

MONTANA STATE SENATE
JUDICIARY COMMITTEE
MINUTES OF THE MEETING

February 13, 1985

The twenty-eighth meeting of the Senate Judiciary Committee was called to order at 10:08 a.m. on February 13, 1985, by Chairman Joe Mazurek in Room 325 of the Capitol Building.

ROLL CALL: All committee members were present.

Chairman Mazurek announced that due to the great deal of input and interest in SB 28 and SB 69, the bills would be reheard before the committee. He asked that those testifying limit their testimony to comments concerning the amendments presented and new issues raised.

The following exhibits were distributed to the committee and entered into the record of the hearing: AG's proposed amendments to grey bill (Exhibit A); proposed attorney general's revisions to grey bill version of SB 28 and explanation (Exhibit B); Reid Chambers' proposed amendment to grey bill (Exhibit C); and attorney general's redrafted version of Reid Chambers' proposed amendments to grey bill (Exhibit D).

FURTHER CONSIDERATION OF SB 28 AND SB 69: Senator Dorothy Eck, sponsor of SB 28, testified that of all of the recommendations that have been made, the one she would prefer would be to go back to her original bill, extend the date, and not make any other changes. She believes the Chambers' amendment (Exhibit C) offers the best solution of addressing some of the problems the committee has raised. She hopes the amendments will allow the process to go on in an orderly way.

Senator Jack Galt, sponsor of SB 69, testified this bill was introduced at the request of the Reserved Water Rights Compact Commission. The bill makes the commission report to the water court judge to keep him informed of whatever compacts it is negotiating and to keep him informed. It also extends the commission's authority to July 1, 1987. Finally, the bill deals with termination of negotiations. Senator Galt hoped the committee would grant the extension or he believed the state of Montana would be getting into some extensive litigation.

PROPOSERS: Caleb Shields, Member, Tribal Executive Board, Assiniboine and Sioux Tribes of the Fort Peck Reservation, presented written testimony in support of the two bills (Exhibit 1). Richard Whitesell, Area Director, Billings Area, Bureau of Indian Affairs, presented written testimony in support of the bills (Exhibit 2). Daryl Wright, Water

Rights Coordinator, Chippewa Cree Tribe of the Rocky Boy's Reservation, entered into the record a resolution from the tribe dated December 20, 1984, supporting an extension of the Water Rights Compact Commission (Exhibit 3). He testified that although they are not happy about having to negotiate any tribal rights with the state of Montana, they have entered into these negotiations to preserve their rights. They have not yet reached the stage where they are close to a compact, but they do feel progress is being made in that direction. They believe the only alternative to negotiation is litigation. The Wind River litigation at last report has exceeded \$7 million. He does not believe either the state or the tribes want to expend the vast amount of resources necessary to reach that settlement. He urged the committee to support the proposed extension and stated the tribe agreed with Mr. Shields' amendments. Dan Decker, Confederated Salish and Kootenai Tribes, presented written testimony to the committee (Exhibit 4). He testified the merits of negotiation over litigation have already been presented to the committee. Joe McKay, Blackfeet Tribe of Montana, testified they believe this is the first time they have participated in proceedings of this kind with regard to their water. They support the extension of the commission and believe it is an act of good faith. They do not think negotiations should ever be foreclosed as an avenue of resolving the critical water rights issue. They do not support the deadline of commencement of negotiations for either July 1, 1985, or January 1, 1986, as that provision at this particular point of time would affect only the Blackfoot Tribe. Mr. McKay believes this is a very emotional issue. Emotions are always the highest on the reservation and in the communities surrounding the reservation. They feel it is essential to be able to strip away the emotional arguments and make this decision against the factual and legal background. He believes setting a deadline as proposed here would be seen as an aggressive act and injure any ability of bringing their tribe to the negotiation table. They believe the hammer of litigation is sufficient, and the legislature doesn't need to set over their heads the sword of a deadline. They support the elimination of a requirement for congressional ratification of an agreement. They support the amendments by Senator Eck which provide for a negotiated compact to be included in a preliminary decree for informational purposes only and included in the final decree without challenge. They do not think the state should impose upon them artificial or arbitrary deadlines for negotiations. In summation, Mr. McKay stated the deadlines should be eliminated and the compact commission's life extended. Clay Smith, Assistant Attorney General, testified on behalf of the Attorney General in connection with the bills and submitted written testimony (Exhibit 5). He stated that with the revisions submitted with their testimony, their office fully supports both bills. They think it is essential that the life of the commission be extended, as the commission is making headway with not only the Fort Peck Tribe but with other tribes as well. It is also making headway with those federal

agencies with which it is negotiating. Mona Jamison, Legal Counsel to the Governor, stated they support enthusiastically both bills and the amendments proposed by the Attorney General's office. They support the extension. They think it is critical to the state. First, because the compact commission has been making tremendous headway. They feel the extension fosters a spirit of cooperation. The amount of money that is saved if we are able to achieve compacts is a tremendous savings to the state. The due process issue that has been raised in SB 28 does concern them, and, therefore, they support the amendment as proposed by Mr. Chambers. They are concerned with the language "for informational purposes only." They strongly urge passage of the bills with the Attorney General's amendments. Cal Wilson, Tribal Attorney, Northern Cheyenne Tribe, testified they like both bills. They have followed and studied them. They stressed that the testimony from the other tribes is the same as what they would like to offer. They think these bills would make this law and the process go along a lot better. They don't see the due process problems the Attorney General does. Louie Clayborn, Coordinator of Indian Affairs, submitted written testimony (Exhibit 6). Gary Kimble, Attorney and staff person in Mr. Clayborn's office, stated they have discussed the perceived problem of due process. They see problems with the Attorney General's amendments and with Mr. Chambers' amendment. He believes what you have is a defect in the state administration of water rights in Montana. When you are signing a compact with an Indian tribe, you are recognizing Indians have rights for present and future purposes. The water wasn't the state's to give away to begin with. When you put it in the final decree, you are recognizing the tribes have certain water rights regardless of whether they are using them. You have a method of trying to eliminate the defect and still have a compact. You have to decide what kind of challenge you are going to make. Mr. Chambers has one method of eliminating the defect. What you don't want to have is the Indians carrying the burden of the state's mistake. It was the state's mistake to allow users to dip into the reserved rights. If the state is going to include descriptions of Indian water rights, it can do it in such a way without affecting the litigation before the state supreme court. Philip Roy, Attorney, Blackfoot Tribe, testified they adamantly support the extension and oppose any deadlines for the start of negotiations. He believes it would be a show of good faith on the part of Montana to grant the extension and clean up the bills and keep any deadlines out of the bills. Jo Brunner, representing W.I.F.E., testified they support SB 69 (see witness sheet attached as Exhibit 7).

OPPONENTS: None.

QUESTIONS FROM THE COMMITTEE: Senator Towe asked Mr. Decker to clarify his position on the Chambers' amendment. Mr. Decker stated his written

statement submitted to the committee was submitted before they saw the Chambers' amendment. He stated the Confederated Tribes still support the compact's being entered into the final decree without challenge. Senator Mazurek asked Mr. Smith to explain their proposed modifications to the Chambers' amendment. Mr. Smith stated it was an attempt to clarify the proposal and to streamline it. There was no change in intent as that was not their purpose. They felt the proposal was awkward.

Senator Pinsoneault addressed Mr. McKay and stated his tribe's involvement in this matter added a new dimension. He stated that when Representative Kennerly testified at the original hearing on these bills, he stated the Blackfoot Tribal Council is replaced every two years en masse. Mr. McKay stated that is theoretically possible. Senator Pinsoneault asked if they are asking for additional time and the council is replaced every two years it would be hard to bring this issue to a new body and have them fully understand it. Mr. McKay stated what they are asking for is time not to educate the council, but time to educate the entire tribe. Then, if there were a turnover of people on the council, the new members would not be as uninformed as they have been in the past. Senator Pinsoneault asked what sort of an extension they were talking about. Mr. McKay responded their suggestion is there be no deadline whatsoever for commencement of negotiations. Senator Blaylock asked Mr. McKay if he were adamant there be no deadline and if it were a possibility his tribe would never negotiate. Mr. McKay responded yes, and that is a possibility. He explained they are asking for two things: (1) The opportunity to provide some community education; and (2) the opportunity to look closely at the issue and determine if there is anything to be gained from negotiations.

Senator Towe asked Mr. Smith to explain his modification to the Chambers' amendment as it appears to contain some substantial differences. Mr. Smith stated he believes the only changes they have made are nonsubstantive in nature. Senator Towe stated their changes injected preponderance of the evidence while the original proposal was beyond a reasonable doubt. Mr. Smith stated the Attorney General's suggestion was different from Mr. Chambers'. He believes without any further reference to burden of proof, the burden of proof under the Chambers' amendment would be that applicable to any other challenge in water proceedings. Senator Towe stated there is no reference in the Attorney General's changes to the burden of proof. He asked why they didn't include the burden of proof concept in their rewrite. Mr. Smith responded he believes the term preponderance of the evidence is equivalent to burden of proof. Senator Towe stated the Attorney General's changes did not pick up the statement Mr. Chambers made that the compact provisions shall be considered prima facie valid in all subsequent litigation before the water judge. Mr. Smith stated that is implicit and did not need reiteration.

Senator Mazurek stated he discussed that particular sentence with Mr. Chambers when this was proposed, and he did not feel strongly about it.

Senator Towe asked Mr. Smith what basis for objection can be sustained here or what objection are you permitting someone to come in and make to overthrow the compact. Mr. Smith stated it is his opinion that objections to a compact must be fairly limited in nature (quantification or use of water rights). Senator Towe stated it did not say that in the rewrite. Mr. Smith responded he doesn't believe the Chambers' proposal or the redraft of it are limited in nature. They believe the availability of substantive challenges are essential. Senator Towe asked Mr. Kimble and Mr. Decker if they were satisfied with the Attorney General's rewrite. Mr. Decker stated they eliminated the prima facie evidence of the claims from the compact. The language change of the burden of proof by the Attorney General submitted preponderance of the evidence. They would prefer substantial evidence rather than preponderance, as preponderance is not as high a standard. Senator Towe asked about substantive objections to the compact rather than procedural objections. He asked if they are willing to let it stand with that language in the proposal. Mr. Decker stated they would prefer the Chambers' amendment to the Attorney General's. Mr. Kimble stated they had no problem with the whole problem of preliminary versus final decree, although it appears you are eliminating the compact process. He believes either you sign an agreement which is binding upon the parties or you don't. He liked the Chambers' amendment because that creates a prima facie status as to the position of the water users. Mr. Kimble stated one of the problems he has is either you are negotiating or not. Senator Towe asked if he would object to the right to bring any substantive objections. Mr. Kimble stated as a compromise, he thinks Mr. Chambers has a good one.

