \_\_\_\_\_

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

WITNESS STATEMENT

NAME Mrs. Tenger BILL No. 529  
ADDRESS Holena DATE 2/17/51  
WHOM DO YOU REPRESENT W. Steegmeyer, Holgrowers + Campbell's  
SUPPORT X OPPOSE \_\_\_\_\_ AMEND \_\_\_\_\_

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

WITNESS STATEMENT

NAME Donald S. Thanner BILL No. HB 529  
ADDRESS Shelby DATE 2/17/81  
WHOM DO YOU REPRESENT National Farmers Organization  
SUPPORT ✓ OPPOSE \_\_\_\_\_ AMEND \_\_\_\_\_

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

Optimum flow is an absolute necessity for Montana - we must not allow in-stream reservations to transport all of our water out of state - ~~and~~ and not be able to use it.

We support the concept of this legislation

Donald S. Thanner

NAME

PAT UNDERWOOD

Bill No.

HB 529

ADDRESS

Bozeman

DATE

17 FEB 81

WHOM DO YOU REPRESENT

MONT. Farm Bureau

SUPPORT

☒

OPPOSE

AMEND

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

WE SUPPORT HB 529 and

Recommend a DO PASS

WITNESS STATEMENT

NAME BILL ASHER BILL No. HB 529  
ADDRESS MANHATTAN DATE FEB 17, 1981  
WHOM DO YOU REPRESENT SEE BELOW  
SUPPORT ✓ OPPOSE                      AMEND                     

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

REPRESENTING: AGRICULTURAL PRESERVATION ASSOCIATION  
PARK COUNTY LEGISLATIVE ASSOCIATION  
SWEETGRASS COUNTY PRESERVATION ASSOCIATION  
STILLWATER COUNTY AGRICULTURAL LEGISLATIVE ASSOCIATION

WITNESS STATEMENT

NAME Conrad B Fredricks BILL No. HB 529  
ADDRESS Big Timber, Montana DATE 2/17/81  
WHOM DO YOU REPRESENT Sweet Grass County Soil Conservation District  
SUPPORT ✓ OPPOSE \_\_\_\_\_ AMEND \_\_\_\_\_

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:



*Exhibit 100*  
*Montana (Dpt)*  
*I*

Montana Association Of Conservation Districts

7 Edwards  
Helena, Montana 59601  
Ph. 406-443-5711

HB 529

MADAM CHAIRMAN, MEMBERS OF THE COMMITTEE:

My name is Ray Beck, representing the Montana Association of Conservation Districts.

The Conservation District Association feels that by requiring instream users to invest in water supply projects, such as offstream, upstream and tributary storage that will strengthen the reservation process for which it was originally intended, to provide water for domestic, municipal and agricultural uses.

Conservation Districts are actively involved with non-point pollution control throughout the State of Montana. One of the most serious problems with non-point pollution control is that of stream dewatering caused by prior uses. The best management practice to correct this situation would be offstream, upstream or tributary storage that will be available for late season infusion into streams.

During the 1980 Conservation Districts State Convention a resolution was passed asking for legislation that would require instream reservation holders to develop offstream storage for late season infusion into streams in order to maintain the instream flow to the extent of the instream reservation.

Madam Chairman I would like to have it shown in the record that the Montana Association of Conservation Districts "Do Support" HB 529.

Thank you.

*Ray Beck*

Ray Beck  
Executive Vice President



My name is Charles Rein. I am a rancher from Sweet Grass County and chairman of the Sweet Grass Conservation District.

I am sure all of us agree that Montana's water is fast becoming very valuable. As their demands increase, agricultural, industrial, municipal, recreational, as well as other water users, are becoming more concerned about the availability of water in the years to come. Out-of-state water users as well as out-of-state industries which have never used Montana water also share this concern. It is plain to see that every drop of water which flows across our borders, whether naturally or through a man-made structure, will become very precious in the decades to come. I believe Montana must begin developing water through off-stream storage now to guarantee our right to that water in the future. Of course the development of off-stream storage is not without its problems. The two major problems are where does the money come from to build these storage sites, and where do we get the water to fill them. On the Yellowstone river and its tributaries what water that has not been previously allocated has been reserved for future beneficial use or to maintain a minimum flow, level, or quality. As you know cities and towns, and agriculture, through the conservation districts, applied for and were granted, some water to develop and put to beneficial use within a period of time designated by the Board of Natural Resources. The Department of Health and Environmental Sciences and the Department of Fish, Wildlife, and Parks applied for, and were granted, water to maintain a minimum flow, level, or quality. The instream holders have

to do very little to develop their reservation. This would be fine except for the fact that many of the tributaries to the Yellowstone are very low or even dry in the Fall of the year. In these cases the instream reservation is not being met, the water quality is sub-standard, and fish habitat is non-existent.

