

HOUSE NATURAL RESOURCES COMMITTEE MINUTES
March 24, 1983

The House Natural Resources Committee convened at 1 p.m., on March 24, 1983, in Room 224A of the State Capitol, with Chairman Harper presiding and all members present except Reps. Brown, Nordtvedt, and Quilici. Chairman Harper opened the meeting to an executive session on the water bills: HBs 893, 894 and 908.

EXECUTIVE SESSION

Chairman Harper said he didn't want to open up a hearing again. He told the committee members they could direct questions at various people but comments are to be confined to the bill.

Rep. Fagg suggested a straw vote to see which way the committee is interested in going. Chairman Harper said this would be a vote for HB 908 or for HBs 893 and 894, which are similar. Rep. Neuman said he had no objection. Chairman Harper asked if there were any questions before this straw vote was taken.

Rep. Bergene asked if the bill addresses droughts. Rep. Neuman said the water they would be marketing is from reservoirs and if a series of dry years occur and the water isn't available it must go to agriculture first.

The straw vote was taken and 5 favored HBs 893 and 894 as the primary vehicle and the majority favored HB 908.

HOUSE BILL 908 Rep. Fagg moved DO PASS.

Rep. Iverson said as we are discussing two major concepts with these bills, both concepts should go to the floor so all can hear and take part in the discussion.

Rep. Addy said from a procedural point all three can be debated on the floor no matter what action is taken by the committee.

Rep. Iverson said there have been several instances where bills of similar intent were placed together on the floor. He said it is different to have it come to the floor in this way than to have it blown out of committee.

Rep. Fagg moved the amendments to HB 908 which is Exhibit 1 of the minutes. Chairman Harper said the main reason for the amendments was that he became concerned that the cubic feet per second and water amounts were too small and would take in some agricultural appropriations. He said the first amendment changes "or" to "and." He said as it is written it could include city sewer pipes.

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The motion to adopt the amendments carried unanimously with all present.

Rep. Jensen said he had intended to amend the bill to say that it had to statutorily reserve sufficient water for the trust lands. He said the worth of land and its usefulness is restricted if water is not available for the land. He said he would consider floor amendments to do this; and if not, he would do it next session.

Rep. Fagg included AND AS AMENDED in his DO PASS motion. This motion carried with Reps. Curtiss and Neuman voting no and Reps. Nordtvedt and Quilici, absent. Rep. Brown had left a vote favoring the bill.

HOUSE BILL 893 Rep. Iverson said he hoped either HB 893 or HB 894 would also make it to the floor.

Rep. Neuman said he would like to amend HB 893 before it goes to the floor. He moved the amendments, all but number 3. A copy of these amendments is Exhibit 2. He said he had one additional amendment on the date.

Chairman Harper said Amendment 4 was lifted directly out of HB 908 with one exception. He said if the language as it is now is adopted the Department would be allowed to market water, sell the permit and deposit the money and then come to the Legislature to have it validated. He said the department as well as the coal company would lobby in the halls and say since you have our money you have to ratify our permit.

Rep. Neuman said he would not expect that to be true. He said all the legal work could get done and the contract ready to be written when the Legislature approves.

Rep. Harper asked Mr. Berry if this was different for a reason. Mr. Berry said the primary reason was not to change the intent of HB 908, but normally with water appropriations the Department processes it and the Legislature ratifies the contract. He said it could be changed to say the department can't issue the permit until the Legislature authorizes the permit.

Rep. Harper said in that case on page 15, line 9, the word "submitted" should be "approved."

Rep. Addy asked if it's the Legislature or the Department that decides whether water should be marketed. Mr. Berry said the Department negotiates the contract and submits it to the Legislature for approval.

Chairman Harper said another concern is that DNRC is conducting the study in conjunction with the Water Resources Oversight Committee, page 19, and then on page 20, line 6, the Department is reporting results of the study, and not the committee, to the Legislature. Also we are appropriating money directly to DNRC from the Council for the legislative committee. He wondered why the study isn't given to the legislative group.

Rep. Neuman said that most of the data needed for the study would be most accessible to the DNRC. He said it is most logical for them to do the study. He said that is not to say you couldn't have a legislative committee do it.

Rep. Ream said he would like to come back to Amendment 3. He said without it it seems to be saying that slurry is a beneficial use even though it doesn't come out and say it.

Mr. Berry said as the bill is right now, you may secure a right to slurry coal but you must go through the water marketing system as devised, and the ban on coal slurry is removed. In Amendment 3 the coal slurry ban is left in but it sets up a mechanism where the Legislature can approve an application for coal slurry if it so desires. Mr. Berry said there isn't much difference as under both mechanisms the Legislature would have to approve any use of Montana water for coal slurry.

Rep. Ream said with Amendment 3 we are saying coal slurry is not a beneficial use and without this we may be opening the door to some problems.

Rep. McBride said language directly preceding Amendment 3 seems to say the use of water for transport may be detrimental. Is this an effort to answer some of the questions raised in the federal court issues. Rep. Berry said it leaves it to a case-by-case decision by the Legislature.