Senator Mazurek stated there seems to be general agreement on the evidence, general agreement a deadline is not favored, and general agreement progress reports to the judge are appropriate. He stated Mr. Decker and Mr. Kimble have raised the question with respect to the filing requirements for persons who would claim reserved rights. Senator Mazurek asked Mr. Decker if he proposed technical modifications of that or if he objected to including that at all. Mr. Decker stated the thing that is troublesome about that provision is there was a separation between federal reserved waters in use and those not put to use. You cannot lose reserved water rights through non-use, so there should be a route for a holder of a reserved right to file a claim, but you should not have to find law to make that claim or show it is water that is in use or not. He objected to categorizing the reserved water rights into those being used and those not being used. Senator Towe stated if you have a federal claim, they are asking on what basis the federal exemption is requested. Mr. Decker stated if the state is going to recognize the reserved rights doctrine, then that should cover it.

Senator Mazurek stated the existing law is unclear as to what the water court could do with a compact before it. The concern he has heard expressed is if we do not change this somehow, we will have a worse situation than if we make some amendments. Mr. Kimble stated he would agree that this is the best you can do, because you do have a defect.

Senator Towe stated Mr. Whitesell's statement makes it very clear his department's view is that the compact should not be overturned once entered into in its course through the courts. That in effect is some indication or expression that there shouldn't be any allowance of objection. Mr. Whitesell stated he cannot speak to the legal views we have been speaking to. He would have his attorney review it and submit testimony. (The testimony was later received and is attached as Exhibit 8.)

Further consideration of SB 28 and SB 69 was closed.

CONSIDERATION OF HB 13: Representative Roland Kennerly, sponsor of HB 13, stated he carried HB 13 at the request of the Select Committee of Indian Affairs. He testified it is a housekeeping bill cleaning up some language in the state-tribal cooperative agreements law. The main thing of the bill was under the past law, these agreements had to be approved by the Attorney General and the Governor. The Governor's office reviewed the bill and concurred that they felt approval of the Attorney General would be sufficient.

PROPOSERS: Louie Clayborn, Coordinator of Indian Affairs for the State of Montana, presented written testimony in support of the bill (Exhibit 9). Dan Decker, on behalf of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, stated he would generally like to express their support for HB 13.

OPPOSERS: None.

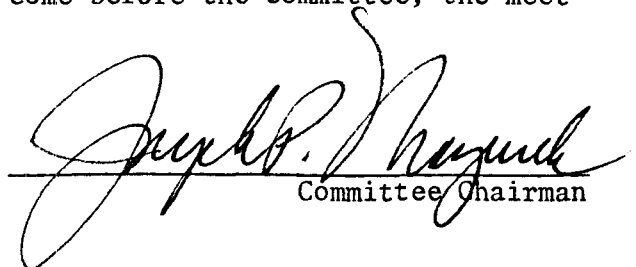
QUESTIONS FROM THE COMMITTEE: None.

CLOSING STATEMENT: None.

Hearing on HB 13 was closed.

ACTION ON HB 13: Senator Towe moved that HB 13 be recommended BE CONCURRED IN. The motion carried unanimously.

There being no further business to come before the committee, the meeting was adjourned at 11:40 a.m.


Committee Chairman

DATE _____

COMMITTEE ON _____

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One	
			Support	Oppose
Jo Brunner	W. I. F. E.	SB 69	X	
Dr Clayton	Indian Affairs	HB 13		
Wmif Becken	Confederated Salish & Kootenai Tribes	HB 12 HB 28	X	
Joe Rosette	Vice Chairman Chippewas Cree Tribe	HB 28	X	
Richard Sany	Council Member Ojibwa - Cree Tribes	HB 28 SB 69	X	
James Musgrave	Fort Belknap Indian Community	SB 28 SB 69		
Wm F. Snel	Ft. Belknap CC	SB 28 SB 69		
John Shontz	Water Marketing Comm.	SB 69	X	
Richard Whitsea	Dept Interior	SB 28 69	X	
DALEB SHIELDS	Ft. PECK TRIBES	SB 28 SB 69	X	
JOE MCKAY	BLACKFEET TRIBES	SB 28 SB 69	X	
PHILIP E. ROY	BLACKFEET TRIBE	SB 28 SB 69	X	
Ken Beartusk	Northern Cheyenne	SB 23 SB 69	X	
Jennie Parker	Northern Cheyenne	SB 28 SB 69	X	
BILL ASHON	APA	SB 69	X	
CALVIN L. WILSON	N. Cheyenne Tribe - Lame Deer MT. 59043	28-69	X	
Marcia Gundle	Reserved Water Right Impact Commission	28-69	X	
Merna Jarnison	Senator's office	28-69	X	
DARYL WRIGHT	Chip/Cree Tribes	28-69	X	

Support, with the
X Chamber
amendment
only

Please send
Senate version
when passed.

AG'S PROPOSED AMENDMENTS TO GREY BILL:

1. Page 5, lines 9 and 10.

Following: "decree"

Strike: remainder of line 9 through "purposes" on line 10

2. Page 6, lines 6 and 7.

Following: "(2)"

Strike: remainder of line 6 through "decree" on line 7

Insert: "The final decree shall set forth the terms of any compact included in the preliminary decree without change unless, as to any matter referred to in subsection (6), the water judge: (a) finds that a proper challenge to such matter was made under 85-2-233; and (b) determines beyond a reasonable doubt that no substantial factual or legal basis exists for the term of the compact to which the challenge is made."

3. Page 6, line 16.

Following: "ANY"

Strike: remainder of line 16 in its entirety

Insert: "person's"

4. Page 6, lines 21 and 22.

Following: "person"

Strike: remainder of line 21 through "TRIBE" on line 22

5. Page 7, line 16.

Following: "PERSON"

Strike: remainder of line 16 in its entirety

6. Page 9, line 5.

Following: "Montana"

Strike: "AND"

Insert: ", "

7. Page 9, line 7.

Following: "authority"

Insert: "the secretary of the interior or his authorized representative, and if required by the terms of the compact, the congress of the United States"

8. Page 9, line 9.

Following: "agency,"

Insert: "and approval by the secretary of the interior or his authorized representative,"

9. Page 9, lines 10 and 11.

Following: "decree"

Strike: remainder of line 10 through "purposes" on line 11

10. Page 9, lines 11 through 13.

Following: "85-2-231"

Strike: remainder of line 11 through "alteration" on line 13

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11. Page 9, line 14.

Following: "legislature"

Strike: "and"

Insert: ", the"

Following: "tribe"

Insert: ", "

Following: "agency"

Insert: "and the secretary of the interior or his authorized representative"

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EXHIBIT NO. A

DATE 021385

BILL NO. SBs 28+69

PROPOSED ATTORNEY GENERAL'S REVISIONS
TO GREY BILL VERSION OF SENATE BILL NO. 28
AND EXPLANATION

Attached are the Attorney General's proposed revisions to the grey bill version of Senate Bill No. 28. There are eight proposed revisions whose locations are noted by corresponding numerical entries in the right margin.

1. Revision No. 1. Revision No. 1 deletes the words "for informational purposes" from the proposed amendment to section 85-2-231(3), MCA. The effect of the Senate Bill No. 28 amendment, if adopted without this office's suggested revision, is to deny affected non-reserved water right users any opportunity to challenge the quantification, use or priority date provisions of a ratified compact which they believe adversely affect them. We have concluded due process requires that such persons be given an opportunity to be heard in connection with any such objection, and the present challenge provisions in section 85-2-233, MCA, afford such opportunity. A failure to allow any opportunity for challenge, moreover, may well undercut the binding nature of the associated final decrees and

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thereby prejudice the entire general adjudicatory process.

2. Revision No. 2. Our second suggested revision involves deletion of the entirety of Senate Bill No. 28's proposed amendment to section 85-2-234(2), MCA. Senate Bill No. 28's proposed amendment to that subsection presently reads: "The terms of the compact negotiated and ratified under 85-2-702 must be included in the final decree." This proposed amendment by Senate Bill No. 28 must be read in connection with the proposed amendment to section 85-2-231(3), MCA, discussed above and makes clear that the Water Court has no authority to modify the terms of a ratified compact.

The purpose of Senate Bill No. 28's proposed amendment to section 85-2-234(2), MCA, is to make binding on the Water Court and all affected non-reserved water right users the terms of a ratified compact. This office agrees that the Water Court's authority to modify ratified compacts should be strictly restricted so as to make the negotiation process itself meaningful. Nonetheless, for those reasons discussed above, we believe due process required notice to affected non-reserved water right users and an opportunity to object. Our suggested revision is intended to address both the concern that ratified compacts be accorded great weight in the final decree process and the need to allow water users the opportunity to raise challenges.

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3. Revisions Nos. 3, 4, and 5. These suggested revisions are technical and involve only the deletion of the words "federal agency or tribe" from the grey bill's proposed section 85-2-234(3) and (4), MCA, and the words "tribe or federal agency" from section 85-2-234(6), MCA. We suggest these changes because the term "person" as presently defined in section 85-2-102(10), MCA, includes tribes and agencies of the United States, and there is consequently no need to mention those entities separately.

4. Revisions Nos. 6 and 7. Our suggested revisions add the words "the secretary of the interior or his authorized representative and, if required by the terms of the compact" to section 85-2-702(2), MCA, of the grey bill and are technical in nature. Because Senate Bill No. 28 proposes to remove congressional approval as a condition to a binding compact, we believe approval by the secretary of the interior is necessary since the United States, as a legal matter, holds the involved water rights in trust for the tribes. We further believe that, under some circumstances, the parties to a compact may want one or more of its provisions to be ratified by congress and have thus added a provision in contemplation of such possibility.

5. Revision No. 8. Our suggested revision deletes the words "for informational purposes" from lines 10 and 11 and the words "and unless renegotiated,

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the terms of the compact must be included in the final decree without alteration" from lines 11 through 13 of the grey bill. The suggested revision also adds the words "and approval by the secretary of the interior or his authorized representative." The reason for the deletion is the due process concern discussed in connection with our suggested revisions to sections 85-2-231(3) and 85-2-234(2), MCA, of Senate Bill No. 28. We propose the additional wording for the same reasons discussed in connection with our suggested revision to section 85-2-702(2), MCA.

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ATTORNEY GENERAL'S
PROPOSED REVISIONS

SENATE BILL NO. 28

INTRODUCED BY

BY REQUEST OF THE SELECT COMMITTEE ON INDIAN AFFAIRS

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR A 2-YEAR
EXTENSION OF THE EXISTENCE OF THE RESERVED WATER RIGHTS
COMPACT COMMISSION; PROVIDING FOR FEDERAL APPROVAL OF A
COMPACT ONLY IF LEGALLY NECESSARY; REQUIRING THAT THE TERMS
OF A COMPACT SET FORTH IN A PRELIMINARY DECREE BE REPRODUCED
UNCHANGED IN THE FINAL DECREE; EXTENDING FROM 60 DAYS TO 6
MONTHS THE TIME PERIOD FOR FILING IN THE WATER COURT CLAIMS
UNRESOLVED BY THE COMPACT COMMISSION; AMENDING SECTIONS
85-2-217, 85-2-224, 85-2-231, 85-2-234, AND 85-2-702, AND
85-2-704, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

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

Section 1. Section 85-2-217, MCA, is amended to read:

"85-2-217. Suspension of adjudication. While
negotiations for the conclusion of a compact under part 7
are being pursued, all proceedings to generally adjudicate
reserved Indian water rights and federal reserved water
rights of those tribes and federal agencies which are
negotiating are suspended. The obligation to file water
rights claims for those reserved rights is also suspended.