Before I say more, I would like you to know that as a rancher, conservationist, and sportsman I am very concerned with fish and wildlife habitat and water quality. I am also concerned about inundating prime farmland for any reason. My livelihood, as well as the livelihood of many others like me, depends on water and the land.

The purpose of this bill is to allow the instream water holder to divert and store water in high flow months ~~that~~ ~~and~~ and to release that water in low flow months when the reservation is not being met. Thus water quality and fish habitat would be greatly enhanced. Also when possible, these storage sites and the water stored in them would be utilized as multipurpose facilities. This stored water, a renewable resource, would benefit all of Montana.

In closing I ask all of you to consider the provisions of this bill and weigh them against the inadequacies of our present reservation system. I urge you to support House Bill 529. Thank you.

February 17, 1981  
Testimony on House Bill #529  
By: Lorents Grosfield

The State of Montana, as represented by the Board of Natural Resources and authorized by the legislature, has determined that in-stream values are of paramount importance to Montana.

I have no argument with this policy. I am not against instream water reservation for fish, wildlife, water quality or aesthetics and I believe ~~that~~ instream reservations <sup>have</sup> ~~have~~ the potential for being, in the long run, a tremendous asset to Montana, both economically and environmentally. I believe the instream reservation has the potential to not interfere with or detract from Montana agriculture or industry at the present time or in the future. I believe it has the potential to protect <sup>the</sup> ~~quality~~ <sup>of</sup> Montana water - to keep streams alive and vital and clean enough to drink, irrigate with, to fish and to swim <sup>in</sup>, etc. I believe it has the potential to protect Montana's recreational base as it relates to fishing and waterfowl. But the instream reservation law, as it now stands, does not have the long-term potential to ~~do~~ <sup>do</sup> any of these things. It doesn't even have the long-term potential for keeping Montana's streams from being de-watered, especially during late-season, low-flow periods, most obviously during drought years.

We live in the semi-arid West. We can't create more water. The reservation law, as it now stands, has enabled the Board of Natural Resources to define reservation needs, including in-stream needs. However, the law does not even address the possibilities for implementation of methods for actually achieving and maintaining instream flows in line with those needs. What we need is a means to stretch our water, and that means, as delineated in House Bill #529 is storage. If we can store high run-off and infuse it during low-flow periods we can potentially eliminate the so called low-flow events.

The situation now in the Yellowstone River Basin is that many tributary streams are de-watered, especially in low-flow seasons. Of what value is an instream

reservation in a stream that is already nearly or completely de-watered?

How does a reservation on paper alone and not in the stream meet the instream needs of fish and water quality?

House Bill #529 seeks to alleviate this problem and make the instream reservation vital through off stream storage. This approach has been criticized as being an attempt to negate the reservation law because the required storage would be prohibitively expensive. But it seems to me that the reservation law is already negated in fact by frequent low-flow events. This bill tries to provide the means whereby instream reservations are guaranteed to be met.

The instream reservants can only come out of it with more water than they have now, that is, a more desirable distribution of water. Minimum flow guaranteed by storage will help insure an acceptable water quality, fish habitat, future agricultural and industrial development, stabilization of the present agricultural water supply to irrigation structures, recreational opportunities and potential power and industrial development.

Another point that needs to be made is that a practical result of instream reservations is to attempt to guarantee large flows to downstream states.

This is water that cannot be used by agriculture or industry in Montana.

<sup>what</sup>  
~~What~~ this means is that the Board of Natural Resources and thus the state of Montana has made a determination of value.----- They have <sup>said</sup> ~~said~~ that, for the future, instream values are more valuable than diversionary water uses. I maintain that saying they are more valuable is not only a philosophical decision of policy but an economic decision as well and dollars can and should rightly be spent to develop and attempt to guarantee the instream water reservations.

