

MINUTES OF THE SELECT COMMITTEE ON WATER
March 12, 1981

The Select Committee on Water convened at 1 p.m. on March 12, 1981, in Room 436 of the Capitol with CHAIRMAN AUDREY ROTH presiding. All members were present.

SB 243

SENATOR GRAHAM opened the hearing on the bill which was introduced at the request of the Department of Natural Resources and Conservation (DNRC). He stated that members of the department were present to appear at the hearing. Because the senator was to appear at another hearing, he asked for permission to open the hearing and allow the department members to answer questions and then close the hearing.

SENATOR GRAHAM said the bill is an act to delegate authority to the DNRC to authorize diversions from the Yellowstone River Basin. He felt the bill should not be amended, and urged passage of it in its present form.

PROPOSERS:

LEO BERRY, DNRC, said that interbasin transfers are one of the issues that the state will be faced with over the next several decades. They need to be judged and allowed under certain conditions. At present there is no criteria, he said. Tenneco offered a bill, he said, but it was killed. Other industrial users will be asking for these transfers in the future and the DNRC needs a means of handling them, according to BERRY. He explained provisions of the bill that would address this problem.

PAT STUART, assistant director of the Montana Coal Council, said there is a need for handling these interbasin transfers, but said the Senate felt that the 90 days the legislature is in session would not allow time for an adequate study. She supports the bill giving the department the necessary authority. If amendments are put on the bill to give the legislature the decision making power, she saw no reason for the bill.

LARRY HEIMRICH, farmer and user of the Yellowstone Basin, presented written testimony in support of the bill. (EXHIBIT I)

PAT OSBORNE, Northern Plains Resource Council (NPRC) lobbyist, said he doesn't object to the board being the decision making body. He discussed amendments offered by the council and called attention to a possible new subsection suggested by the NPRC. He said the amendments would delay hearings, but that hearings would be held within the statutory time limits. He stated that water allocated in Wyoming will not affect property owners in Montana,

but said there may be more requests than water available. He explained that the council felt that water should not be transferred until there is authorization. (EXHIBIT II)

WILLA HALL, League of Women Voters, suggested that the public interest definition be put back in on page 6, line 14.

ANN SCOTT, representing the Montana Farmers' Union, said she supports SB 243 with amendments presented by the NPRC.

OPPONENTS:

CHARLIE CRANE, Montana Water Development Association (MWDA) feels that water transfers will have more ramifications than any other decisions made in this area. He said that these decisions are strict policy decisions, and to put them in the administrative branch of government is to ask for problems. Policy as important as this must be decided in a policy body, he said.

BILL ASHER, representing the Agricultural Preservation Association, the Park County Legislative Association, the Sweetgrass County Preservation Association and the Stillwater County Agricultural Legislative Association, opposed the bill as his clients are opposed to water transfers.

QUESTIONS FROM THE COMMITTEE:

REP. THOFT asked how MR. CRANE felt about the amendments. MR. CRANE said he did not support them.

REP. CONROY asked if there was a fiscal note for SB 243. LEO BERRY said there was no need for additional funds.

CHAIRMAN ROTH asked if the main thrust of the bill was where the legal authority lies in regard to interbasin transfers. MR. BERRY said that we are going to be faced with these transfers. At the present, the legislature has to approve each and every transfer. Presently there is a suit in litigation by Tenneco, in which Tenneco claims that the compact is illegal because it is interfering with interstate commerce. If the bill isn't passed, we will have a definite challenge to the compact itself, he said.

The hearing was then closed on SB 243.

SB 297

SENATOR TURNAGE opened the hearing on SB 297, which asks for a definition of surface water and wishes to amend the definition of ground water. The senator said he feels the department is capable of determining applications.

A problem has arisen in Jefferson County where a well was dug and the owner claimed the water came from an underground aquifer. The application was denied saying the water was surface water because it was felt to be connected with surface water. SENATOR TURNAGE felt the law was needed to protect property owners from the Montana Power and the Bureau of Reclamation claiming rights to a great deal of the water flowing in rivers.

PROPOSERS:

MR. W.T. BOONE presented written testimony (EXHIBIT III) in favor of the bill.

OPPOSERS:

JOHN SCULLY felt it was important to kill the bill to protect agriculture. The diverting of surface water by digging a well affects agriculture. If it can be shown that ground water is interfering with surface water rights, it can be stopped.

WILLIAM LEAPHART, attorney, said if this bill passes, ground water and surface water will be considered to be completely separate, which is against the laws of nature. He noted that Mr. Boone said that Montana Power objects to all water rights. There may be a problem with Montana Power, he agreed, but he felt this was not the way to handle it. He also felt this would be against the Water Use Act.