This suspension shall be effective until July 1, 1985.

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as long as negotiations are continuing or ratification of a completed compact is being sought. If approval by the state legislature and tribes or federal agencies has not been accomplished by July 1, ~~1985~~ 1987, the suspension shall terminate on that date. Upon termination of the suspension of this part, the tribes and the federal agencies shall be subject to the special filing requirements of 85-2-702(3) and all other requirements of the state water adjudication system provided for in Title 85, chapter 2. Those tribes and federal agencies that choose not to negotiate their reserved water rights shall be subject to the full operation of the state adjudication system and may not benefit from the suspension provisions of this section."

SECTION 2. SECTION 85-2-224, MCA, IS AMENDED TO READ:

"85-2-224. Statement of claim. (1) The statement of claim for each right arising under the laws of the state and for each right reserved under the laws of the United States which has been actually put to use shall include substantially the following:

(a) the name and mailing address of the claimant;

(b) the name of the watercourse or water source from which the right to divert or make use of water is claimed, if available;

(c) the quantities of water and times of use claimed;

(d) the legal description, with reasonable certainty,

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1 of the point or points of diversion and places of use of
2 waters;

3 (e) the purpose of use, including, if for irrigation,
4 the number of acres irrigated;

5 (f) the approximate dates of first putting water to
6 beneficial use for the various amounts and times claimed in
7 subsection (c); and

8 (g) the sworn statement that the claim set forth is
9 true and correct to the best of claimant's knowledge and
10 belief.

11 (2) The Any claimant filing a statement of claim under
12 subsection (1) shall submit maps, plats, aerial photographs,
13 decrees, or pertinent portions thereof, or other evidence in
14 support of his claim. All maps, plats, or aerial
15 photographs should show as nearly as possible to scale the
16 point of diversion, place of use, place of storage, and
17 other pertinent conveyance facilities.

18 (3) Any statement of claim for rights reserved under
19 the laws of the United States which have not yet been put to
20 use shall include substantially the following:

21 (a) the name and mailing address of the claimant;

22 (b) the name of the watercourse or water source from
23 which the right to divert or make use of water is claimed
24 if available;

25 (c) the quantities of water claimed;

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1 (d) the priority date claimed;

2 (e) the laws of the United States on which the claim
3 is based; and

4 (f) the sworn statement that the claim set forth is
5 true and correct to the best of claimant's knowledge and
6 belief."

7 Section 3. Section 85-2-231, MCA, is amended to read:

8 "85-2-231. Preliminary decree. (1) The water judge
9 shall issue a preliminary decree. The preliminary decree
10 shall be based on:

11 (a) the statements of claim before the water judge;

12 (b) the data submitted by the department;

13 (c) the contents of compacts approved by the Montana
14 legislature and the tribe or federal agency or, lacking an
15 approved compact, the filings for federal and Indian
16 reserved rights; and

17 (d) any additional data obtained by the water judge.

18 The preliminary decree shall be issued within 90 days after
19 the close of the special filing period set out in
20 85-2-702(3) or as soon thereafter as is reasonably feasible.
21 This section does not prevent the water judge from issuing
22 an interlocutory decree or other temporary decree if such a
23 decree is necessary for the orderly administration of water
24 rights prior to the issuance of a preliminary decree.

25 (2) A preliminary decree may be issued for any

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1 hydrologically interrelated portion of a water division,
 2 including but not limited to a basin, subbasin, drainage,
 3 subdrainage, stream, or single source of supply of water, at
 4 a time different from the issuance of other preliminary
 5 decrees or portions of the same decree.

6 (3) The preliminary decree shall contain the
 7 information and make the determinations, findings, and
 8 conclusions required for the final decree under 85-2-234.
 9 The water judge shall include in the preliminary decree

10 the contents of a compact negotiated
 11 under the provisions of part 7 that has been approved by the
 12 legislature and the tribe or federal agency whether--or--not
 13 it-has-been-ratified-by-congress.

14 (4) If the water judge is satisfied that the report of
 15 the water master meets the requirements for the preliminary
 16 decree set forth in subsections (1) and (3), and is
 17 satisfied with the conclusions contained in the report, the
 18 water judge shall adopt the report as the preliminary
 19 decree. If the water judge is not so satisfied, he may, at
 20 his option, recommit the report to the master with
 21 instructions, or modify the report and issue the preliminary
 22 decree."

23 Section 4. Section 85-2-234, MCA, is amended to read:

24 "85-2-234. Final decree. (1) The water judge shall, on
 25 the basis of the preliminary decree and on the basis of any

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1 hearing that may have been held, enter a final decree
 2 affirming or modifying the preliminary decree. If no
 3 request for a hearing is filed within the time allowed, the
 4 preliminary decree automatically becomes final, and the
 5 water judge shall enter it as the final decree.

(2) The final decree shall set forth the terms of any compact included in the preliminary decree without change unless, as to any matter referred to in paragraph (6) below, the water judge (1) finds that a proper challenge to such matter was made under 85-2-233 and (2) determines beyond a reasonable doubt that no substantial factual or legal basis exists for the term of the compact to which the challenge is made.

+2+ (3) The final decree shall establish the existing rights and priorities within the water judge's jurisdiction of persons required by 85-2-221 to file a claim for an existing right, and of persons required to file a declaration of existing rights in the Powder River Basin pursuant to an order of the department or a district court issued under sections 8 and 9 of Chapter 452, Laws of 1973,

AND OF ANY PERSON.

POSSESSING WATER

RIGHTS ARISING UNDER FEDERAL LAW, REQUIRED BY 85-2-702 TO FILE CLAIMS.

+3+ (4) The final decree shall state the findings of fact, along with any conclusions of law, upon which the existing rights and priorities of each person

named in the decree are based.

+4+ (5) For each person who is found to have an existing right ARISING UNDER THE LAWS OF THE STATE OF MONTANA, the final decree shall state:

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1 (a) the name and post-office address of the owner of
2 the right;

3 (b) the amount of water, rate, and volume, included in
4 the right;

5 (c) the date of priority of the right;

6 (d) the purpose for which the water included in the
7 right is used;

8 (e) the place of use and a description of the land, if
9 any, to which the right is appurtenant;

10 (f) the source of the water included in the right;

11 (g) the place and means of diversion;

12 (h) the inclusive dates during which the water is used
13 each year;

14 (i) any other information necessary to fully define
15 the nature and extent of the right.

16 (6) FOR EACH PERSON

17 POSSESSING WATER RIGHTS ARISING UNDER THE LAWS OF THE UNITED
18 STATES, THE FINAL DECREE SHALL STATE:

19 (A) THE NAME AND MAILING ADDRESS OF THE HOLDER OF THE
20 RIGHT;

21 (B) THE SOURCE OR SOURCES OF WATER INCLUDED IN THE
22 RIGHT;

23 (C) THE QUANTITY OF WATER INCLUDED IN THE RIGHT;

24 (D) THE DATE OF PRIORITY OF THE RIGHT;

25 (E) THE PURPOSE FOR WHICH THE WATER INCLUDED IN THE

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1 RIGHT IS CURRENTLY USED, IF AT ALL;

2 (F) THE PLACE OF USE AND A DESCRIPTION OF THE LAND, IF
3 ANY, TO WHICH THE RIGHT IS APPURTENANT;

4 (G) THE PLACE AND MEANS OF DIVERSION, IF ANY;

5 (H) ANY OTHER INFORMATION NECESSARY TO FULLY DEFINE
6 THE NATURE AND EXTENT OF THE RIGHT, INCLUDING THE TERMS OF
7 ANY COMPACTS NEGOTIATED AND RATIFIED UNDER 85-2-702."

8 Section 5. Section 85-2-702, MCA, is amended to read:

9 "85-2-702. Negotiation with Indian tribes. (1) The
10 reserved water rights compact commission, created by
11 2-15-212, may negotiate with the Indian tribes or their
12 authorized representatives jointly or severally to conclude
13 compacts authorized under 85-2-701. Compact proceedings
14 shall be commenced by the commission. The commission shall
15 serve by certified mail directed to the governing body of
16 each tribe a written request for the initiation of
17 negotiations under this part and a request for the
18 designation of an authorized representative of the tribe to
19 conduct compact negotiations. Upon receipt of such written
20 designation from the governing body of a tribe, compact
21 negotiations shall be considered to have commenced, EXCEPT
22 THAT NO COMPACT PROCEEDINGS MAY COMMENCE AFTER JULY 1, 1985.

23 (2) When the compact commission and the Indian tribes
24 or their authorized representatives have agreed to a
25 compact, they shall sign a copy and file a copy

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1 with the department of state of the United States of America
 2 and copies with the secretary of state of Montana and with
 3 the governing body for the tribe involved. The compact is
 4 effective and binding upon all parties upon ratification by
 5 the legislature of Montana, any affected tribal
 6 governing body, ~~and~~ the Secretary of the Interior or his
 7 authorized representative and, if required by the terms of
the compact, the congress of the United States.

8 (3) Upon its ~~approval~~ RATIFICATION by the Montana
 9 legislature and the tribe ~~or-federal-agency~~, and approval by
 10 the Secretary of the Interior or his authorized
 11 representative, the terms of a compact must be included in
 12 the preliminary decree as provided by 85-2-231. However, if
 13 approval of the state legislature, and the tribe or-federal
 14 agency and the Secretary of the Interior or his authorized
 15 representative has not been accomplished by July 1, ~~1985~~
 16 ~~1987~~, all ~~federal-and~~ Indian claims for reserved water rights
 17 that have not been resolved by a compact must be filed with
 18 the department within ~~60-days~~ 6 months. These new filings
 19 shall be used in the formulation of the preliminary decree
 20 and shall be given treatment similar to that given to all
 21 other filings."

22 SECTION 6. SECTION 85-2-704, MCA, IS AMENDED TO READ:

23 "85-2-704. Termination of negotiations. (1) The
 24 commission or any other---party---to---the---negotiations
 25 negotiating tribe or federal agency may terminate
 negotiations by providing notice to all parties 30 days in

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1 advance of the termination date. On the termination date,
 2 the suspension of the application of part 2 provided for in
 3 85-2-217 shall also terminate. The tribe or federal agency
 4 shall file all of its claims for reserved rights within 60
 5 days of the termination of negotiations.