As I say, I have no problem with instream reservation policy. But let's understand the trade-offs involved.

Some people think they've gotten something for nothing through the instream reservations, but no one gets something for nothing.

page 3 cont.

Some people say agriculture de-waters streams but the instream reservations de-water agriculture's and industry's future, and I'm not only talking about agricultural or industrial revenue, but also foregone tax revenue; in that sense, instream reservations are indeed a consumptive use of water----- from the point of view of the future of agriculture and industry, that water is gone.

House Bill #529 would provide Montana's economy with open future options through the storage of Montana's waters for use by Montanans, instead of the present reservations law which virtually guarantees the export of good Montana water. Expensive? Certainly water development<sup>costs</sup> a lot. But I don't look at it as expensive. I look at it as an investment in the future of Montana. The present system of guaranteed exportation of good Montana water must be viewed as the expensive alternative, because by exporting our water we are essentially ex~~po~~rt~~ing~~ing our future.

There are three other points I'd like to make. I think that without some investment it will become increasingly hard in the future to maintain our instream reservations, especially as energy development expands. For example; a lawyer in federal court defending our instream reservation would have a much easier time of it if he could point to investments <sup>whereby</sup> ~~already~~ Montana has deemed it appropriate to develop and safeguard the instream reservations.

Secondly, if say in 50 years instream reservation water were offered to agriculture by instream hold<sup>ers</sup> ~~ing~~ in Montana because of a food shortage, and this water has already been appropriated in downstream states, we would find that North Dakota or Nebraska might be the biggest defenders of our reservation law and we would probably be unable to reallocate that water in Montana even though subsection 10 of the reservation law provides for such reallocation. The third point has to do with grave concern in many sectors that this bill will result in negating the instream reservation concept. As I've said, I

believe the opposite, that is, that this bill will strengthen the law in Montana and will also strengthen our defense of it against outside interests. There is a fear that if this bill passes, the Board will be required to revoke any instream reservation that does not provide storage. I believe this fear is unfounded, because the Board has wide discretion under the law. Several places in the reservation law is the phrase; "To the satisfaction of the Board". This implies that the Board will determine criteria and in the determination of the criteria, as state policy makers, I believe they will act in the best interests of the state. This means that meeting the Board's requirements and criteria will possible, feasible, and reasonable, and the Board will not put itself in the position of having to revoke a valid instream reservation. I therefore urge you to act favorably on this bill in it's present form.

Thank you.

PRESENTED BY: James W. Flynn, Director  
Dept. Fish, Wildlife, & Parks

February 17, 1981

HB 529

Mr. Chairman, members of the committee, my name is Jim Flynn. I am here today on behalf of the Department of Fish, Wildlife, & Parks, and I speak in opposition to HB 529.

HB 529 is a bill to restrict all instream flow reservations to available unappropriated water and to require holders of instream reservations to provide offstream storage where they have been granted an instream reservation.

This bill, if passed, will do several things. First, it will limit stream flow to a quantity of water somewhat less than the minimum stream flow ever recorded for a particular stream. Second, the bill requires offstream storage to be discharged into a drainage to fully satisfy the instream reservation after first satisfying "existing rights."

In regard to the limiting of a reservation to the minimum stream flow recorded, it should be noted that in the last session of the legislature, a limit to the amount of water that could be reserved instream was already imposed. That limit is found in 85-2-316, paragraph 5, MCA. That limitation is simply 50% or less of the average annual flow recorded on gauged streams. You can see from that section of law, reservations are limited to, at the most, half of what is left; imposing still more restrictions is simply not necessary.

The second requirement imposed by this legislation is a requirement to develop offstream storage for the purpose of low flow infusion sufficient

to maintain the minimum flow after prior existing water rights have been satisfied. We are all aware that in Montana there are some over-appropriated streams - streams that do, in fact, at times go dry - streams in which water users can get water only after senior users have been satisfied.

The effect of this bill would be requiring that anyone trying to restore flow to a depleted stream would first have to create sufficient storage, not only to restore that flow, but to meet all of those existing rights in all years at no cost to those depleting the stream.