Chairman Harper asked if this language firmed up our court position. Don MacIntyre, attorney, DNRC, said the language is designed to recognize the concerns of the citizens of Montana. Coal slurry may not be a beneficial use and then there may be cases where it is a beneficial use. Coal slurry people would be allowed to come to the state and show the viability of their project and how that particular project would not adversely affect our resources and the Legislature would then decide whether coal slurry is detrimental to the welfare of the state. He said it would make Montana laws stronger.

Rep. Addy asked why our present ban would be held unconstitutional. Mr. MacIntyre said the argument can be made either way. Some say our water can best be protected on the proposition of conservation.

He said the courts look at many things such as what our water is used for, how much is available, present and future needs, do we prohibit the shipment of anything else by slurry - which we don't, and its impact on other resources. He said in his opinion it would be better not to have a ban and let the market control it.

Rep. Addy asked if Rep. Kemmis had something to say.

Rep. Kemmis said he felt we are guessing about whether the statute is constitutional or not. He said the real question is whether we replace it with something that is even shakier. He said nothing that has been suggested makes him feel easier than with what we already have. He felt Ted's bill was much shakier than the current ban.

Rep. Ream said he still had a hangup with Amendment 3. He said he would make that a separate motion to reinsert it.

The question was called and a roll call vote was taken and failed with 9 voting no; 6 yes (Ream, Addy, Jensen, McBride, Metcalf, Veleber); and 4 absent (Brown, Fagg, Nordtvedt, Quilici).

Rep. Addy asked if anything else would need prior legislative approval.

Mr. MacIntyre said as sub 8 originally stood it in effect put a moratorium on the repealer of the coal slurry ban and the purpose of the section was to say there could be no action in response to coal slurry activity until 1987 or until the EIS came to the Legislature, and then the Legislature could OK that we could go back into the general mechanism. He said they may have to rework 8 now.

Rep. Addy said in one part of the bill coal slurry is suspect use of water to be very closely looked at, but in this section we are saying it would be easier to get this than for other purposes.

Rep. Kemmis said he would like to make a procedural point. In this case it is valuable to have a clear recommendation one way or the other. He said the members had been placed on this committee because they had the most expertise and the rest of the House would like to have their recommendation.

Rep. Neuman moved that HB 893 AS AMENDED DO PASS.

Rep. Jensen urged the committee to keep in mind the larger concepts this deals with.

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A roll call vote was taken and the motion failed with 11 voting no; 6 voting yes (Brown, Curtiss, Hand, Iverson, Mueller and Neuman); and 2 absent (Nordtvedt and Quilici). Rep. Brown had left a vote favoring the bill. Rep. Metcalf moved the vote be reversed and this motion carried unanimously with those present. HB 893 receives a AND AS AMENDED DO NOT PASS recommendation from the committee.

HOUSE BILL 894 Rep. Jensen moved that this bill be TABLED.
The motion carried unanimously with all present
(absent were Reps. Nordtvedt, Quilici and
Brown).

Meeting adjourned at 2:15 p.m.

Respectfully submitted,



HAL HARPER, CHAIRMAN

Emelia A. Satre, Sec.

PROPOSED AMENDMENTS TO HOUSE BILL 908

Submitted by Representative Hal Harper

- (1) Page 5, line 5
Following: line 4
Strike: "or"
Insert: "and"
- (2) Page 17, line 17
Following: "appropriation of"
Strike: "5,000"
Insert: "10,000"
- (3) Page 17, line 18
Following: line 17
Strike: "7"
Insert: "15"
- (4) Page 18, line 21
Following: "of"
Strike: "5,000"
Insert: "10,000"
- (5) Page 18, line 21
Following: "appropriation"
Insert: "for a diversion for a consumptive use"
- (6) Page 18, line 22
Following: "year of"
Strike: "7"
Insert: "15"

AMENDMENTS TO HB 893

Introduced Bill (White Copy)

1. Page 8, line 10 through line 19, page 9
Strike: Section 3 in its entirety
Penumber: all subsequent sections

2. Page 15, lines 6 through 8
Following: "until"
Strike: "
 (a) July 1, 1987; or
 (b) "

3. Page 17, lines 6 through 10
Following: "(2)" on line 6
Strike: the remainder of the material in its entirety
Insert: "The use of water for slurry transport of coal is not a beneficial use of water except upon affirmation by the legislature of the findings and determinations of the department made under 85-2-311."