6 (2) (a) However, if a notice of termination is
 7 submitted by either party and the submitting party elects to
 8 retract the notice before the termination date, the notice
 9 of termination must be disregarded and negotiations are not
 10 terminated. The retraction of a notice of termination must
 11 be made by certified mail addressed to:

12 (i) the chairman of the governing body of the affected
 13 tribe;

14 (ii) the officially designated representative of the
 15 affected federal agency; or

16 (iii) the chairman of the reserved water rights compact
 17 commission.

18 (b) The retraction of a notice of termination must be
 19 received before the termination date."

20 THERE IS A NEW MCA SECTION THAT READS:

21 NEW SECTION. Section 7. Status reports to chief water
 22 judge. (1) The Montana reserved water rights compact
 23 commission must submit to the chief water judge, appointed
 24 pursuant to 3-7-221, a report on the status of its
 25 negotiations on July 1, 1985, and every 6 months thereafter.

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1 (2) Each report must state which Indian tribes and
2 federal agencies are engaged in negotiations, whether any
3 negotiations with Indian tribes or federal agencies have
4 been terminated, and the progress of negotiations on a
5 tribe-by-tribe and agency-by-agency basis. The report must
6 be made available to the public.

7 NEW SECTION. Section 8. Effective date. This act is
8 effective on-passage-and-approval JULY 1, 1985.

-End-

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REID CHAMBERS' PROPOSED AMENDMENT TO GREY BILL:

Page 6, lines 6 through 8.

Strike: lines 6 through 8 in their entirety

Insert: "(2) The terms of a compact negotiated and ratified under 85-2-702 must be included in the final decree. Provided that the water judge may, after the hearing required to be held by 85-2-233, relieve any person objecting to the compact from all its provisions. A person so relieved shall remain free to litigate all issues in the pending case without, however, receiving any assistance from any person who did not file a timely objection to the compact. Provided, further, that where a person is relieved from the provisions of a compact pursuant to this section, the compact provisions shall nonetheless be considered prima facie valid in all subsequent litigation before the water judge and any person relieved from those provisions shall carry the burden of proof on all contested issues of fact and law."

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STATE
OF
MONTANA
**ATTORNEY GENERAL
MIKE GREELY**

JUSTICE BUILDING, 215 N. SANDERS, HELENA, MONTANA 59620
TELEPHONE (406) 444-2026

11 February 1985

Greg Petesch
Legislative Council Office
Capitol Building
Helena MT 59620

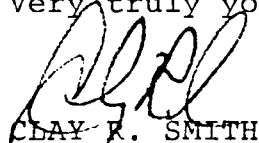
Re: Reid Chambers' proposed amendment to the grey bill
version of Senate Bill No. 28

Dear Greg:

Enclosed please find a redrafted version of Reid Chambers' proposed amendments to section 85-2-234(2) of the grey bill version of Senate Bill 28. As I indicated during our telephone conversation yesterday, I believe the enclosed retains the substance of Mr. Chambers' proposed amendment and otherwise clarifies certain of its syntax.

Should you have any questions, please do not hesitate to contact me.

Very truly yours,



CLAY R. SMITH
Assistant Attorney General

Enclosure

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(2) The terms of a compact ratified under 85-2-702 shall be included without alteration in the final decree; provided, however, that an objection may be filed under 85-2-233 and the Court may, after hearing, relieve the objector of any provision of the compact so challenged if the objection is established by a preponderance of the evidence; provided, moreover, that a person not filing an objection under 85-2-233 to a ratified compact's provisions shall not be permitted to participate in a hearing on a properly filed objection and shall be bound by the provisions of the ratified compact.

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BILL NO. SBs 28469

Testimony of
CALEB SHIELDS

on behalf of

The Assiniboine & Sioux Tribes
of the Fort Peck Reservation

Regarding

Senate Bill Nos. 28 and 69

My name is Caleb Shields, and I am a member of the Tribal Executive Board of the Assiniboine and Sioux Tribes of the Fort Peck Reservation. I appear here on behalf of the Tribes to support Senate Bill No. 28 and Senate Bill No. 69, as amended. These bills would extend the life of the Reserved Water Rights Compact Commission for two additional years, and would make other desirable changes in state law regarding water adjudications.

First, the Fort Peck Tribes support extending the life of the Commission. The Tribes have been engaged in negotiations with the Reserved Water Rights Compact Commission for over four years. We were deeply concerned in 1983 when we felt that the Commission reneged on its agreement with us to submit a draft compact we had agreed upon to the legislature. Negotiations became inactive for a year and a half after that. The Tribes made it clear that we would not reconsider any of the essential advantages contained in the 1983 agreement. Finally, in November of last year, the Commission returned to the bargaining table. Since then, we have had three productive working sessions and are now even hopeful that a final compact may be agreed upon and

submitted to the present legislature. If it is not, we hope that an agreement could be worked out if the life of the Commission is extended for two additional years. We therefore support that extension as contained in amended Senate Bill No. 28.

The marked-up bill also contains other changes which the Fort Peck Tribes support. Section 2 revises existing law concerning the statement of claim to take account of particular aspects of reserved water rights. These changes were proposed by the Fort Peck Tribes to the Compact Commission.

The Tribes also strongly support section 4 of the amended bill, which provides that the terms of any negotiated and ratified compact must be included in the final decree. Present law, Section 85-2-234(2) Montana Code Annotated, is somewhat unclear on this point. While we believe that present law does not permit the State Water Court to modify a ratified compact, we think any ambiguities should be removed from the law.

Once the State ratifies a compact, we believe it binds all water users claiming under State law. However, we understand that some concern has been expressed that this is somehow unfair to a water user who objects in court to a compact. We are agreeable to language which would allow the water judge, after a hearing, to relieve any person objecting to a compact from all its

provisions and leave that person free to litigate all issues in the pending case. However, the law should provide that the State, United States, and the Tribe would litigate against any objecting person. We are submitting language to this effect to the Committee.

The Fort Peck Tribes also strongly support that portion of section 5 of the amended bill which deletes the requirement that the Congress of the United States approve any compact agreed to between the State and an Indian Tribe. The State and a tribe may wish a particular compact to be approved by Congress--for example, a compact where federal appropriations are sought for a water project. But there is no legal reason why the Congress should be required to ratify all water compacts between the State and a tribe. Where that is not necessary, the State and the Tribe, as governmental authorities, should be able to enter into compacts which, if approved by the United States Department of Justice, can be the basis for a final decree in the pending litigation.

I am attaching to my testimony possible language to make sure that the Water Court cannot modify a compact and to allow objectors to opt out of a compact and continue to have their day in court.

This concludes my testimony. I appreciate the opportunity to appear before the Committee and would be pleased to answer any questions you may have. Thank you.

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85-2-234(2) M.C.A.

The terms of a compact negotiated and ratified under 85-2-702 must be included in the final decree. Provided that the water judge may, after the hearing required to be held by Section 85-2-233, relieve any person objecting to the compact from all its provisions. A person so relieved shall remain free to litigate all issues in the pending case without, however, receiving any assistance from any person who did not file a timely objection to the compact. Provided, further, that where a person is relieved from the provisions of a compact pursuant to this section, the compact provisions shall nonetheless be considered prima facie valid in all subsequent litigation before the water judge and any person relieved from those provisions shall carry the burden of proof on all contested issues of fact and law.

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EXHIBIT NO. 1DATE 02/3/85BILL NO. SBs 28 & 69

NAME: Richard Whitesell DATE: 2-13-85

PHONE: 406-657-6315

APPEARING ON WHICH PROPOSAL: SR 28 - 69

DO YOU: SUPPORT? ✓ AMEND? OPPOSE?

COMMENTS: _____

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TESTIMONY OF RICHARD WHITESELL,
AREA DIRECTOR, BILLINGS AREA
BUREAU OF INDIAN AFFAIRS
CONCERNING SENATE BILL 28

Mr. Chairman; Thank you for the opportunity to express the views of the Department of the Interior and to represent Secretary Hodel in these proceedings. The Department of the Interior strongly supports negotiated settlements of Indian and other reserved water rights claims. The advantages of negotiation over litigation are many and obvious. Several Montana Tribes are actively involved in good faith negotiations with the Montana Reserved Water Rights Compact Commission, but with the exception of the Fort Peck negotiations, it will be impossible to conclude compacts by July 1, 1985. On June 4, 1984, Secretary of the Interior Clark wrote to Governor Schwinden emphasizing the desire of the Department to negotiate Federal reserved water rights with the State of Montana. In a November 29, 1984, speech, Department of the Interior Solicitor, Frank Richardson, again stated the Department's policy to negotiate water rights cases rather than litigate.

In his speech, Judge Richardson refers to the long expensive process of litigation that often produces results unfavorable to both sides. A negotiated settlement, on the other hand, is usually beneficial to all concerned parties. Judge Richardson's speech expresses the policy of the Administration and emphasizes our desire to negotiate with the State of Montana. I believe the Solicitor's speech would be useful to the record of these proceedings and I have appended a copy to this testimony with the request that the speech become part of the record.

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The National Park Service and the Compact Commission are also close to an agreement, but there is no guarantee that a compact can be completed during this session of the legislature. At this time we are reviewing issues regarding water use and management in the Department's program for the Bureau of Land Management and the U.S. Fish and Wildlife Service that may be appropriate for negotiation with the Compact Commission.

We support an extension of the negotiation deadline. We further recommend that the Judiciary Committee consider whether it would be mutually beneficial to the State of Montana and the United States for the legislature to decide not to include an arbitrary deadline for the commencement or completion of compact negotiations. By eliminating such deadlines in the proposed amendment, all parties, including the State, would be assured of the opportunity to begin or continue negotiations at any stage of the adjudication process.

The Department of the Interior is persuaded that Congressional ratification is not required for all elements of a compact. However, approval by some Federal authority will be required. Accordingly, we suggest an expression reflecting this view be incorporated in the amendment.

The Department is also of the view that a compact that is confirmed by the legislature cannot be altered or amended by the courts in the course of the adjudication process. Of course, judicial review of the compact would be available to any party.

Again, we strongly support an extension. Thank you for the opportunity to testify in this important matter.

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A VIEW OF INDIAN WATER LAW

Remarks Prepared for Delivery by
Interior Solicitor Frank K. Richardson

American Indian Lawyer Training Program Conference

Scottsdale, Arizona
November 29, 1984

Good morning. I want to thank Mr. Trudell and the other organizers of the conference for permitting me to address you today. As chief legal officer of the Department of the Interior, I welcome this opportunity to discuss Indian water issues and to listen to the varied view points of the other speakers and participants.

The Department is actively involved in numerous dispute resolutions concerning Indian water rights. The United States holds in trust reserved water rights in more than fifty Indian reservations in seventeen western states. At the present time, the federal government is a party to almost sixty general stream adjudications involving Indian water rights. We are involved either in our capacity as trustee for Indian reserved water rights, or as proprietor of water rights established by the reserved rights doctrine or acquired pursuant to state law for various federal functions such as parks, forests, wildlife refuges, military bases, and land management programs.