The Department of Natural Resources & Conservation estimates that approximately 3.5 million acre feet of water are required if HB 529 is enacted. ~~The dollar cost is approximately \$500 million annually with a~~ construction cost of approximately 5 billion dollars. An estimated 100,000 acres of bottom land will be covered. This bill imposes a requirement, by law, that massive investments be made for offstream storage projects and is, in essence, decreeing that this storage be accomplished even though no rational offstream storage sites are available in a place like the upper Yellowstone Basin.

~~It is akin to legislating that it rain and providing penalties to a party holding an instream right if it didn't rain.~~ Once again, it requires by law that any storage developed be used first to satisfy diversionary rights before any of that investment could be realized to the benefit of the stream. It would, in essence, impose by law requirements on people trying to protect an instream flow that a depleting user of water would be immune from. If it is desired that new water users have storage, then by any measure of fairness, the same requirement should be imposed on those who deplete flows as well as those who seek only to protect flows.

Significantly, last summer, Montana Power Co. and its west coast partners in Colstrip 3 & 4 were excused from an offstream storage requirement imposed as a condition for building Colstrip 3 & 4. Now, less than a year later,



this legislation seeks to impose a storage requirement on users who seek only to protect a stream flow rather than deplete it. This is an unreasonable imposition.

The Montana Department of Fish, Wildlife, & Parks favors offstream storage. The department will support offstream storage wherever it is practical, wherever it is feasible, and feel it is an asset to supplement stream flows. The department was the only state agency that appealed to the Department of Natural Resources & Conservation that the Colstrip project be held to its commitment to an offstream storage facility. Ironically, advocates of this bill were silent on that issue.

Offstream storage is a good concept. We support it, we advocate it, and we have done what we could to see to it that it is put into effect. We realize, however, in dealing with this subject, that to impose it as a requirement, even where no sites are identified as being available, feasible, practical, or even possible, is to impose an unreasonable restriction. In the long run, it will lead to the loss of a stream resource now unique to Montana, but in that uniqueness becoming a more and more valuable asset to this state.

We suggest, therefore, that you allow the instream flow reservation system to work as it is now designed. For those who fear too much will be left instream, I respectfully refer you to the law as it exists - a law that already limits the amount that can be reserved, provides for reallocation of water that is reserved, and provides for periodic review of any action already taken.

# NORTHERN PLAINS RESOURCE COUNCIL

Main Office  
419 Stapleton Bldg  
Billings, Mt. 59101  
(406) 248-1154

Field Office  
P.O. Box 886  
Glendive, Mt. 59330  
(406) 365-2525

Testimony on HB 529  
Submitted by Fran Mertes  
House Select Committee on Water  
February 17, 1981

---

Madam Chairman, members of the Committee, for the record my name is Fran Mertes.

I am speaking today for the Yellowstone Basin Water Use Association, the Northern Plains Resource Council, the Kinsey Irrigation Company and the Custer County Conservation District. I am a registered engineer in Montana and specialize in water hydraulics.

I appear today in opposition to HB 529. While we support the orderly development of offstream storage, we do not feel this bill would accomplish that objective. We view HB 529 instead as a serious threat to the instream reservations on the Yellowstone River.

On page three line 20 the bill states: "...the board shall require, as a condition of granting such reservation or the continuance thereof, that the entity holding such reservation either prove to the board that there is sufficient unappropriated water to fully satisfy such reservation or make provision for the development and maintenance of off-stream storage facilities for the purpose of low flow infusion sufficient to maintain the minimum flow, level, or quality of water to the extent granted in the reservation..." (emphasis added)

This language indicates that to "fully satisfy" an instream reservation one would have to look at the lowest record flow and store excessive amounts of water to meet the requirement of maintaining instream flow, to the extent granted in the reservation, at all times and in all cases.

Thus, the storage requirement, mandated by HB 529, would be excessive and overstated. There is a limited number of feasible storage sites along the Yellowstone River. Economic feasibility places additional limitations on the amount of off-stream storage an instream

reservation holder could logically develop.

To further complicate matters --- the instream reservation holder would have the burden of proving the availability of unappropriated water. Until Montana waters are adjudicated, as outlined in SB 76 last session, only educated guesses could be used as "proof."