PAUL SMITH, representing his parents of the Paul T. Smith Ranch in the Boulder Valley, testified that the sump in question was dug into a ditch which was normally a channel of the Boulder River. He said that during the summer months, the water there is almost all used up by irrigation. Mr. Boone wants to sink a sump next to the river, taking water from the underground aquifers. And the state says the person digging the sump has to prove that it won't affect other persons' water rights. MR. SMITH said that, even Mr. Boone's hydrologist admitted the water was in connection with the Boulder River. AL STONE, of the law school, told Mr. Smith that changing the law in this manner would be "opening a can of worms." MR. SMITH said the burden being on the applicant is as it should be, and is not an undue burden. If this bill passes, he said, it would have a "devastating" affect on agriculture.

CHARLIE CRANE, MWDA, said that in this case, it was definitely proved that there was an interconnection. He said that a farmer cannot afford to have an attorney on hand all the time. He also said that Montana Power is actually protecting the farmer in this instance.

GORDON MC GOWAN, a rancher, said that all of the streams have a different underground structure which makes it difficult to define ground and surface water. He felt this was a "bad" bill and should be killed.

MONS TEIGEN, representing the Montana Stockgrowers, Woolgrowers, and Cowbellers, said he felt this was a "lawyers relief act" and is apprehensive about the future of water rights if this should pass.

RON WATERMAN, an attorney representing Dreyer Brothers, Inc., read written testimony (EXHIBIT IV).

LEO BERRY, director of the DNRC, felt the bill was directly related to the case that conflicted with the department. He felt a more proper means of appealing would be through the courts.

BOB GANNON, representing Montana Power Company, read written testimony (EXHIBIT V) to the committee in opposition to the bill.

ROBERT A. ELLIS, Helena, representing the Montana Water Developers Association, said that in his experiences of working in the Helena Valley with the Bureau of Reclamation, it was true that Montana Power Company does object to every water request. They do that so they don't lose water rights under "adverse possession," he said.

MR. BOONE commented on statements made by the opponents.

QUESTIONS FROM THE COMMITTEE:

REP. CURTISS asked if it is case law or statutory precedent on the definition. MR. BOONE said there was no case law regarding a definition of ground water that he knew.

REP. CURTISS asked if there was a definition in the Washington water law. TED DONEY, lawyer and former director of DNRC, said he didn't know the Washington definition. He felt that each state would have to address this on its own.

REP. ROTH asked Mr. Leaphart if he would like to comment on the subject. MR. LEAPHART said he would like to cite to the committee the Supreme Court opinion, Cappaert vs. United States, found on 426 U.S. 128, a unanimous opinion held "that federal water rights were being depleted, because as the evidence showed, the ground water and the surface water are physically interrelated at integral parts of the hydrological cycle."

REP. CONROY told of witching a well for a neighbor about 300 feet above his own reservoir, and when the neighbor used it, his reservoir went dry.

MR. BOONE said that in particular cases, rather than a permit being granted, he suggested a provisional permit for additional study of adverse effects or any relationship between ground and surface water.

REP. CURTISS asked for the volume of the application. MR. BOONE said the application was for 2,300 to 2,700 gallons per minute from July 15 until the first of October.

CHAIRMAN ROTH asked Mr. Waterman if the surface and ground water are independent or interrelated according to law. RON WATERMAN answered that present law defines ground water as being in independent aquifers, but if there is a change in the surface water, then it is considered to be surface water. Opponents would not have grounds to object if this bill is passed, he said.

REP. BRIGGS said he knows of an instance in which nearby water was being affected, but if it weren't, would the person be allowed to use the ground water. MR. WATERMAN said if the water came from a true aquifer, the person would be allowed to develop the subsurface water.

The hearing was closed.

The meeting adjourned at 2:50 p.m.



AUDREY ROTH, CHAIRMAN

rj

VISITORS' REGISTER

HOUSE

COMMITTEE

BILL

Date _____

SPONSOR

[illegible]

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

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Heimbuch testimony - 3

The Yellowstone Basin Water Use Association is affiliated with the Northern Plains Resource Council. NPRC has worked out some amendments to SB 243 that we support and that we feel addresses our concerns. We urge this committee to adopt those amendments in order to make a good bill much better.

THANK YOU.

SENATE BILL NO. 243

INTRODUCED BY GRAHAM

BY REQUEST OF THE DEPARTMENT OF

NATURAL RESOURCES AND CONSERVATION

A BILL FOR AN ACT ENTITLED: "AN ACT TO DELEGATE AUTHORITY TO THE ^{BOARD} ~~DEPARTMENT~~ OF NATURAL RESOURCES AND CONSERVATION TO AUTHORIZE DIVERSIONS FROM THE YELLOWSTONE RIVER BASIN UNDER ARTICLE X OF THE YELLOWSTONE RIVER COMPACT, SECTION 95-20-101, MCA, ON BEHALF OF THE STATE OF MONTANA;--AND PR-VI-BING-AH-EFFEEETIVE-BATE."

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

SECTION 1. Definitions. Unless the context requires otherwise, in [this act] the following definitions apply:

(1) "basin" means the Yellowstone River basin.

(2) "Compact" means the Yellowstone River Compact provided for in 25-20-101.