In some instances, the federal government has either initiated or been named as a defendant in federal court proceedings. In most of these cases, the federal government has been named as a defendant in state court actions pursuant to the McCarren Amendment. In either forum, I can assure you that we are asserting the Indian water claims as vigorously as possible.

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In policy and in practice, this Administration takes very seriously its trust responsibilities towards Indians. In the specific area of water rights, as in all Indian affairs, both President Reagan and Secretary Clark are firmly committed to the promotion of Indian tribal economic self-sufficiency, political self-determination with interaction on a government-to-government basis, and careful natural resource development.

At the Department of the Interior, we recognize that, as in so many other contexts, water is fundamental to the tribal achievement of economic independence and self-sufficiency. We have consistently pursued discussions, negotiations, and litigation with a government-to-government framework, believing, as President Reagan has said, that "tribal governments, like state and local governments, are more aware of the needs and desires of their citizens than is the federal government. . . ." Furthermore, we understand that water has a vital role in reservation economic enterprises such as mineral development, farming, and fishing.

As this Administration approaches the beginning of its second term, the Department is evaluating various methods for resolving Indian water disputes. The President's commitment and good faith are resolute. The Winters doctrine of Indian reserved water rights is clear and compelling. However, what has been lacking, until very recently, was a method, a technique for resolving Indian water problems with ultimate solutions which are both practical and equitable. As in so many other aspects of the Department's responsibilities, the increasingly apparent expense, delay, uncertainty, and inadequacy of litigation have frustrated too many Indian water claimants.

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In an article on this subject, Newsweek described such litigation as "courthouse water torture" aptly noting that "most of the water fights wind up in courts, where they linger but seldom die."

A very unfortunate example of this is the litigation involving the Nevada Truckee and Carson River Basins--the Pyramid Lake actions. In 1913, the first law suit was filed involving the Newlands Project, which diverts water from the Truckee River into the Carson River Basin. Litigation concerning water rights in this area has persisted relentlessly. Complaints upon complaints have been filed. Motion after motion has been argued. Interrogatories for discovery have been filed. Generations of lawyers and judges have wrestled with the legal niceties involved. Literally millions of dollars in legal fees have been incurred. The principal contenders for the use of water on the river system are the Pyramid Lake Paiute Tribe of Indians and the Truckee-Carson Irrigation District. In the 71 years since litigation was first initiated in this region, twenty major Pyramid Lake cases have emerged; only ten of which have been finally adjudicated. There has to be a better way.

Indian water rights issues are particularly ill-suited for litigation. Even a final order may not resolve the dispute. All too often, true enjoyment of the rights won in court is deferred until further issues are adjudicated or until water delivery and application systems can be constructed. The only truly effective dispute mechanism is one that is flexible, yields practical solutions, is relatively inexpensive, and is fair.

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The concept of negotiated settlements is certainly not new to the legal system, but it is new to Indian water rights. In his Senate confirmation hearings, Secretary Clark expressed his hope that the Department of the Interior could utilize this process. When I first came to Washington to assume responsibility as Solicitor, Secretary Clark personally urged me to explore the many possibilities available in settling Indian water rights through negotiations. I am firmly convinced of the wisdom of this approach in large part because of more than 42 years of exposure to the litigation and adjudication of cases in a courtroom.

Litigation should be the absolute last resort in Indian water right disputes, not only because of long delay, heavy expense, and substantial uncertainty, but also because of the "wooden" nature of the process. The precise issues are framed by the litigants. The specific parties are fixed by the litigants. The method of presenting evidence is fixed by long-established evidentiary rules which do not necessarily lend themselves to the ascertainment of either the truth or the controlling issues of policy or fairness.

On the other hand, a negotiated settlement is normally beneficial to all the parties concerned. Participants in negotiated settlements can take into consideration the wide range of affected interests and can accommodate them fairly. They can and should consider among other factors:

-- the unique characteristics of each reservation,

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- the differences in the nature and extent of the water supply available to the parties,
- the climate,
- the terrain,
- the access to markets,
- the scarcity and abundance of reservation natural resources requiring water for development,
- the variety of Indian claims,
- the variety of non-Indian claims, and
- the interests of federal, state, and local governments.

Through the process of negotiated settlements, claimants can acknowledge the scarcity of water and pursue creative and innovative schemes aimed at maximizing benefits from our water sources. Agreements may be made for improving water delivery and management systems. Programs such as these cannot be conveniently or legally required in the context of an adjudication.

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Negotiated settlements avoid the uncertainty and loss of control often associated with litigation. Parties to a negotiation determine the course and outcome of their negotiations.

Finally, parties often find that significant, intangible benefits accrue through this process. Negotiations afford an opportunity for the parties to develop mutual respect for one another from a clearer understanding of each other's interests, goals, and fears. Moreover, settlement agreements which require congressional approval encourage a partnership rather than an adversarial approach, as together the parties work towards a common goal.

Secretary Clark and the Solicitor's Office have received a very favorable response to this problem-solving approach. For example, in a meeting with the Ad Hoc Working Group on Indian Reserved Water Rights representing the Western Governor's Association, Western Regional Council, National Congress of American Indians, Council on Energy Resource Tribes and Native American Rights Fund, the members of the working Group pledged their cooperation and assistance in our joint efforts to pursue negotiated water settlements.

At the present, the Department is actively engaged in negotiations with several Indian and non-Indian water claimants. I earnestly believe that we can arrive at solutions which satisfactorily benefit each of these parties.

An example of the Reagan Administration's commitment in this area is the Legislation Concerning the Ak-Chin Community Water Settlement signed into law by

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the President on October 19, 1984. This bill is the consummate work product of a negotiated water settlement. It "reconfirms," as the President said in his signing remarks, "our commitment to the policy of Indian tribal self-determination and does so in a fiscally responsible manner."

In 1978, Congress enacted legislation providing for the settlement of the Ak-Chin Indian Community's claims to water for its reservation in central Arizona. Leaders of the Ak-Chin Indian Community, Arizona officials, non-Indian water users in central Arizona, the committees in the Congress, and representatives of this Department worked to enact the Ak-Chin settlement.

As we proceeded to implement the settlement, it became apparent that many of the assumptions that Congress made in enacting the settlement had not been borne out by later events. The cost of providing an interim supply of water in 1984-2002 period was more than twice the amount which Congress had authorized. Yet, even this increased expenditure would not secure the permanent water supply agreed to be provided as soon as possible, but no later than 2003.

These conclusions led us to begin discussions with Ak-Chin regarding ways to amend the 1978 Act and economically to satisfy their congressionally granted water entitlement.

The Ak-Chin bill ratifies a series of agreements negotiated by officials of the Department of the Interior, with the affected parties, over the past two years. It succeeds in fulfilling the intent of the earlier Act by providing a

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usable, permanent water supply beginning in 1988 at less than half the cost of the previous, temporary plan.

The ratified agreement settles the outstanding water claims of the Ak-Chin Indian community, provides a permanent water supply to be delivered through the Central Arizona Project facilities, provides funds for water conservation, and ensures that water not needed to satisfy the Ak-Chin entitlement will be available for allocation to other water users in central Arizona. Finally, the agreement provides an enforcement remedy of penalties should the Secretary be unable to deliver the water amounts allocated to the Ak-Chin community. Ak-Chin is a living testament to the benefits which will flow from careful planning, patience, hard work, innovation, and above all, a spirit and willingness to compromise--to give and take.

As we look to the future in our negotiation efforts, we will be guided by three principles which seem to me essential in fulfilling our commitments and fiduciary duties in a fiscally responsible manner:

1. The negotiations should be initiated by representatives of Indian tribal governments and by the local water users. Parties must approach negotiations in a spirit of cooperation and with an eye towards creating an integrative rather than zero-sum solution.
2. The federal government must be a party to the negotiations.

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3. The federal government cannot provide unlimited funding in water rights settlements. Uncle Sam does not have a deep pocket. The federal, state, and local governments, as well as Indian and non-Indian water users, must explore and implement various schemes for cost-sharing and in-kind exchanges.

The favorable experience of Ak-Chin strengthens our resolve to pursue non-litigious methods of settling Indian water claims. In the case of Ak-Chin, negotiations were initiated before the courtroom battle began. Perceiving that an impending adjudication could result in serious disruption in existing patterns of water use, the parties resorted to more effective, direct negotiations.

However, the negotiated settlements of Indian water claims can be initiated at any stage of the adjudication process. As with other types of interests, Indian water claims can be successfully negotiated while adjudication is pending. For example, the Papago settlement, again in Arizona, was not enacted until seven years after litigation commenced.

Even when an adjudication has been completed, the parties may find negotiation to be beneficial. For, in many instances, the near certainty of appeal and the reluctance of courts to dispose of all the water issues increases the attractiveness of negotiating.

In many instances, efforts to achieve a negotiated settlement which are unsuccessful at one stage of the adjudication process may prove highly effective

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at a later date. The advantages of settlements change from time to time and reflect modifications in conditions such as new judicial orders, impending legislation, annual rainfall, financial pressures, changes in key personalities, and technical developments in the water industry.

The complexity of the Indian water rights issues cannot be underestimated. Finding fair and practical solutions to the problems requires considerable expertise, creativity, and good faith. This Administration accepts the challenge. We will meet it with careful consideration of our trust responsibilities and with due regard for the country's national fiscal concerns.

Having participated in well over 100 civil jury trials in my 30 years as a lawyer, and having reviewed the records in many others in my 12 years as a judge, I say with all of the force at my command that the courtroom is not the first place to go for equitable and practical solutions to Indian water rights problems. It is the last place to go. The so-called "courthouse water torture" leaves few unscathed.

Nonetheless, I can assure you in all earnestness, that, when negotiations prove unfruitful and when the federal government is joined as a party in Indian water rights lawsuits, we will engage in vigorous representation as trustee on behalf of Indian tribes wherever and whenever those claims arise.

As Solicitor of the Department of the Interior, I want to emphasize my open-door policy. I am always happy to converse directly or by telephone with

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Indian tribal leaders. I have come across the continent to tell you this face to face. It seems to me that this access enables us all to become better informed of the varied interests, issues, and problems. So much depends upon the climate and the atmosphere of our discussions and negotiations. There has to be willingness to listen, to consider, to be willing to give and take, to compromise where the end result is fair and just, to accommodate, to share, and to cooperate.

It is with an attitude of openness and optimism that Tim Vollmann, Associate Solicitor for Indian Affairs, and I have joined you at this conference. I have enjoyed the opportunity to meet with many of you and to visit with you today. Unfortunately, I am unable to remain until the final conclusion of the conference. Tim Vollmann will remain, however, and will continue to meet and exchange ideas with many of you. I hope to have full reports of your deliberations and conclusions.