After looking at these very real limitations --- the only practical conclusion we can draw is that HB 529 will serve to eliminate the instream reservations.

Consider the Kinsey Irrigation Company near Miles City, Montana. Through the Custer County Conservation District - Kinsey has an instream reservation of 4,000 cubic-feet-per-second. (cfs)

This instream flow was granted based on the fact that instream flows below 4,000 cfs result in a decrease in pumping efficiency and an increase in pumping head, which results in an increased pumping cost.

Low flow records indicate the Yellowstone River at Miles City can fall below 4,000 cfs. It is very unlikely that the private irrigators, who make up the Kinsey Irrigation Company or the Custer Conservation District could afford to store water off-stream to protect their instream reservation.

We are also very concerned over the prospect of Fish and Game and the Department of Health being placed in jeopardy of losing its instream reservation. The fact that these agencies have instream reservations assure prior agricultural users on the Lower Yellowstone that a healthy volume of water will reach our pumps and diversions.

Factors to consider include --- pumping sites, pumping depth, less silt, less salinity concentration, greater streambank stability and higher pumping percentage from fixed elevation plants. The point I wish to emphasize is that --- INSTREAM FLOWS ENHANCE AGRICULTURAL USE ON THE LOWER YELLOWSTONE.

As an aside, instream flows promote lower water temperature and less turbidity making less water treatment necessary for the purpose of municipal supply.

As past president of the Glendive Chamber of Commerce and Agriculture, I can assure this Committee that this is of significant importance to Glendive citizens.

In closing --- I note the fact that the reservation system has already addressed off-stream storage. The Bureau of Reclamation, currently known as the Water and Power Resources Service, applied for and received a reservation of 68,700 and 121,800 acre-feet-of-water per year (AFY) for storage at Buffalo Creek and Cedar Ridge Reservoir sites respectively. The Bureau of Land Management applied for and received a reservation of 539,000 for storage at the Sunday Creek Reservoir site. WPRS is currently undertaking to develop these three sites in approximately these same amounts.

Again, we support the off-stream storage concept - but feel that HB 529 would eliminate much needed instream reservations and not accomplish its off-stream objective.

We respectfully urge this Committee to give HB 529 a DO NOT PASS recommendation.

Thank You.

HOUSE BILL 529

INTRODUCED BY ROTH

A BILL FOR AN ACT ENTITLED: "AN ACT TO REQUIRE APPLICANTS FOR AND  
HOLDERS-OF RESERVATIONS OF WATER ~~TO MAINTAIN MINIMUM FLOW OR QUALITY~~ TO  
PROVE THAT SUFFICIENT UNAPPROPRIATED WATER IS ~~OR WILL BE MADE~~ AVAILABLE  
TO SATISFY THE RESERVATION; TO ALLOW THE BOARD OF NATURAL RESOURCES AND  
CONSERVATION TO REQUIRE THAT OFFSTREAM OR TRIBUTARY STORAGE BE CONSTRUCTED  
TO SATISFY INSTREAM RIGHTS; AMENDING SECTION 85-2-316, MCA; AND PROVIDING  
AN IMMEDIATE EFFECTIVE DATE."

WHEREAS, the Legislature finds that certain reservations of water  
have been made, under the provisions of section 85-2-316, MCA, to maintain  
a minimum flow, level, or quality of water, whereby the applicant has  
established the purpose of the reservation, the need for the reservation,  
and the amount of water necessary for the purpose of the reservation but  
without establishing that there is either sufficient unappropriated water  
to satisfy the reservation or providing a means whereby there would be  
sufficient unappropriated water to satisfy the reservation; and

WHEREAS, in order to provide for the orderly administration of the  
waters of this state and to facilitate and preserve the purpose of allowing  
reservation of waters to maintain a minimum flow or quality of waters to the  
detriment of future consumptive uses of water in the state, the Legislature  
finds it necessary that the applicant or holder of a reservation of water  
to maintain a minimum flow, level, or quality be required, as a condition  
of either receiving or continuing to hold such reservation, to either  
establish that there is sufficient unappropriated water to satisfy such

reservation or to provide a means whereby there will be sufficient unappropriated water to satisfy such reservation.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 85-2-316, MCA, is amended to read:

"85-2-316. Reservation of waters. (1) The state or any political subdivision or agency thereof or the United States or any agency thereof may apply to the board to reserve waters for existing or future beneficial uses or to maintain a minimum flow, level, or quality of water throughout the year or at such periods or for such length of time as the board designates.