SECTION 2. Authority to approve diversions. The ^{Board} ~~Department~~ [of natural resources and conservation] may consent on behalf of the state of Montana to diversions of water from the basin pursuant to Article X of the compact, including diversions of water allocated under the terms of the compact to the other signatory states of Wyoming and North Dakota.

Section 3. Application -- notice -- objections -- report -- hearing. (1) Any appropriator proposing to divert water from the basin allocated to Montana under the terms of the compact or divert unallocated compact water within Montana from the basin shall file an application with the department.

(2) The application must state the name and address of the applicant and facts affirmatively demonstrating that:

(a) the diversion and ultimate use of the water in Montana is for a beneficial use of water under the terms of Montana;

(b) the diversion and ultimate use of water will not adversely affect the water rights of other persons;

(c) the proposed means of diversion, construction, and operation are adequate;

(d) the diversion and ultimate use will not interfere unreasonably with other planned uses or developments for which a water right has been established or a permit has been issued or for which water has been reserved;

(e) the diversion and ultimate use of the water will not exceed the allocated share under the compact of any of the signatory states;

(f) the diversion and ultimate use of the water is in the public interest of Montana; and

(g) the applicant intends to comply with the laws of the signatory states to the compact.

(2) ANY APPROPRIATOR PROPOSING TO DIVERT WATER ALLOCATED IN NORTH DAKOTA OR WYOMING UNDER THE TERMS OF THE COMPACT OR DIVERT UNALLOCATED COMPACT WATER WITHIN NORTH DAKOTA OR WYOMING ^{from the basin} SHALL FILE AN APPLICATION WITH THE DEPARTMENT. THE APPLICATION MUST STATE THE NAME AND ADDRESS OF THE APPLICANT AND FACTS ^{effectively demonstrating} TENDING TO SHOW THAT:

(a) THE PROPOSED MEANS OF DIVERSION, CONSTRUCTION, AND OPERATION ARE ADEQUATE;

(b) THE DIVERSION AND ULTIMATE USE OF THE WATER WILL NOT EXCEED THE ALLOCATED SHARE UNDER THE COMPACT OF ANY OF THE SIGNATORY STATES; AND

(c) THE APPLICANT ^{will} COMPLY WITH THE COMPACT.

(3) Notice of the proposed diversion must be given by the department in the same manner as provided in RS-2-307, (1) and (2).

(4) An objection to an application must be filed by the date specified by the department in the notice.

(5) The objector TO AN APPLICATION UNDER SUBSECTION (1) shall state his name and address and facts tending to show that:

(a) the diversion and ultimate use of the water IN MONTANA are not for a beneficial use of water under the terms of Montana;

(b) the property, rights, or interests of the objector would be adversely affected by the proposed diversion or ultimate use of the water;

(c) the proposed means of diversion, construction, and operation are not adequate;

(d) the diversion and ultimate use will interfere unreasonably with the objector's planned uses or development for which the objector has a water right, a permit, or a reserved water right;

(e) the diversion and ultimate use of the water will exceed the allocated share under the compact of any signatory state; or

(f) the diversion and ultimate use of the water are not in the public interest of Montana regardless of whether the water in question is allocated to Montana or one of the other signatory states to the compact.

(6) THE OBJECTOR TO AN APPLICATION UNDER SUBSECTION (2) SHALL STATE HIS NAME AND ADDRESS AND FACTS TENDING TO SHOW THAT:

(a) THE PROPERTY, RIGHTS, OR INTERESTS OF THE OBJECTOR WOULD BE ADVERSELY AFFECTED BY THE PROPOSED DIVERSION OR ULTIMATE USE OF THE WATER;

(b) THE PROPOSED MEANS OF DIVERSION, CONSTRUCTION, AND OPERATION ARE NOT ADEQUATE; OR

(c) THE DIVERSION AND ULTIMATE USE OF THE WATER WILL EXCEED THE ALLOCATED SHARE UNDER THE COMPACT OF ANY SIGNATORY STATE.

(7) If the department receives an objection to an

Insert new subsections (7) and (8) (see attached page)

(See attached supplemental sheet for proposed wording.)

application, it shall hold a hearing on the application ^{STRIKE} within 60 days from the date set by the department for filing objections. Service of notice of the hearing must be

(f) the diversion and ultimate use of the water are in the public interest of Montana; and

(g) the applicant signs an agreement to comply with the law LAWS of the signatory states to the compact in constructing, operating, and maintaining all facilities associated with the diversion and ultimate use of the water.