The challenges facing each of us involved in Indian water rights are complex and sometimes quite difficult. Wherever possible, let us diligently pursue the broad avenues of negotiated settlements seeking solutions as partners in a cooperative manner, where possible, and so that our common, vital, national treasure--water--can be put to its fullest possible use.

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The Chippewa Cree Tribe of the Rocky Boy's Reservation

R E S O L U T I O N

NO: 120-84

TO SUPPORT A TWO YEAR EXTENSION FOR THE MONTANA STATE COMPACT COMMISSION
ON RESERVED WATER RIGHTS

WHEREAS, the Chippewa-Cree Tribal Business Committee is the governing body of the Chippewa-Cree Tribe of the Rocky Boy's Indian Reservation, Montana, by the authority of the Constitution and By-Laws of the Chippewa-Cree Tribe, approved on the 23rd. day of November, 1935, and,

WHEREAS, pursuant to the Constitution and By-Laws of the Chippewa-Cree Tribe, the Chippewa-Cree Tribal Business Committee is charged with the duty of protecting the health, security and general welfare of the Chippewa-Cree Tribe, and,

WHEREAS, the Business Committee hereby supports development of the political economic, and social well-being of the Tribe, and,

WHEREAS, the Chippewa-Cree Tribe is presently negotiating Water Rights with the State Compact Commission on Reserved Water Rights, and,

WHEREAS, the Chippewa-Cree Tribe has entered negotiations in good faith, and,

WHEREAS, the Chippewa-Cree Tribe has not concluded a negotiated compact with the State of Montana within the time frame identified in SB 76.

THEREFORE BE IT RESOLVED, that the Chippewa-Cree Tribe hereby requests that the Montana State Legislature grant a two (2) year extension to the Montana State Compact Commission on Reserved Water Rights.

C E R T I F I C A T I O N

I, THE UNDERSIGNED, AS SECRETARY/TREASURER OF THE CHIPPEWA CREE TRIBE HEREBY CERTIFY THAT THE BUSINESS COMMITTEE IS COMPOSED OF NINE MEMBERS OF WHOM eight (8) MEMBERS CONSTITUTING A QUORUM WERE PRESENT AT A MEETING DULY AND REGULARLY CALLED, NOTICED, CONVENED, AND HELD THIS 20th DAY OF December, 19 84, AND THAT FOREGOING RESOLUTION WAS DULY ADOPTED, AT SUCH MEETING, BY THE AFFIRMATIVE VOTE OF seven (7) MEMBERS FOR AND zero (0) MEMBERS AGAINST AND THAT THIS RESOLUTION HAS NOT BEEN RESCINDED OR AMENDED IN ANY WAY.



CHAIRMAN, BUSINESS COMMITTEE



SECRETARY/TREASURER

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 3

DATE 02/3/85

BILL NO. SBs 28 & 69

(This sheet to be used by those testifying on a bill.)

NAME: Daniel Decker DATE: Feb. 13, 1985
Confederated Salish and Kootenai Tribes
Tribal Complex

ADDRESS: Box 275
Pablo, Mont. 59821

PHONE: (406) 675-4600 ext. 534

REPRESENTING WHOM? Confederated Salish and Kootenai Tribes

APPEARING ON WHICH PROPOSAL: SB 28

DO YOU: SUPPORT? X AMEND? _____ OPPOSE? _____

COMMENTS: _____

See submitted comment.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 4

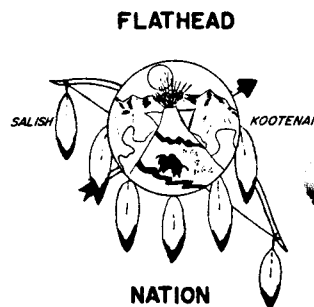
DATE 021385

BILL NO. SB 28



THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION

Box 278
Pablo, Montana 59855
(406)675-4600



TRIBAL COUNCIL MEMBERS:
Joseph "Joe Dog" Felsman - Chairman
James H. Steele - Vice-Chairman
Al Hewankorn
Kevin S. Howlett
Robert L. McCrea
Sonny Morigeau
Michael Pablo
Victor L. Stinger
Ron Theriault
Teresa M. Wall

SENATE JUDICIARY COMMITTEE

The Confederated Salish and Kootenai Tribes would like to present this statement to the Senate Judiciary Committee on the "grey" copy of Senate Bill No. 28.

The Confederated Salish and Kootenai Tribes support the extension of the negotiating deadline date for the Reserved Water Rights Compact Commission. The two year extension is needed so that negotiations between the State and Indian Tribes will be a viable alternative to litigation. One needs only to look to our neighbor, Wyoming, to see the expense to tribes and the states if litigation is the route chosen to determine our water rights. The amendment proposed in Section 1 of the bill extending the negotiation deadline date to July 1, 1987 is supported by the Tribes.

The amendments proposed in Section 2 of the bill seem to be an effort to prioritize types of use of reserved water rights held by Tribes. The changes are confusing when applied to the existing federal law governing Indian reserved water rights. It is established federal law that reserved waters are not lost through

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non-use, therefore, actual use of the water is not necessary in order for tribes to possess a reserved water right. Applying diversion standards to reserved water rights is inappropriate and inconsistent with well established federal law. Further putting an obligation upon Indian tribes to find supportive federal case law on which to support their claim is a burden not placed upon any other water user in the Montana Water Use Act. To do so would create a legal briefing for Indian Tribes prior to any administrative action or hearing process.

The amendment in Section 3 of the bill is acceptable to the Tribes.

The amendment proposed in subsection (2) of Section 4 of the bill, on page 6, is supported by the Confederated Tribes. It is the Tribes position that a compact negotiated with Montana should be binding upon the parties and entered unchanged into the final decree.

The remainder of the amendments in Section 4 of the bill are seen as unnecessary, since, the terms of a negotiated compact would likely include all of this information.

The proposed language on line 22 of page 8, suggesting that no negotiations may be commenced after July 1, 1985, is viewed as contradictory to policy of negotiation. The original provisions of the Water Use Act contained no such provision and six of seven Indian reservations in Montana are now negotiating with Montana. This language seemingly serves no purpose other than to threaten one Tribe in Montana and therefore is contradictory to the stated policy preference for negotiations.

Lines 11 and 12 on page 9 contain the phrase "and unless renegotiated" seems to add extra verbage that unnecessarily creates ambiguity and vagueness that is not needed; it is recommended that the phrase "and unless renegotiated" be eliminated. Again, the Tribes are supportive of language requiring that concluded compacts be entered unchanged into final water decrees.

If the deadline for beginning negotiations is eliminated than the changes for terminating negotiations on pages 9 and 10 are unneeded.

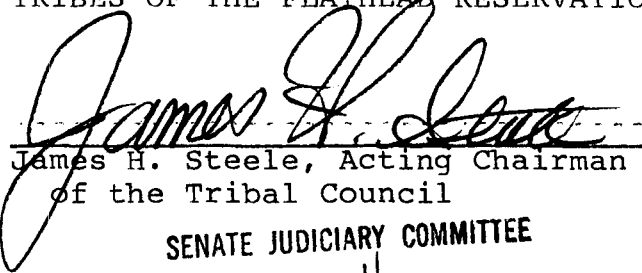
Finally, The Confederated Tribes have no objections to reports being made to the Montana Water Court.

The Tribes were most supportive of the Legislative Council bill sponsored by Senator Eck, S.B. 28, over S.B. 69. The Tribes for obvious policy considerations favor an extension of the negotiation deadline and see that is the most important consideration to be given the proposed legislation.

The Confederated Salish and Kootenai Tribes thank you for any consideration given these comments, and recommend passage of an extension for negotiations with a provision that concluded compacts be entered into final decrees affecting tribal lands.

Sincerely,

CONFEDERATED SALISH AND KOOTENAI
TRIBES OF THE FLATHEAD RESERVATION


James H. Steele, Acting Chairman
of the Tribal Council

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 4

DATE 02/385

BILL NO. SB 28

STATE
OF
MONTANA

FEB 08

ATTORNEY GENERAL
MIKE GREELY

JUSTICE BUILDING, 215 N. SANDERS, HELENA, MONTANA 59620
TELEPHONE (406) 444-2026

7 February 1985

Senator Joseph P. Mazurek
Chairman, Senate Judiciary Committee
Box 84, Capitol Station
Helena MT 59620

Re: Attorney General's Suggested Revisions to Grey Bill
Version of Senate Bill No. 28

Dear Chairman Mazurek:

Enclosed please find 10 copies of the Attorney General's suggested revisions to the grey bill version of Senate Bill No. 28. We ask that the enclosed be distributed to the members of the Senate Judiciary Committee prior to the hearing scheduled for February 13, 1985. We have forwarded a copy of the enclosed to Senator Eck and to Greg Petesch. The suggested revisions are identical to those previously submitted to you except for the addition of the words "possessing water" to line 16 of section 85-2-234(3), MCA; those words were inadvertently deleted in our suggested revisions and appear in the grey bill as presently constituted.

Thank you for your courtesy and cooperation in this matter. Should you have any questions, please contact me.

Very truly yours,



CLAY R. SMITH
Assistant Attorney General

Enclosures

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 5

DATE 021385

BILL NO. SB 28

PROPOSED ATTORNEY GENERAL'S REVISIONS
TO GREY BILL VERSION OF SENATE BILL NO. 28
AND EXPLANATION

Attached are the Attorney General's proposed revisions to the grey bill version of Senate Bill No. 28. There are eight proposed revisions whose locations are noted by corresponding numerical entries in the right margin.

1. Revision No. 1. Revision No. 1 deletes the words "for informational purposes" from the proposed amendment to section 85-2-231(3), MCA. The effect of the Senate Bill No. 28 amendment, if adopted without this office's suggested revision, is to deny affected non-reserved water right users any opportunity to challenge the quantification, use or priority date provisions of a ratified compact which they believe adversely affect them. We have concluded due process requires that such persons be given an opportunity to be heard in connection with any such objection, and the present challenge provisions in section 85-2-233, MCA, afford such opportunity. A failure to allow any opportunity for challenge, moreover, may well undercut the binding nature of the associated final decrees and

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thereby prejudice the entire general adjudicatory process.

2. Revision No. 2. Our second suggested revision involves deletion of the entirety of Senate Bill No. 28's proposed amendment to section 85-2-234(2), MCA. Senate Bill No. 28's proposed amendment to that subsection presently reads: "The terms of the compact negotiated and ratified under 85-2-702 must be included in the final decree." This proposed amendment by Senate Bill No. 28 must be read in connection with the proposed amendment to section 85-2-231(3), MCA, discussed above and makes clear that the Water Court has no authority to modify the terms of a ratified compact.