(2) Upon receiving an application, the department shall proceed in accordance with 85-2-307 through 85-2-309. After the hearing provided in 85-2-309, the board shall decide whether to reserve the water for the applicant. The department's costs of giving notice, holding the hearing, conducting investigations, and making records incurred in acting upon the application to reserve water, except the cost of salaries of the department's personnel, shall be paid by the applicant.

(3) The board may not adopt an order reserving water unless the applicant establishes to the satisfaction of the board:

- (a) the purpose of the reservation;
- (b) the need for the reservation;
- (c) the amount of water necessary for the purpose of the reservation;
- (d) that the reservation is in the public interest;

(e) that, in the case of reservation of waters to maintain a minimum flow, level, or quality of water, there is or will be made available sufficient unappropriated water to satisfy the reservation during the period or length of time during which the reservation is sought or designated by the board.

(4) In the case of all reservation, regardless of when granted,  
of water to maintain a minimum flow, level, or quality of water, the  
board shall MAY require, as a condition of granting such reservation or  
the continuance thereof, that the entity holding such reservation either  
prove to the board that there is sufficient unappropriated water to fully  
satisfy such reservation or make provision for the development and  
maintenance of off-stream OR TRIBUTARY storage facilities for the purpose  
of low flow infusion sufficient to maintain the minimum flow, level, or  
quality of water to the extent granted in the reservation. THE BOARD SHALL  
CONSIDER THE FOLLOWING FACTORS IN DETERMINING THE NEED TO REQUIRE OFFSTREAM  
OR TRIBUTARY STORAGE FOR THE PURPOSE OF LOW-FLOW INFUSION TO MAINTAIN AN  
INSTREAM RESERVED RIGHT:

(A) WATER SHORTAGES THAT CURRENTLY EXIST IN A STREAM;

(B) FREQUENCY OF LOW-FLOW OCCURRENCES IN A STREAM;

(C) THE NEED TO AUGMENT STREAM FLOWS TO MAINTAIN WATER QUALITY AND  
AQUATIC ECOSYSTEMS;

(D) THE COST OF THE OFFSTREAM OR TRIBUTARY STORAGE;

(E) WHETHER OR NOT FUNDS ARE AVAILABLE OR WILL BECOME AVAILABLE TO  
CONSTRUCT THE STORAGE FACILITY:

(F) THE ECONOMIC LAND BASE DISPLACED OR INUNDATED BY THE OFFSTREAM  
OR TRIBUTARY STORAGE; AND

(G) ANY OTHER FACTORS THE BOARD CONSIDERS PERTINENT.

When practicable, such storage sites and the waters stored therein shall  
be utilized as multiple-use facilities, including but not limited to fish  
and wildlife, stockwater, recreation, irrigation, and industrial uses, and  
municipal water supply augmentation. If the purpose of the reservation

requires construction of a storage or diversion facility, the applicant or-holder shall establish to the satisfaction of the board that there will be progress toward completion of the facility and accomplishment of the purpose with reasonable diligence in accordance with an established plan.

(5) The board, in addition to the provisions of subsection (4), shall limit any reservations after May 9, 1979, for maintenance of minimum flow, level, or quality of water that it awards at any point on a stream or river to a maximum of 50% of the average annual flow of record on gauged streams. Ungauged streams can be allocated at the discretion of the board, subject to the provisions of subsection (4).

(6) After the adoption of an order reserving waters, the department may reject an application and refuse a permit for the appropriation of reserved waters or may, with the approval of the board, issue the permit subject to such terms and conditions it considers necessary for the protection of the objectives of the reservation.

(7) Any person desiring to use water reserved to a conservation district for agricultural purposes shall make application for such use with the district, and the district upon approval of the application must inform the department of the approved use. The department shall maintain records of all uses of water reserved to conservation districts and be responsible for rendering technical and administrative assistance within the department's staffing and budgeting limitations in the processing of such applications for the conservation districts.

(8) A reservation under this section shall date from the date the order reserving the water is adopted by the board and shall not adversely affect any rights in existence at that time.

(9) The board shall, periodically but at least once every 10 years, review existing reservations to ensure that the objectives of the reservation



and the conditions of subsection (4) are being met. Where the objectives of the reservation or the conditions of subsection (4) are not being met, the board may extend, revoke, or modify the reservation.

(10) The board may modify an existing or future order originally adopted to reserve water for the purpose of maintaining minimum flow, level, or quality of water, so as to reallocate such reservation or portion thereof to an applicant who is a qualified reservant under this section. Reallocation of reserved water may be made by the board following notice and hearing wherein the board finds that all or part of the reservation is not required for its purpose and that the need for the reallocation has been shown by the applicant to outweigh the need shown by the original reservant. WHEN APPROVED BY THE BOARD WATER RESERVED FOR MINIMUM FLOW MAY BE DIVERTED AND STORED FOR THE PURPOSE OF SUCH LOW FLOW INFUSION. Reallocation of reserved water shall not adversely affect the priority date of the reservation, and the reservation shall retain its priority date despite reallocation to a different entity for a different use. The board may not reallocate water reserved under this section on any stream or river more frequently than once every 5 years.

(11) Nothing in this section vests the board with the authority to alter a water right that is not a reservation."

Section 2. Effective date. This act is effective on passage and approval.

11

HOUSE BILL 529

TESTIMONY OF THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

-----

"AN ACT TO REQUIRE APPLICANTS FOR AND HOLDERS OF RESERVATIONS OF WATER TO MAINTAIN MINIMUM FLOW OR QUALITY TO PROVE THAT SUFFICIENT UNAPPROPRIATED WATER IS OR WILL BE MADE AVAILABLE TO SATISFY THE RESERVATION; AMENDING SECTION 85-2-316, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

-----

The Department of Natural Resources and Conservation supported construction of offstream and tributary storage long before it became popular, ~~popular~~ <sup>historic</sup>. In fact, the Department owns over 20 offstream and tributary storage reservoirs. In addition, the Department has recommended that the Tongue River Dam be increased in height to provide more firm water supplies and that the Pattengail damsite in the Bighole River Basin be constructed. Each of these projects ~~are~~ <sup>is</sup> multipurpose; that is, they provide water for irrigation, flood control and recreation. The Department is committed to the development of reasonable offstream and tributary storage, but HB 529 would put us on the wrong track.

House Bill 529, as written, would require that 3.5 million acre-feet of storage be developed in the Yellowstone River Basin at a cost of ~~five~~ <sup>five</sup> billion dollars. These reservoirs would inundate 100,000 acres of land along streams, most likely prime agricultural land.

The impracticality, indeed impossibility, of providing this much storage is obvious and probably not the intent of the bill. The Department suggests that the bill be amended to require storage only where storage is needed to fulfill the purpose of an instream reservation. This amendment would encourage the development of offstream and tributary storage where it

is needed, where it is desirable, and where there is support for it. Attached to this testimony is a copy of our suggested amendments to House Bill 529.

Legislation doesn't build reservoirs, money does and there is no funding source established in this legislation. The Governor's water development bill does include a mechanism for funding offstream storage.

AMENDMENTS TO HB 551

1. Title, lines 6 and 7.  
Following: "ESTABLISH"  
Strike: "A PUBLIC INTEREST"  
Insert: "AN ADDITIONAL"
2. Page 2, line 7.  
Following: "year"  
Strike: ","  
Insert: "and"
3. Page 2, lines 10 through 12.  
Following: "requested,"  
Strike: line 10 through "interest," on line 12
4. Page 2, line 13.  
Following: "consider"  
Insert: "and provide evidence on"
5. Page 2, line 15.  
Strike: Subsection (ii) in its entirety  
Re-number: subsequent subsections
6. Page 2, line 21.  
Following: "department"  
Strike: "may deny the application"  
Insert: "shall issue the permit"
7. Page 2, line 22.  
Following: "(6)"  
Strike: "only if it"  
Insert: "unless the department"
8. Page 2, line 23.  
Following: "the"  
Strike: "public interests served"  
Insert: "benefits of existing water uses or private property rights protected"
9. Page 2, line 25.  
Following: "applicant"  
Insert: "or unless no evidence is provided under this subsection (6) for the department to consider"