(2) ~~in determining if the diversion is in the public interest of Montana, the department shall consider~~

~~that the benefits to the applicant and the state resulting from the proposed diversion~~

~~that the effects of economic activity in Montana resulting from the proposed diversion and~~

~~that the effects of the proposed diversion on the public health, welfare, and safety~~

~~(3) The department may approve a diversion of water allocated to North Dakota or Wyoming or unallocated compact water diverted in North Dakota or Wyoming if the diversion will not adversely affect the property, rights, or interests of an appropriator located in Montana, and if the diversion exceeds the allocated share and~~

~~(4) The department may approve a diversion subject to such terms, conditions, restrictions, and limitations as it considers necessary to meet the APPLICABLE criteria listed in subsection (1) OR (2).~~

Section 5. Combined proceeding. The ~~department, in its discretion~~ board ~~may consider and~~

1 act upon any application for diversion of water from the
 2 basin filed pursuant to the provisions of [this act] in
 3 conjunction with any board proceedings involving the siting
 4 of a facility or associated facilities conducted under the
 5 provisions of Title 75, chapter 20, part 4, as amended, or
 6 in conjunction with any departmental proceeding involving
 7 the issuance of a permit or approval of a change conducted
 8 under Title 75, chapter 2, as amended, if in the opinion of
 9 the ~~department~~ ^{board} consideration of both applications in the
 10 same proceeding will better enable the board and department
 11 to fulfill their functions, duties, and responsibilities
 12 under the provisions of Title 75, chapter 20, part 4, or
 13 Title 75, chapter 2, and [this act]. ^{However, the board}
 14 ~~may not~~ ^{may not} ~~require~~ ^{may not} consent to the diversion of Montana
 15 water out of the basin for ultimate use in a facility as
 16 defined in Title 75, chapter 20, ^{prior to} ~~prior to~~ ~~SAFARI~~
 17 ~~CONVINCING UPON~~ the board's issuance of a certificate for
 18 the facility in accordance with Title 75, chapter 20. ^{SAFARI}

19 Section 6. Department authorized to appear in
 20 administrative and legal proceedings. The department may
 21 appear on behalf of the state of Montana in proceedings
 22 before the legislatures and administrative agencies of the
 23 other signatory states to the compact and in legal
 24 proceedings commenced in federal or state court within the
 25 other signatory states involving the consent of such

1 signatory states to diversions of water from the basin under
 2 Article X of the compact and any other laws or rules of such
 3 signatory states applicable to such diversions to the extent
 4 necessary to protect the interests and the citizens of
 5 Montana in those proceedings.

6 Section 7. Codification instruction. This act is
 7 intended to be codified as a new part in Title 85, chapter
 8 2, and the provisions of Title 85, chapter 2, apply to this
 9 act.

10 Section 8. Severability. If a part of this act is
 11 invalid, all valid parts that are severable from the invalid
 12 part remain in effect. If a part of this act is invalid in
 13 one or more of its applications, the part remains in effect
 14 in all valid applications that are severable from the
 15 invalid applications.

16 Section 9. --Effective date--This act is--effective--on
 17 passage--and--approval--

-End-

PROPOSED AMENDMENTS

SB 243

(supplemental sheet)

Section 3, NEW SUBSECTION (7) to be inserted on page 4, after line 24.

"THE DEPARTMENT SHALL SUBMIT A REPORT TO THE BOARD WHICH SHALL CONTAIN THE DEPARTMENT'S STUDIES, EVALUATIONS, RECOMMENDATIONS, OTHER PERTINENT DOCUMENTS RESULTING FROM ITS STUDY AND EVALUATION, AND AN ENVIRONMENTAL IMPACT STATEMENT OR ANALYSIS PREPARED PURSUANT TO THE MONTANA ENVIRONMENTAL POLICY ACT, IF ANY.

THE DEPARTMENT SHALL SUBMIT ITS REPORT WITHIN 120 DAYS AFTER THE DATE OF RECEIVING AN APPLICATION OR CONCURRENTLY WITH AN ENVIRONMENTAL IMPACT STATEMENT OR OTHER REVIEW REQUIRED BY LAW."

Section 3, NEW SUBSECTION (8)

"THE DEPARTMENTS OF STATE LANDS; FISH, WILDLIFE AND PARKS; COMMUNITY AFFAIRS; AND PUBLIC SERVICE REGULATION SHALL REPORT TO THE DEPARTMENT INFORMATION RELATING TO THE IMPACT OF THE PROPOSED DIVERSION ON EACH DEPARTMENT'S AREA OF EXPERTISE. THE REPORT MAY INCLUDE OPINIONS AS TO THE ADVISABILITY OF GRANTING, DENYING, OR MODIFYING THE DIVERSION."

Page 5, line 1, after the first "application" insert:

"THE BOARD SHALL SET A DATE FOR A HEARING TO BE HELD NOT LESS THAN 30 DAYS BUT WITHIN 60 DAYS AFTER THE BOARD RECEIVES THE DEPARTMENT'S REPORT SUBMITTED UNDER (Section 3 (7)). HOWEVER, IF THE APPLICATION IS FOR A DIVERSION OF MONTANA WATER OUT OF THE BASIN FOR ULTIMATE USE IN A FACILITY AS DEFINED IN TITLE 75, CHAPTER 20, THE BOARD MAY SET A HEARING DATE CONCURRENT WITH THE TIMEFRAMES ESTABLISHED IN TITLE 75, CHAPTER 20."