The purpose of Senate Bill No. 28's proposed amendment to section 85-2-234(2), MCA, is to make binding on the Water Court and all affected non-reserved water right users the terms of a ratified compact. This office agrees that the Water Court's authority to modify ratified compacts should be strictly restricted so as to make the negotiation process itself meaningful. Nonetheless, for those reasons discussed above, we believe due process required notice to affected non-reserved water right users and an opportunity to object. Our suggested revision is intended to address both the concern that ratified compacts be accorded great weight in the final decree process and the need to allow water users the opportunity to raise challenges.

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3. Revisions Nos. 3, 4, and 5. These suggested revisions are technical and involve only the deletion of the words "federal agency or tribe" from the grey bill's proposed section 85-2-234(3) and (4), MCA, and the words "tribe or federal agency" from section 85-2-234(6), MCA. We suggest these changes because the term "person" as presently defined in section 85-2-102(10), MCA, includes tribes and agencies of the United States, and there is consequently no need to mention those entities separately.

4. Revisions Nos. 6 and 7. Our suggested revisions add the words "the secretary of the interior or his authorized representative and, if required by the terms of the compact" to section 85-2-702(2), MCA, of the grey bill and are technical in nature. Because Senate Bill No. 28 proposes to remove congressional approval as a condition to a binding compact, we believe approval by the secretary of the interior is necessary since the United States, as a legal matter, holds the involved water rights in trust for the tribes. We further believe that, under some circumstances, the parties to a compact may want one or more of its provisions to be ratified by congress and have thus added a provision in contemplation of such possibility.

5. Revision No. 8. Our suggested revision deletes the words "for informational purposes" from lines 10 and 11 and the words "and unless renegotiated,

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the terms of the compact must be included in the final decree without alteration" from lines 11 through 13 of the grey bill. The suggested revision also adds the words "and approval by the secretary of the interior or his authorized representative." The reason for the deletion is the due process concern discussed in connection with our suggested revisions to sections 85-2-231(3) and 85-2-234(2), MCA, of Senate Bill No. 28. We propose the additional wording for the same reasons discussed in connection with our suggested revision to section 85-2-702(2), MCA.

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ATTORNEY GENERAL'S
PROPOSED REVISIONS

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 5DATE 021385BILL NO. SB 28

SENATE BILL NO. 28

INTRODUCED BY

BY REQUEST OF THE SELECT COMMITTEE ON INDIAN AFFAIRS

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR A 2-YEAR
EXTENSION OF THE EXISTENCE OF THE RESERVED WATER RIGHTS
COMPACT COMMISSION; PROVIDING FOR FEDERAL APPROVAL OF A
COMPACT ONLY IF LEGALLY NECESSARY; REQUIRING THAT THE TERMS
OF A COMPACT SET FORTH IN A PRELIMINARY DECREE BE REPRODUCED
UNCHANGED IN THE FINAL DECREE; EXTENDING FROM 60 DAYS TO 6
MONTHS THE TIME PERIOD FOR FILING IN THE WATER COURT CLAIMS
UNRESOLVED BY THE COMPACT COMMISSION; AMENDING SECTIONS
85-2-217, 85-2-224, 85-2-231, 85-2-234, AND 85-2-702, AND
85-2-704, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

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

Section 1. Section 85-2-217, MCA, is amended to read:

"85-2-217. Suspension of adjudication. While
negotiations for the conclusion of a compact under part 7
are being pursued, all proceedings to generally adjudicate
reserved Indian water rights and federal reserved water
rights of those tribes and federal agencies which are
negotiating are suspended. The obligation to file water
rights claims for those reserved rights is also suspended.
This suspension shall be effective until July 1, 1985 1987,

as long as negotiations are continuing or ratification of a completed compact is being sought. If approval by the state legislature and tribes or federal agencies has not been accomplished by July 1, ~~1985~~ 1987, the suspension shall terminate on that date. Upon termination of the suspension of this part, the tribes and the federal agencies shall be subject to the special filing requirements of 85-2-702(3) and all other requirements of the state water adjudication system provided for in Title 85, chapter 2. Those tribes and federal agencies that choose not to negotiate their reserved water rights shall be subject to the full operation of the state adjudication system and may not benefit from the suspension provisions of this section."

SECTION 2. SECTION 85-2-224, MCA, IS AMENDED TO READ:

"85-2-224. Statement of claim. (1) The statement of claim for each right arising under the laws of the state and for each right reserved under the laws of the United States which has been actually put to use shall include substantially the following:

(a) the name and mailing address of the claimant;

(b) the name of the watercourse or water source from which the right to divert or make use of water is claimed, if available;

(c) the quantities of water and times of use claimed;

(d) the legal description, with reasonable certainty,

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1 of the point or points of diversion and places of use of
2 waters;

3 (e) the purpose of use, including, if for irrigation,
4 the number of acres irrigated;

5 (f) the approximate dates of first putting water to
6 beneficial use for the various amounts and times claimed in
7 subsection (c); and

8 (g) the sworn statement that the claim set forth is
9 true and correct to the best of claimant's knowledge and
10 belief.

11 (2) The Any claimant filing a statement of claim under
12 subsection (1) shall submit maps, plats, aerial photographs,
13 decrees, or pertinent portions thereof, or other evidence in
14 support of his claim. All maps, plats, or aerial
15 photographs should show as nearly as possible to scale the
16 point of diversion, place of use, place of storage, and
17 other pertinent conveyance facilities.

18 (3) Any statement of claim for rights reserved under
19 the laws of the United States which have not yet been put to
20 use shall include substantially the following:

21 (a) the name and mailing address of the claimant;

22 (b) the name of the watercourse or water source from
23 which the right to divert or make use of water is claimed,
24 if available;

25 (c) the quantities of water claimed;

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1 (d) the priority date claimed;

2 (e) the laws of the United States on which the claim
3 is based; and

4 (f) the sworn statement that the claim set forth is
5 true and correct to the best of claimant's knowledge and
6 belief."

7 Section 3. Section 85-2-231, MCA, is amended to read:

8 "85-2-231. Preliminary decree. (1) The water judge
9 shall issue a preliminary decree. The preliminary decree
10 shall be based on:

11 (a) the statements of claim before the water judge;

12 (b) the data submitted by the department;

13 (c) the contents of compacts approved by the Montana
14 legislature and the tribe or federal agency or, lacking an
15 approved compact, the filings for federal and Indian
16 reserved rights; and

17 (d) any additional data obtained by the water judge.
18 The preliminary decree shall be issued within 90 days after
19 the close of the special filing period set out in
20 85-2-702(3) or as soon thereafter as is reasonably feasible.
21 This section does not prevent the water judge from issuing
22 an interlocutory decree or other temporary decree if such a
23 decree is necessary for the orderly administration of water
24 rights prior to the issuance of a preliminary decree.

25 (2) A preliminary decree may be issued for any

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1 hydrologically interrelated portion of a water division,
 2 including but not limited to a basin, subbasin, drainage,
 3 subdrainage, stream, or single source of supply of water, at
 4 a time different from the issuance of other preliminary
 5 decrees or portions of the same decree.

6 (3) The preliminary decree shall contain the
 7 information and make the determinations, findings, and
 8 conclusions required for the final decree under 85-2-234.
 9 The water judge shall include in the preliminary decree.

10 the contents of a compact negotiated
 11 under the provisions of part 7 that has been approved by the
 12 legislature and the tribe or federal agency whether--or--not
 13 it-has-been-ratified-by-congress.

14 (4) If the water judge is satisfied that the report of
 15 the water master meets the requirements for the preliminary
 16 decree set forth in subsections (1) and (3), and is
 17 satisfied with the conclusions contained in the report, the
 18 water judge shall adopt the report as the preliminary
 19 decree. If the water judge is not so satisfied, he may, at
 20 his option, recommit the report to the master with
 21 instructions, or modify the report and issue the preliminary
 22 decree."

23 Section 4. Section 85-2-234, MCA, is amended to read:

24 "85-2-234. Final decree. (1) The water judge shall, on
 25 the basis of the preliminary decree and on the basis of any

SENATE JUDICIARY COMMITTEE

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1 hearing that may have been held, enter a final decree
 2 affirming or modifying the preliminary decree. If no
 3 request for a hearing is filed within the time allowed, the
 4 preliminary decree automatically becomes final, and the
 5 water judge shall enter it as the final decree.

6 (2) The final decree shall set forth the terms of any
 7 compact included in the preliminary decree without change
 8 unless, as to any matter referred to in paragraph (6) below,
 9 the water judge (1) finds that a proper challenge to such
 10 matter was made under 85-2-233 and (2) determines beyond a
 11 reasonable doubt that no substantial factual or legal basis
 12 exists for the term of the compact to which the challenge is
 13 made. (2) (3) The final decree shall establish the existing

14 rights and priorities within the water judge's jurisdiction
 15 of persons required by 85-2-221 to file a claim for an
 16 existing right, and of persons required to file a
 17 declaration of existing rights in the Powder River Basin
 18 pursuant to an order of the department or a district court
 19 issued under sections 8 and 9 of Chapter 452, Laws of 1973,

20 AND OF ANY PERSON.

POSSESSING WATER

21 RIGHTS ARISING UNDER FEDERAL LAW, REQUIRED BY 85-2-702 TO
 22 FILE CLAIMS.

23 (3) (4) The final decree shall state the findings of
 24 fact, along with any conclusions of law, upon which the
 25 existing rights and priorities of each person

named in the decree are based.

26 (4) (5) For each person who is found to have an
 27 existing right ARISING UNDER THE LAWS OF THE STATE OF
 28 MONTANA, the final decree shall state:

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1 (a) the name and post-office address of the owner of
2 the right;

3 (b) the amount of water, rate, and volume, included in
4 the right;

5 (c) the date of priority of the right;

6 (d) the purpose for which the water included in the
7 right is used;

8 (e) the place of use and a description of the land, if
9 any, to which the right is appurtenant;

10 (f) the source of the water included in the right;

11 (g) the place and means of diversion;

12 (h) the inclusive dates during which the water is used
13 each year;

14 (i) any other information necessary to fully define
15 the nature and extent of the right.

16 (6) FOR EACH PERSON

17 POSSESSING WATER RIGHTS ARISING UNDER THE LAWS OF THE UNITED
18 STATES, THE FINAL DECREE SHALL STATE:

19 (A) THE NAME AND MAILING ADDRESS OF THE HOLDER OF THE
20 RIGHT;

21 (B) THE SOURCE OR SOURCES OF WATER INCLUDED IN THE
22 RIGHT;

23 (C) THE QUANTITY OF WATER INCLUDED IN THE RIGHT;

24 (D) THE DATE OF PRIORITY OF THE RIGHT;

25 (E) THE PURPOSE FOR WHICH THE WATER INCLUDED IN THE

SENATE JUDICIARY COMMITTEE

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1 RIGHT IS CURRENTLY USED, IF AT ALL;

2 (F) THE PLACE OF USE AND A DESCRIPTION OF THE LAND, IF
3 ANY, TO WHICH THE RIGHT IS APPURTENANT;

4 (G) THE PLACE AND MEANS OF DIVERSION, IF ANY;

5 (H) ANY OTHER INFORMATION NECESSARY TO FULLY DEFINE
6 THE NATURE AND EXTENT OF THE RIGHT, INCLUDING THE TERMS OF
7 ANY COMPACTS NEGOTIATED AND RATIFIED UNDER 85-2-702."

8 Section 5. Section 85-2-702, MCA, is amended to read:

9 "85-2-702. Negotiation with Indian tribes. (1) The
10 reserved water rights compact commission, created by
11 2-15-212, may negotiate with the Indian tribes or their
12 authorized representatives jointly or severally to conclude
13 compacts authorized under 85-2-701. Compact proceedings
14 shall be commenced by the commission. The commission shall
15 serve by certified mail directed to the governing body of
16 each tribe a written request for the initiation of
17 negotiations under this part and a request for the
18 designation of an authorized representative of the tribe to
19 conduct compact negotiations. Upon receipt of such written
20 designation from the governing body of a tribe, compact
21 negotiations shall be considered to have commenced, EXCEPT
22 THAT NO COMPACT PROCEEDINGS MAY COMMENCE AFTER JULY 1, 1985.

23 (2) When the compact commission and the Indian tribes
24 or their authorized representatives have agreed to a
25 compact, they shall sign a copy and file an original copy

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1 with the department of state of the United States of America
 2 and copies with the secretary of state of Montana and with
 3 the governing body for the tribe involved. The compact is
 4 effective and binding upon all parties upon ratification by
 5 the legislature of Montana, any affected tribal
 6 governing body, ~~and~~ the Secretary of the Interior or his
 7 authorized representative and, if required by the terms of
the compact, the congress of the United States.

8 (3) Upon its ~~approval~~ RATIFICATION by the Montana
 9 legislature and the tribe ~~or-federal-agency~~, and approval by
 10 the Secretary of the Interior or his authorized
 11 representative, the terms of a compact must be included in
 12 the preliminary decree as provided by 85-2-231. However, if
 13 approval of the state legislature, ~~and the tribe or-federal~~
 14 ~~agency~~ and the Secretary of the Interior or his authorized
 15 representative has not been accomplished by July 1, 1985
 16 1987, all ~~federal-and~~ Indian claims for reserved water rights
 17 that have not been resolved by a compact must be filed with
 18 the department within ~~60-days~~ 6 months. These new filings
 19 shall be used in the formulation of the preliminary decree
 20 and shall be given treatment similar to that given to all
 21 other filings."

22 SECTION 6. SECTION 85-2-704, MCA, IS AMENDED TO READ:

23 "85-2-704. Termination of negotiations. (1) The
 24 commission or any ~~other---party---to---the---negotiations~~
 25 negotiating tribe or federal agency may terminate
 negotiations by providing notice to all parties 30 days in

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1 advance of the termination date. On the termination date,
 2 the suspension of the application of part 2 provided for in
 3 85-2-217 shall also terminate. The tribe or federal agency
 4 shall file all of its claims for reserved rights within 60
 5 days of the termination of negotiations.

6 (2) (a) However, if a notice of termination is
 7 submitted by either party and the submitting party elects to
 8 retract the notice before the termination date, the notice
 9 of termination must be disregarded and negotiations are not
 10 terminated. The retraction of a notice of termination must
 11 be made by certified mail addressed to:

12 (i) the chairman of the governing body of the affected
 13 tribe;

14 (ii) the officially designated representative of the
 15 affected federal agency; or

16 (iii) the chairman of the reserved water rights compact
 17 commission.

18 (b) The retraction of a notice of termination must be
 19 received before the termination date."

20 THERE IS A NEW MCA SECTION THAT READS:

21 NEW SECTION. Section 7. Status reports to chief water
 22 judge. (1) The Montana reserved water rights compact
 23 commission must submit to the chief water judge, appointed
 24 pursuant to 3-7-221, a report on the status of its
 25 negotiations on July 1, 1985, and every 6 months thereafter.

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1 (2) Each report must state which Indian tribes and
2 federal agencies are engaged in negotiations, whether any
3 negotiations with Indian tribes or federal agencies have
4 been terminated, and the progress of negotiations on a
5 tribe-by-tribe and agency-by-agency basis. The report must
6 be made available to the public.

7 NEW SECTION. Section 8. Effective date. This act is
8 effective ~~on-passage-and-approval~~ JULY 1, 1985.

-End-

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 5

-11- DATE 02/385

SB 28

BILL NO. SB 28

STATE COORDINATOR OF INDIAN AFFAIRS



TED SCHWINDEN, GOVERNOR

1218 EAST SIXTH AVENUE

STATE OF MONTANA

(406) 444-3702
DONALD L. CLAYBORN, COORDINATOR

HELENA, MONTANA 59620

FEBRUARY 13, 1985

TESTIMONY

SENATE BILL NO. 28

THE COORDINATOR OF INDIAN AFFAIRS OFFICE SUPPORTS THE ORIGINAL LEGISLATION WITHOUT THE ADDITIONS WHICH HAVE CAUSED SO MANY QUESTIONS CONCERNING THEIR AFFECT ON CURRENT WATER ADMINISTRATION LITIGATION AND THE PROCESS OF INTEGRATION OF COMPACTS IN THE WATER JUDGES DECREE.

I HAVE REVIEWED REED CHAMBERS AMENDMENT AND FIND THAT IT WAS CLARIFYING SOME OF OUR PROBLEMS OF INCLUSION OF AN AGREEMENT IN THE FINAL DECREE.

THE FINAL PROBLEM AS THE BILL NOW STANDS CONCERNS THAT PROBLEM OF INCLUSION OF INDIAN WATER RIGHTS UNDER STATE ADMINISTRATION. THE NEW LANGUAGE ON PAGE 2, LINE 14 THROUGH 18, HAS A LANGUAGE CHANGE BUT IT APPEARS THAT AFFECT IS STILL THE SAME: UNDER THE DEFINITION SECTION THAT THIS SECTION IS, THE NEW LANGUAGE STILL PLACES INDIAN WATER RIGHTS UNDER STATE ADMINISTRATION.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 6
DATE 02/13/85
BILL NO. SB 28

new 100 6 grams 90

NAME:

J. Brunner

DATE:

2/13/85

ADDRESS:

1496 Kodak Rd Helena

PHONE:

443 4254

REPRESENTING WHOM?

WIFE

APPEARING ON WHICH PROPOSAL:

SB 69

DO YOU:

SUPPORT?

X

AMEND?

OPPOSE?

COMMENTS:

We support Senator Hall's efforts
to extend the expiration date of the
Compact Commission and specifically,
that the time limit concerning entering into
negotiation be maintained as Sen Hall request.

J. Brunner

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE

EXHIBIT NO.

7

DATE

02/385

BILL NO.

SB 69

FEB 16



United States Department of the Interior

BUREAU OF INDIAN AFFAIRS

BILLINGS AREA OFFICE

316 NORTH 26TH ST.

BILLINGS, MONTANA 59101

IN REPLY REFER TO:

FEB 15 1985

Senator Joseph P. Mazurek
Senate Judiciary Committee
Capitol Station
Box 84
Helena, Montana 59620

Dear Senator Mazurek:

Once again, I wish to express my appreciation for being allowed to testify on February 13, 1985, regarding Senate Bill 28-69.

In response to Senator Towe's question, we have reviewed the two proposed amendments and have the following comments:

Regarding the Attorney General and Reid Chambers' drafts of subsection (2) of Section 3 of Senate Bill No. 28, the Department of the Interior does not require any specific language of either draft, except that it desires the inclusion of a compact in a final decree. Although it may be implied, please consider allowing parties (including the State, Tribe, United States, or other adversely effected interests) to "participate" in an objectors hearing in order to rebut the objectors assertions in defense of such parties rights. Such parties' rights need not be increased thereby.

Sincerely,

Acting Area Director

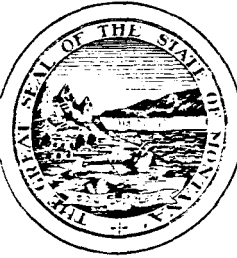
SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 8

DATE 021385

BILL NO. SBs 28+69

STATE COORDINATOR OF INDIAN AFFAIRS



TED SCHWINDEN, GOVERNOR

1218 EAST SIXTH AVENUE

STATE OF MONTANA

(406) 444-3702
DONALD L. CLAYBORN, COORDINATOR

HELENA, MONTANA 59620

JANUARY 10, 1985

TESTIMONY

HOUSE BILL NO. 13

MR. CHAIRMAN AND MEMBERS OF THE STATE ADMINISTRATION. I AM LOUIE CLAYBORN, COORDINATOR OF INDIAN AFFAIRS FOR THE STATE OF MONTANA. I AM IN SUPPORT OF HOUSE BILL NO. 13, A BILL REVISING THE REQUIREMENTS FILING OF A STATE/TRIBAL COOPERATIVE AGREEMENT.

THIS BILL MAKES TWO IMPORTANT AMENDMENTS TO THE COOPERATIVE AGREEMENT CODE. THE FIRST AMENDMENT IS TO REQUIRE THAT THE AGREEMENT BE FILED WITH THE AREA OFFICE OF THE BUREAU OF INDIAN AFFAIRS. AS IS POINTED OUT IN THE BILL, THE BUREAU OF INDIAN AFFAIRS HAS A TRUST RESPONSIBILITY AND THEREFORE WILL HAVE SOME FISCAL CONTROL OF SUBJECT MATTERS UNDER TRIBAL ADMINISTRATION. THAT AGENCY WILL HAVE AN IMPACT UPON THE ADMINISTRATION OF THE SERVICE DELIVERY OF PROCESS OF ANY COOPERATIVE AGREEMENT AND IS, AS A CONSEQUENCE, A NECESSARY OBSERVER OF THE PROCESS.

THE SECOND SECTION IS THE REMOVAL OF THE FILING OF THESE AGREEMENTS WITH THE COUNTY CLERK AND RECORDER FOR LEWIS AND CLARK COUNTY. ON ITS FACE, THAT PROCEDURE IS CUMBERSOME.

FOR THESE REASONS I SUPPORT THE LEGISLATION.

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 9

DATE 021385

BILL NO. HB 13

STANDING COMMITTEE REPORT

February 13

1985

MR. PRESIDENT

We, your committee on **JUDICIARY**

having had under consideration **HOUSE BILL** No. **13**

third reading copy (**blue**)
color

(Senator Eck)

REVISING FILING REQUIREMENTS FOR STATE-TRIBAL COOPERATIVE AGREEMENTS.

Respectfully report as follows: That **HOUSE BILL** No. **13**

BE CONCURRED IN

~~XXXXXX~~

~~XXXXXXXXXX~~

Senator Joe Mazurek

Chairman.