4. Page 17, line 12 through line 25, page 18
Strike: section 10 in its entirety through subsection (2)
Insert: "Section 9. section 85-2-311, MCA, is amended to read:

"85-2-311. Criteria for issuance of permit. ~~The~~
(1) Except as provided in subsections (2) and (4), the
department shall issue a permit if the applicant
proves by substantial credible evidence that the
following criteria are met:

~~(1)~~ (a) there are unappropriated waters in the source of supply;

~~(2)~~ (i) at times when the water can be put to the use proposed by the applicant;

~~(3)~~ (ii) in the amount the applicant seeks to appropriate; and

~~(4)~~ (iii) throughout the period during which the applicant seeks to appropriate, the amount requested is available;

~~(5)~~ (b) the rights of the prior appropriator will not be adversely affected;

~~(6)~~ (c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

~~(7)~~ (d) the proposed use of water is a beneficial use;

~~(8)~~ (e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved;

(6) an applicant for an appropriation of 10,000 acre feet a year or more and 15 cubic feet per second or more proves by clear and convincing evidence that the rights of a prior appropriator will not be adversely affected;

(7) except as provided in subsection (6), the applicant proves by substantial credible evidence the criteria listed in subsections (1) through (5);

(2) (a) The department may not issue a permit for an appropriation of 10,000 or more acre-feet of water a year or 15 or more cubic feet per second of water unless:

(1) the department makes an affirmative finding that:

(A) the criteria in subsection (1) are met;

(B) the applicant has proven by clear and convincing evidence that the rights of a prior appropriator will not be adversely affected; and

(C) the proposed appropriation is in the public interest; and

(b) In making a finding under subsection (c) shall consider:

(i) existing demands on the state water supply, as well as projected demands such as reservations of water for future beneficial purposes, including municipal water supplies, irrigation systems, and minimum streamflows for the protection of existing water rights and aquatic life;

(ii) the benefits to the applicant and the state;

(iii) the economic feasibility of the project;

(iv) the effects on the quantity, quality, and potability of water of existing beneficial uses in the source of supply;

(v) the effects on private property rights by any creation of or contribution to saline seep; and

(vi) the probable significant adverse environmental impacts of the proposed use of water as determined by the department pursuant to Title 75, chapter 1, or Title 75, chapter 20;

(vii) the use of water is reasonable;

(viii) the use of water is not detrimental to the public welfare.

(c) a permit for an appropriation for a diversion for a consumptive use of 10,000 or more acre feet of water a year or 15 or more cubic feet per second of water under subsection (2) is not valid and water may not be used pursuant to the permit until the legislature affirms the findings of the department.

5. Page 10, lines 5 through 6

Following: "in" on line 5

Strike: "subsection (1), including subsection (f)"

Insert: "subsections (1) and (2)"

6. Page 19

Following: line 7

Insert: (4)

"(4) An appropriation, diversion, impoundment, restraint, or attempted appropriation, diversion, impoundment, or restraint contrary to the provisions of this section is null and void. No officer, agent, agency, or employee of the state may knowingly permit, aid, or assist in any manner such unauthorized appropriation, diversion, impoundment, or other restraint. No person or corporation may, directly or indirectly, personally or through an agent, officer, or employee, attempt to appropriate, divert, impound, or otherwise restrain or control any of the waters within the boundaries of this state except in accordance with this section."

7. Page 25, line 12

Strike: "water"

8. Page 25, lines 14 and 15

Strike: "or water as a transport medium"

Insert: "coal slurry"

9. Page 26

Following: line 10

Insert: "Section 14

NEW SECTION. Section 14. Section 75-20-218, MCA, is amended to read:

"75-20-218. Hearing date - location - department to act as staff - hearings to be held jointly. (1) Upon receipt of the department's report submitted under 75-20-216, the board shall set a date for a hearing to begin not more than 120 days after the receipt. ~~Except for those hearings involving applications submitted for facilities as defined in (b) and (c) of 75-20-104(10) certification~~ Certification hearings shall be conducted by the board in the county seat of Lewis and Clark County or the county in which the facility or the greater portion thereof is to be located.

(2) Except as provided in 75-20-221(2), the department shall act as the staff for the board throughout the decisionmaking process and the board may request the department to present testimony or cross-examine witnesses as the board considers necessary and appropriate.

(3) At the request of the applicant, the department of health and the board of health shall hold any required permit hearings required under laws administered by those agencies in conjunction with the board certification hearing. In such a conjunctive

hearing the time periods established for reviewing an application and for issuing a decision on certification of a proposed facility under this chapter supersede the time periods specified in other laws administered by the department of health and the board of health."

10. NEW SECTION. Section 15. Repealer. Section 85-1-121, MCA, is repealed.

11. Renumber: subsequent sections

NAME Ward A. Shanahan BILL NO. HB 908

ADDRESS P.O. Box 1715, Helena, MT 59624 DATE 03/24/83

WHOM DO YOU REPRESENT Northern Tier Pipeline Company

SUPPORT _____ OPPOSE _____ AMEND XXX

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

1. Page 5, line 6.
Following: "transporting"
Strike: "water"
Insert: "coal slurry"

NAME Ward A. Shanahan BILL NO. HB 908
ADDRESS P.O. Box 1715, Helena, MT 59624 DATE 03/24/83
WHOM DO YOU REPRESENT Northern Tier Pipeline Company
SUPPORT _____ OPPOSE _____ AMEND XXX

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

1. Page 5, line 5.
Following: "designed"
Insert: "and intended"
2. Page 5, line 6.
Strike: "or capable of"