AMENDMENTS TO SB 243

1. Page 1 line 7 (Title) strike "Department" and insert "Board"
2. Page 1, line 20, strike "department" and insert "board"
3. Page 2, line 1, Following "objections" insert "report"
4. Page 2, line 4, Following "Montana" insert "from the basin"
5. Page 2, line 7, strike "tending to show" and insert "affirmatively demonstrating"
6. Page 3, line 4, Following "Wyoming" insert "from the basin"
7. Page 3, line 6, strike "tending to show" and insert "affirmatively demonstrating"
8. Page 3, line 12, strike "intends to" and insert "will"
9. Page 3, line 14, Following "85-2-307" insert "(1) and (2)"
10. Page 4, line 24, Following line 24 insert new subsection "(7)"

New subsection (7): "The department shall submit a report to the board which shall contain the department's studies, evaluations, recommendations, other pertinent documents resulting from its study and evaluation, and an environmental impact statement or analysis prepared pursuant to the Montana Environmental Policy Act, if any."

The department shall submit its report within 120 days after the date of receiving an application or concurrently with an environmental impact statement or other review required by law."

11. Following new subsection (7) insert new subsection (8)

New subsection (8): "The departments of state lands; fish, wildlife and parks; community affairs; and public service regulation shall report to the department information relating to the impact of the proposed diversion on each department's area of expertise. The report may include opinions as to the advisability of granting, denying, or modifying the diversion."

12. Page 4, line 25, strike "(7)" and insert "(9)"
13. Page 5 lines 1 through 3, Following "application," strike "it shall hold a hearing on the application within 60 days from the date set by the department for filing objections." and insert "the board shall set a date for a hearing to be held not less than 30 days but within 60 days after the board receives the department's report submitted under Section 3 (7). However, if the application is for a diversion of Montana water out of the basin for ultimate use in a facility as defined in Title 75, chapter 20, the board may set a hearing date concurrent with the timeframes established in Title 75, chapter 20."

14. Page 5 line 5, "(8)" and insert "(10)"
15. Page 5, line 9, strike "department" and insert "board"
16. Page 6, line 15, strike "department" and insert "board"
17. Page 6, line 19, Following "Montana" insert "and if the diversion and ultimate use of water will not exceed the allocated share under the compact of any of the signatory states."
18. Page 6, line 20, strike "department" and insert "board"
19. Page 6, line 24, strike "department" and insert "board"
20. Page 6 line 25, strike "upon petition by the applicant"
21. Page 7, line 9, strike "department" and insert "board"
22. Page 7, lines 13 and 14, strike "The department's" on line 14 and insert "However, the board may not" following "this act" on line 13.
23. Page 7, lines 16 and 17, strike "shall be contingent upon" and insert "prior to" following "chapter 20," on line 16

WITNESS STATEMENT

NAME BILL ASHLER BILL No. SB 243
ADDRESS MANHATTAN DATE MARCH 12, 1981
WHOM DO YOU REPRESENT SEE BELOW
SUPPORT _____ OPPOSE X AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

REPRESENTING. AGRICULTURAL PRESERVATION ASSN.
PARK COUNTY LEGISLATIVE ASSN.
SWEETENESS COUNTY PRESERVATION ASSN.
STILLWATER^{COUNTY} AGRICULTURAL LEGISLATIVE ASSN.

VISITORS' REGISTER

HOUSE

Water

COMMITTEE

BILL

SB 297

Date

3-12-81

SPONSOR

TURNAGE

NAME	RESIDENCE	REPRESENTING	SUP- PORT	OP- POSE
<i>Turnage</i>	<i>Sponsor</i>	<i>Sen. De</i>	✓	
<i>Perkins</i>	<i>Thessalon</i>	<i>Self</i>	✓	
<i>Karol F. Williams</i>	<i>Helena</i>	<i>Dupe Bros.</i>		✓
<i>Charlie Cae</i>	<i>Butte</i>	<i>MWR</i>		2
<i>Boyl E. Ellis</i>	<i>Helena</i>	<i>MWR</i>		2
<i>Jo Brunner</i>	<i>Helena</i>	<i>W.I.F.E.</i>		✓
<i>Gary Fritz</i>	<i>Butte</i>			✓
<i>Leo Berg</i>	<i>Butte</i>			✓
<i>Patrick O'Brien</i>	<i>Bozeman</i>	<i>NPAC</i>		✓
<i>Harry Teimburt</i>	<i>Glendive</i>	<i>YBWVFA</i>		2
<i>Ann Scott</i>	<i>Bozeman</i>	<i>Mont. Fairness Clinic</i>		✓
<i>Tom Carey</i>	<i>Bozeman</i>	<i>self</i>		✓
<i>Helen M. Carey</i>	<i>Bozeman</i>	<i>self</i>		✓
<i>Wm. Leaphart</i>	<i>Helena</i>	<i>self</i>		✓
<i>Bob Gannon</i>	<i>Butte</i>	<i>M.T. Power</i>		✓
<i>Bill Asher</i>	<i>MANHATTAN</i>	<i>APA, PCA, SCPA + SCAL</i>	—	—

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

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

711

LAW OFFICES
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W. T. BOONE
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TELEPHONE
543-6646
AREA CODE 406

January 19, 1981

Senator Jean Turnage
State Capitol
Helena, Montana 59601

Dear Jean:

I hope this memorandum will help you to understand the need for the amendment of the definition of "groundwater" and for the enactment of a statutory definition of surface water.

In 1977 my son, Thomas H. Boone, Trustee, filed an application with the Montana Department of Natural Resources and Conservation for an appropriation of groundwater from a dug well in Jefferson County for supplemental irrigation of 800 plus acres of land. The application was under the groundwater statutes. This application was heard in 1979 and November 1980 the Hearing Examiner prepared a "Proposal for Decision."

This Proposal for Decision denied the application for permit to appropriate groundwater. The proposed decision is to the effect that the application to withdraw water from the dug well involves "surface water" and not groundwater. "Groundwater" is defined in two sections of the code, namely 85-2-101 and 85-2-501. Both definitions are the same and read

"'Groundwater' means any water beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water, and which is not a part of that surface water."

The experts who testified at the hearing, including Department personnel, stated that the water from the dug well was groundwater as that term is known in their professions, but under the definition of groundwater it did not meet the definition because it was "a part of that surface water."

The Examiner's proposed decision proceeds on the basis that the waters from the dug well come from an aquifer which is defined in Section 85-2-501 (paragraph 1) as "any underground geological structure or formation which is capable of yielding water or is capable of recharge" and that the water from the aquifer is interconnected with the Boulder River and by reason thereof the water from the well is in fact surface water. Some of the experts expressed opinions to the effect that there was a saturated mound between the aquifer and the river, the possibility of subsurface stream flows from the aquifer to the river and other conditions, which contributed directly or indirectly to the flow of the waters of the Boulder River; that subsurface flows which contribute either directly or indirectly in some way become a part of surface waters. Or to state it conversely the Examiner held that for groundwater not to be a part of that surface water "there must be a known non-saturated intervening layer between the surface water source and the point of withdrawal of the surface waters". The point of withdrawal referred to is the place where the waters are taken from the well.

The Department has defined surface water by an administrative rule, known as A.R.M. 36.12.101 (3) (1980) as follows:

"Surface water" means all water of the state at the surface, including but not limited to any river, stream, creek, coulee, undeveloped spring, lake and other natural surface source of water and diversions thereof and the impoundment of flood, seepage, and waste waters in a reservoir."

There is no statutory definition of surface water but despite the Department's own definition the Hearing Examiner concluded that

- (1) Subsurface waters which contribute directly or indirectly to the surface flows are a part of the natural source of surface water; and
- (2) The Board's definition of surface is not exclusive, and therefore does not exclude subsurface waters which are part of the surface water.

The effect of this proposed decision is to make it virtually impossible for one to appropriate water from an underground source unless he could establish by scientific evidence that there is no interconnection or relationship between that underground source and the river or stream.

At this point I should comment that because that dug well was in the Boulder drainage objections were filed by Montana Power Company and the Bureau of Reclamation on the basis that the use of water from the dug well would affect the storage rights of Montana Power at Canyon Ferry dam and its five dams at Great Falls, and would affect the storage rights of the Bureau of Reclamation at Canyon Ferry. All of these dams are from about a hundred miles to two hundred miles downstream from the dug well.

Because of the interrelationship theory the effect of the proposed decision would require any applicant seeking to appropriate groundwater to scientifically establish not only in the immediate area where the well is located but also downstream to these various dams that there was no relationship between that underground source and the river in that area.

Obviously it would be impossible for anyone to make an investigation so extensive as that and to be able to prove scientifically that there is no relationship between the underground sources of water and the river or rivers covering a distance of several hundred miles.

The same difficulties would be encountered under the proposed decision for one who is seeking to appropriate surface water of a stream or river on a drainage where either Montana Power or the Bureau of Reclamation have storage dams or hydroelectric dams. For example, if one seeks to appropriate water on any creek that is a tributary to the Bitterroot or the Clark Fork he would be hit with the same problem because of the location of the Montana Power dam at Thompson Falls. The same thing is true on any tributary to the Missouri because of the dams at Canyon Ferry and Great Falls.

We have filed exceptions to the proposed decision and to date no hearing has been set on the exceptions.

As I have previously explained to you I think that if the legislature should pass a statute to change the definition of groundwater so as to eliminate the interrelationship or interconnection theory and was to adopt by statute a definition of surface water, it seems to me that the Department could not approve the Proposal for Decision and a different resolution of the problem would have to be made.

Senator Jean Turnage
January 19, 1981
Page 4

The proposed decision is so widespread in effect that I personally feel that agricultural interests in this State will be materially affected by it. Agriculture in Montana is the most important single industry and everything that can possibly be done to encourage and promote that industry should be done and nothing to hinder it. In our specific case agriculture would be improved by putting 800 plus acres into active cultivation for the raising of hay or grains which means additional employment, more taxes and more livestock. This is just one instance, and with the wise utilization of water there are many areas in the State where additional lands can be put under irrigation and be made to be productive.

I feel that this matter is of such importance that it should be brought to the attention of the Governor.

As I mentioned to you before I will be leaving Missoula on January 20 for a short vacation but expect to be back in the office on February 2 and I will contact you promptly after my return.

Sincerely and with Best Regards,

BOONE, KARLBERG & HADDON



W.T. BOONE

WTB:cm

WITNESS STATEMENT

NAME Paul B. Smith BILL NO. Sen. 297
ADDRESS 240 N Higgins, Missoula, MT DATE Mar 12, 1981
WHOM DO YOU REPRESENT Paul T. Smith Ranches
SUPPORT _____ OPPOSE X AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

WITNESS STATEMENT

NAME Charlie Crane BILL No. SB 292
ADDRESS Butte DATE 3/11/81
WHOM DO YOU REPRESENT MWDA
SUPPORT _____ OPPOSE X AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

WITNESS STATEMENT

NAME Theresa T. Quinn BILL No. 297
ADDRESS Helena DATE 3/12/81
WHOM DO YOU REPRESENT Mont. Stockmen, Woolgrowers & Cattle
SUPPORT _____ OPPOSE X AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

NAME Ronald F. Waterman BILL NO. SB 297
ADDRESS P.O. Box 1686, Helena, MT 59624 DATE 031281
WHOM DO YOU REPRESENT Dreyer Bros., Inc.
SUPPORT OPPOSE XXX AMEND

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

I am Ronald F. Waterman, a lobbyist for Dreyer Bros., Inc. I appear in opposition to SB 297. This bill amends the definition of ground and surface water and the proposed changes will have an immediate and adverse effect upon the surface water rights of all water users within the State of Montana.

Of particular concern is the deletion from the definition of the term "groundwater", which deletion removes the phrase "is not a part of that surface water" and the amended definition of surface water, which restricts the term to only the water "on the outer face of the land." Through these amendments the law will make a clear and distinct division between ground and surface waters. While some ground water aquifers are in fact isolated from surface waters, many ground and surface water systems are interdependent and all surface waters are supported by subsurface, groundwater aquifers. The amendment, as proposed, will ignore these hydrolic facts and establish as a matter of law that a total separation exists between ground and surface water. The water law of Montana, if the amendment passes, will then be inconsistent with the realities of the world of nature. Just as this legislature could not effectively

repeal the law of gravity, so also the legislature cannot declare no interdependence exists at all between ground and surface water. The interdependence will continue; Montana water law will simply not recognize this fact.

The ultimate question is what will happen should the amendment pass. The answer is simple and devastating to surface water users within this state. An individual seeking to appropriate water could, under these definitions, drill a shallow well immediately adjacent to a stream. The well could be placed to avoid directly intersecting the surface waters, but located to intersect the saturated mound of water which supports and permits the surface water to flow. As the well is pumped, the water in the saturated mound of the stream would be drawn through the gravels and removed by the well. Under current law, an appropriator would have to file for a surface right and would obtain a priority which would protect prior appropriators. Under the proposed amendment, the water would be groundwater only and could be appropriated. This would be true even if the entire surface flow was depleted by the operation of the pump. While such an extreme example probably would not frequently occur, a partial diversion of surface waters is likely and predictable. The way Montana water law is presently structured, with passage of this amendment a surface water user would have no standing to object to the issuance of the groundwater permit, since the permit would be addressed to a withdrawal from a separate water system which by statute is declared to be isolated and independent

from the surface waters.

The unfortunate result of this amendment will be seen whenever low water or drought conditions arise. When the water supply is the shortest, then a groundwater appropriator will be able to divert surface water despite the appropriator's lack of priority or indeed any right to use the surface waters.

Again, we must look to the lesson hydrology teaches. The surface waters exist and flow because they are supplied by groundwater aquifers. If the interrelated groundwater aquifers can be withdrawn, the surface water flow will be diminished and depleted.

SB 297 is of concern to every surface water user in the state since it will allow diversions of the surface water through an indirect withdrawal by a groundwater appropriator who will lack both a priority and a right to directly divert surface water. The amendment, if adopted, will have an immediate, adverse effect upon all surface water users, be they domestic, commercial, agricultural or persons interested in maintaining minimum flows to support fish and wildlife values. I urge this committee to reject this amendment.

Bob Lannon

NAME Michael E. Zimmerman, Esq. BILL NO. Senate Bill 297
ADDRESS 40 East Broadway, Butte, MT 59701 DATE 3-12-81
WHOM DO YOU REPRESENT The Montana Power Company
SUPPORT _____ OPPOSE X AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments.

Senate Bill 297 creates an artificial distinction between surface and groundwater that ignores the hydrological fact that these waters may be an interconnected source. The definitions simply state: (1) Groundwater is any "water within the zone of saturation of an aquifer or any underground geological structure or formation beneath the land surface or beneath the bed of a stream, lake, reservoir or other body of surface water . . . ;" (2) Surface water is "all water . . . on the outer face of the land"

The problem inherent in creating these distinct categories and ignoring the fact that they are often interconnected is found in MCA (1979) 85-5-311. This section lists the criteria that guide the DNR in their decision to issue a water use permit. The first criteria that must be proven is that there are "unappropriated waters in the source of supply."

Senate Bill 297 creates an immediate problem of interpretation when the words "source of supply" are read with

the definitions created by Senate Bill 297. Are we to ignore the fact that groundwater and surface water are often a single, interrelated source of supply? If the definitions are read literally it is probable that a court would conclude that a source of supply is either groundwater or surface water, but not both.

The result, then, would be that an appropriator could appropriate groundwater that is interconnected to a surface water source without proving that his appropriation does not adversely affect downstream surface appropriators. Clearly, Senate Bill 297 threatens an adverse impact on the policy of Montana water law and should not be passed.

WITNESS STATEMENT

NAME Leo Berr BILL No. 213
ADDRESS _____ DATE _____
WHOM DO YOU REPRESENT DNRC
SUPPORT X OPPOSE _____ AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

Testimony on SB 243

House Select Committee on Water

March 12, 1981

Larry Heimbuch - testifying for the Yellowstone Basin Water Use Association

Madam Chairman, members of the Committee, for the record my name is Larry Heimbuch. I run an irrigated farm/ranch operation near Glendive, Montana. I am speaking today as the President of the Yellowstone Basin Water Use Association which is mainly comprised of irrigators along the Lower Yellowstone River.

Our organization supported SB 243 in the Senate. We feel it is basically a good bill because it sets up criteria that must be looked at before Montana will consent to a transfer of water out of the Yellowstone Basin. The criteria that an applicant must meet is similar to that found in the Water Use Act and reflects Montana's commitment to protect existing water users.

We do, however, strongly urge that this committee amend SB 243 in two very important areas.

First of all, we do not feel that one person, the director of the department of natural resources, should be given sole decision making authority. Currently the Legislature has the power to decide on interbasin transfers --- we are far more comfortable with this arrangement but can see how a body that meets only once every two years may not always be in a position to make timely decisions. We therefore believe the best solution is to give the board of natural resources the decision making authority in this area.

If this bill is passed, we can expect Tenneco to be the first one to apply to the department for an interbasin transfer out of the Yellowstone to supply water to its proposed gasification plant near Wibaux, Montana. By giving the board the decision making authority we can accomplish a more efficient and coordinated government process.

The board is already in the decision making position as far as granting or denying certificates to Tenneco under the Montana Major Facility Siting Act. Let's give the board the ability to look at the total picture and decide in a comprehensive fashion, under the same timeframes, whether the total project should be approved.

Tenneco's diversion point, by the way, is approximately 4,000 feet upstream from the intake canal of the Lower Yellowstone Irrigation Project where many of our members get their irrigation water. You can bet we'll be very interested both in making sure Tenneco's pumping plans are adequate to protect our irrigation rights and that their overall project is designed to minimize the impacts on the area we live in.

Giving the board decision making authority allows us, as well as state government, to address these important issues under the same process.

Briefly consider other possible applications for interbasin transfers of water. We hear talk about diverting Montana water to recharge the Ogilala aquifer or diverting Wyoming allocated water out of Montana back into Wyoming for coal slurry purposes. Granted this is just talk but the point is that taking Yellowstone Basin water out of the basin is a serious matter in any instance and we do not feel decisions in such serious matters should rest solely with one bureaucrat in Helena.

Secondly --- we feel it is very important to amend Section 5 of this bill (which starts on the bottom of page 6) back to its original form in regards to when application can be acted on and when Montana consent can be given for an interbasin transfer of water to a major facility in Montana.

Again, the board should be able to grant interbasin transfer permission concurrently with permission to construct such a facility and NOT BEFORE. What good is approval for a water transfer to a project that may not be approved in the future. The way the bill is set up now you unnecessarily risk wasting government time and taxpayer's money by allowing consent for a piece of a project that may never materialize.

Also, in the case of a new water right application which involves an interbasin transfer for a major facility, you risk granting the application and the water transfer for a project that's never built, for one reason or another, and in the process you tie up water that could otherwise have been put to a beneficial use by a new irrigator or any other applicant.

WITNESS STATEMENT

NAME Charlie Crane BILL No. SB 243
ADDRESS Butte MT DATE _____
WHOM DO YOU REPRESENT MWPA
SUPPORT _____ OPPOSE X AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

WITNESS STATEMENT

NAME R. A. Ellis BILL No. SB 243
ADDRESS 1785 Secoya Nelauna Nt DATE 2/12/81
WHOM DO YOU REPRESENT MWDPA
SUPPORT _____ OPPOSE ✓ AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

WITNESS STATEMENT

NAME Leo Berly BILL No. 297

ADDRESS _____ DATE _____

WHOM DO YOU REPRESENT DVRC

SUPPORT _____ OPPOSE X AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments: