

MONTANA STATE SENATE
JUDICIARY COMMITTEE
MINUTES OF THE MEETING

February 18, 1985

The thirty-third meeting of the Senate Judiciary Committee was called to order at 6:00 p.m. on February 18, 1985, by Chairman Joe Mazurek in Room 325 of the Capitol Building.

ROLL CALL: All committee members were present.

RECONSIDERATION OF AND ACTION ON SB 200: Chairman Mazurek stated a number of people were concerned about subsection (6) and section (2) of SB 200. Senator Daniels moved the committee reconsider its action in recommending SB 200 DO PASS AS AMENDED. The motion carried unanimously. Senator Pinsoneault stated there were concerns about the words "or has reason to know" in subsection (b). The scenario suggested was when you have a president of a corporation, it is a tremendous burden to impose on him the ability to know what goes on in all of his subgroups within his corporation. It was felt that was too broad. They also wanted to add the word "serious" before the word "risk." Senator Mazurek stated by the time you get to trial, you may have dropped that allegation. The bill as written allows you to penalize them at the time of filing a complaint, but not at trial. Senator Daniels stated we have amended the bill, studied it, and he believes it should be killed. It's the knee-jerk syndrome. Every time somebody says something, we react. Senator Crippen stated the testimony indicated we have to do something. If we don't do anything, at all, by what he has been told by the insurance companies, there isn't an insurance carrier in the state of Montana that will carry punitive damage insurance as a part of his coverage. The testimony indicates what really is a gap in the law. Senator Mazurek stated since the decision in Transamerica on coverage that says it is not against public policy to construe an insurance policy as not covering punitive damages, most companies will exclude punitive damages. He assumes most have already. Senator Crippen stated he has checked, and they haven't, because they are waiting to see what the legislature is going to do. Senator Pinsoneault moved the committee's prior amendment be further amended as follows:

(b) . . . Presumed malice exists when a person knows ~~or~~-has-reason ~~to~~-know of facts which create a high degree of serious risk of harm

Senator Towe stated he would support the first part of the proposed amendment, but he is not sure about adding the word "serious." The

issues are going to be primarily products liability or in those areas where you have a large corporation. He doesn't have that serious of a problem with it. He contends the corporation is required to know some of what its employees are doing. Senator Pinsoneault withdrew the portion of his motion to amend relating to inserting the word "serious." The motion carried with Senators Daniels and Mazurek voting in opposition. Senator Towe stated the point Senator Mazurek was making is a valid one. There is a point at which the plaintiff shouldn't be penalized for raising the issue until he has had an opportunity to gather all of the facts. If the plaintiff alleges punitive damages and then finds out after discovery he ought to drop it and if he doesn't drop it, then he should be zapped for attorneys' fees. He would suggest adding the following language to section (2):

(2) . . . in defense of such claim, from the time when all discovery was completed or could reasonably have been completed.

Senator Mazurek stated he disagreed with the proposed amendment. As long as punitive damages are in the complaint, then you still have to submit that question to the jury. You cannot make that determination until the pretrial order has been filed. Senator Pinsoneault stated if the question doesn't get to the jury, there will be no damages. Senator Towe moved that the committee's earlier amendment adding a section (2) be amended as follows:

(2) If a plaintiff sought exemplary damages ~~in his complaint~~ at trial, but such damages

The motion carried with Senator Daniels voting in opposition. Senator Towe stated he is satisfied with it, but he does want to point out that he visited with Judge Bennett, and Judge Bennett pointed out that this whole punitive damages system has been resolved in the federal system because the judge has the authority to review the jury award. Senator Blaylock asked if our state judges do that. Senators Daniels and Towe stated yes. Senator Daniels stated the district judge can say those punitive damages haven't been proven or he can reduce them or eliminate them. Senator Towe stated these cases have been settled before the judge has his final say on it, because they are concerned this will happen. Senator Pinsoneault stated its this language or a cap. Senator Mazurek stated he thinks the biggest concern over punitive damages is in the employment field, and it rises out of good faith and fair dealings. Senator Browne called the committee's attention to the effective date. Senator Mazurek stated this bill should apply to any claim arising after the effective date; it shouldn't apply to anything going on now. Senator Towe moved the bill be amended as follows:

Title, line 6.
Following: "DATE"
Strike: remainder of line 6 through "DATE" on line 7

Page 2, line 3.
Following: "any"
Strike: proceeding begun"
Insert: "claim arising"
Following: "after"
Strike: remainder of line 3 through "act" on line 5
Insert: "October 1, 1985"

Page 2, lines 6 and 7.
Strike: section 4 in its entirety

Mr. Petesch stated if you want to combine those, you should say in the applicability section, October 1, 1985, because applicability will probably be codified. The motion to amend carried with Senator Daniels voting in opposition. Senator Pinsoneault moved SB 200 be recommended DO PASS AS AMENDED. The motion carried with Senators Daniels and Mazurek voting in opposition.

FURTHER CONSIDERATION OF SB 28: Copies of the new grey bill were distributed to the committee members for their review. The grey bill incorporated all of the amendments adopted by the committee.

There being no further business to come before the committee, the meeting was adjourned at 6:22 p.m.


Committee Chairman

STANDING COMMITTEE REPORT

February 18

1985

MR. PRESIDENT

JUDICIARY

We, your committee on.....

SENATE BILL

200

having had under consideration.....

No.....

first reading copy (white)
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LIMITING PUNITIVE DAMAGES IN CIVIL ACTIONS.

Respectfully report as follows: That.....

SENATE BILL

No. 200

be amended as follows:

1. Page 1, line 11.

Following: "(1)"

Insert: "(a)"

2. Page 1, line 17.

Strike: subsection (2) in its entirety

Insert: "(b) An award of exemplary damages must be supported by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, actual or presumed. Presumed malice exists when a person knows or has reason to know of facts which create a high degree of risk of harm to the substantial interests of another, and either deliberately proceeds to act in conscious disregard of or indifference to that risk, or recklessly proceeds in unreasonable disregard of or in indifference to that risk.

(2) If a plaintiff sought exemplary damages in his complaint, but such damages were not awarded, the court shall submit to the jury a question concerning whether the jury found in the evidence presented any basis in fact for seeking exemplary damages. If no jury has been impaneled, the court shall make a separate finding on the question. If the response to the question is negative, the court may, in its discretion, assess damages against the plaintiff in an amount not to exceed what is determined by the court to be reasonable attorney fees of the defendant incurred in defense of such claim."

AND AS AMENDED

DO PASS

~~DO NOT PASS~~

.....
Senator Joe Mazurek

Chairman.

1 SENATE BILL NO. 28

2 INTRODUCED BY ECK

3 BY REQUEST OF THE SELECT COMMITTEE ON INDIAN AFFAIRS

4
5 A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR A 2-YEAR
6 EXTENSION OF THE EXISTENCE OF THE RESERVED WATER RIGHTS
7 COMPACT COMMISSION; PROVIDING FOR FEDERAL APPROVAL OF A
8 COMPACT ONLY IF LEGALLY NECESSARY; ~~REQUIRING THAT THE TERMS~~
9 ~~OF A COMPACT SET FORTH IN A PRELIMINARY DECREE BE REPRODUCED~~
10 UNCHANGED--IN--THE--FINAL--DECREE PROVIDING AN ALTERNATE
11 STATEMENT OF CLAIM FOR RESERVED RIGHTS NOT YET PUT TO USE;
12 SPECIFYING THE INFORMATION RELATING TO RESERVED RIGHTS TO BE
13 INCLUDED IN THE FINAL DECREE; EXTENDING FROM 60 DAYS TO 6
14 MONTHS THE TIME PERIOD FOR FILING IN THE WATER COURT CLAIMS
15 UNRESOLVED BY THE COMPACT COMMISSION; REQUIRING THE
16 COMMISSION TO MAKE STATUS REPORTS TO THE WATER JUDGE;
17 AMENDING SECTIONS 85-2-217, 85-2-224, 85-2-231, 85-2-234,
18 AND 85-2-702, AND 85-2-704, MCA; AND PROVIDING AN IMMEDIATE
19 EFFECTIVE DATE."

20
21 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

22 Section 1. Section 85-2-217, MCA, is amended to read:
23 "85-2-217. Suspension of adjudication. While
24 negotiations for the conclusion of a compact under part 7
25 are being pursued, all proceedings to generally adjudicate

1 reserved Indian water rights and federal reserved water
2 rights of those tribes and federal agencies which are
3 negotiating are suspended. The obligation to file water
4 rights claims for those reserved rights is also suspended.
5 This suspension shall be effective until July 1, ~~1985~~ 1987,
6 as long as negotiations are continuing or ratification of a
7 completed compact is being sought. If approval by the state
8 legislature and tribes or federal agencies has not been
9 accomplished by July 1, ~~1985~~ 1987, the suspension shall
10 terminate on that date. Upon termination of the suspension
11 of this part, the tribes and the federal agencies shall be
12 subject to the special filing requirements of 85-2-702(3)
13 and all other requirements of the state water adjudication
14 system provided for in Title 85, chapter 2. Those tribes and
15 federal agencies that choose not to negotiate their reserved
16 water rights shall be subject to the full operation of the
17 state adjudication system and may not benefit from the
18 suspension provisions of this section."

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

20 "85-2-224. Statement of claim. (1) The statement of
21 claim for each right arising under the laws of the state and
22 for each right reserved under the laws of the United States
23 which has been actually put to use shall include
24 substantially the following:

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

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

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

5 (d) the legal description, with reasonable certainty,
6 of the point or points of diversion and places of use of
7 waters;

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

10 (f) the approximate dates of first putting water to
11 beneficial use for the various amounts and times claimed in
12 subsection (c); and

13 (g) the sworn statement that the claim set forth is
14 true and correct to the best of claimant's knowledge and
15 belief.

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

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

- 1 (a) the name and mailing address of the claimant;
2 (b) the name of the watercourse or water source from
3 which the right to divert or make use of water is claimed,
4 if available;
5 (c) the quantities of water claimed;
6 (d) the priority date claimed;
7 (e) the laws of the United States on which the claim
8 is based; and
9 (f) the sworn statement that the claim set forth is
10 true and correct to the best of claimant's knowledge and
11 belief."

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

13 "85-2-231. Preliminary decree. (1) The water judge
14 shall issue a preliminary decree. The preliminary decree
15 shall be based on:

- 16 (a) the statements of claim before the water judge;
17 (b) the data submitted by the department;
18 (c) the contents of compacts approved by the Montana
19 legislature and the tribe or federal agency or, lacking an
20 approved compact, the filings for federal and Indian
21 reserved rights; and
22 (d) any additional data obtained by the water judge.

23 The preliminary decree shall be issued within 90 days after
24 the close of the special filing period set out in
25 85-2-702(3) or as soon thereafter as is reasonably feasible.

1 This section does not prevent the water judge from issuing
2 an interlocutory decree or other temporary decree if such a
3 decree is necessary for the orderly administration of water
4 rights prior to the issuance of a preliminary decree.

5 (2) A preliminary decree may be issued for any
6 hydrologically interrelated portion of a water division,
7 including but not limited to a basin, subbasin, drainage,
8 subdrainage, stream, or single source of supply of water, at
9 a time different from the issuance of other preliminary
10 decrees or portions of the same decree.

11 (3) The preliminary decree shall contain the
12 information and make the determinations, findings, and
13 conclusions required for the final decree under 85-2-234.
14 The water judge shall include in the preliminary decree ~~for~~
15 informational purposes, the contents of a compact negotiated
16 under the provisions of part 7 that has been approved by the
17 legislature and the tribe or federal agency ~~whether or not~~
18 ~~it has been ratified by congress~~.

19 (4) If the water judge is satisfied that the report of
20 the water master meets the requirements for the preliminary
21 decree set forth in subsections (1) and (3), and is
22 satisfied with the conclusions contained in the report, the
23 water judge shall adopt the report as the preliminary
24 decree. If the water judge is not so satisfied, he may, at
25 his option, recommit the report to the master with

1 instructions, or modify the report and issue the preliminary
2 decree."

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

4 "85-2-234. Final decree. (1) The water judge shall, on
5 the basis of the preliminary decree and on the basis of any
6 hearing that may have been held, enter a final decree
7 affirming or modifying the preliminary decree. If no
8 request for a hearing is filed within the time allowed, the
9 preliminary decree automatically becomes final, and the
10 water judge shall enter it as the final decree.

11 (2) The terms of a compact negotiated and ratified
12 under 85-2-702 must be included in the final decree without
13 alteration. PROVIDED THAT THE WATER JUDGE MAY, AFTER THE
14 HEARING REQUIRED TO BE HELD BY 85-2-233, RELIEVE ANY PERSON
15 OBJECTING TO THE COMPACT FROM ALL ITS PROVISIONS. A PERSON
16 SO RELIEVED SHALL REMAIN FREE TO LITIGATE ALL ISSUES IN THE
17 PENDING CASE WITHOUT, HOWEVER, RECEIVING ANY ASSISTANCE FROM
18 ANY PERSON WHO DID NOT FILE A TIMELY OBJECTION TO THE
19 COMPACT. PROVIDED, FURTHER, THAT WHERE A PERSON IS RELIEVED
20 FROM THE PROVISIONS OF A COMPACT PURSUANT TO THIS SECTION,
21 THE COMPACT PROVISIONS SHALL NONETHELESS BE CONSIDERED PRIMA
22 FACIE VALID IN ALL SUBSEQUENT LITIGATION BEFORE THE WATER
23 JUDGE AND ANY PERSON RELIEVED FROM THOSE PROVISIONS SHALL
24 CARRY THE BURDEN OF PROOF ON ALL CONTESTED ISSUES OF FACT
25 AND LAW.

1 ~~(2)~~(3) The final decree shall establish the existing
2 rights and priorities within the water judge's jurisdiction
3 of persons required by 85-2-221 to file a claim for an
4 existing right, and of persons required to file a
5 declaration of existing rights in the Powder River Basin
6 pursuant to an order of the department or a district court
7 issued under sections 8 and 9 of Chapter 452, Laws of 1973,
8 AND OF ANY FEDERAL AGENCY OR INDIAN TRIBE POSSESSING WATER
9 RIGHTS ARISING UNDER FEDERAL LAW, REQUIRED BY 85-2-702 TO
10 FILE CLAIMS.

11 ~~(3)~~(4) The final decree shall state the findings of
12 fact, along with any conclusions of law, upon which the
13 existing rights and priorities of each person, FEDERAL
14 AGENCY, AND INDIAN TRIBE named in the decree are based.

15 ~~(4)~~(5) For each person who is found to have an
16 existing right ARISING UNDER THE LAWS OF THE STATE OF
17 MONTANA, the final decree shall state:

18 (a) the name and post-office address of the owner of
19 the right;

20 (b) the amount of water, rate, and volume, included in
21 the right;

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

23 (d) the purpose for which the water included in the
24 right is used;

25 (e) the place of use and a description of the land, if

1 any, to which the right is appurtenant;

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

3 (g) the place and means of diversion;

4 (h) the inclusive dates during which the water is used
5 each year;

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

8 (6) FOR EACH PERSON, TRIBE, OR FEDERAL AGENCY
9 POSSESSING WATER RIGHTS ARISING UNDER THE LAWS OF THE UNITED
10 STATES, THE FINAL DECREE SHALL STATE:

11 (A) THE NAME AND MAILING ADDRESS OF THE HOLDER OF THE
12 RIGHT;

13 (B) THE SOURCE OR SOURCES OF WATER INCLUDED IN THE
14 RIGHT;

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

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

17 (E) THE PURPOSE FOR WHICH THE WATER INCLUDED IN THE
18 RIGHT IS CURRENTLY USED, IF AT ALL;

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

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

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

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

1 "85-2-702. Negotiation with Indian tribes. (1) The
2 reserved water rights compact commission, created by
3 2-15-212, may negotiate with the Indian tribes or their
4 authorized representatives jointly or severally to conclude
5 compacts authorized under 85-2-701. Compact proceedings
6 shall be commenced by the commission. The commission shall
7 serve by certified mail directed to the governing body of
8 each tribe a written request for the initiation of
9 negotiations under this part and a request for the
10 designation of an authorized representative of the tribe to
11 conduct compact negotiations. Upon receipt of such written
12 designation from the governing body of a tribe, compact
13 negotiations shall be considered to have commenced.

14 (2) When the compact commission and the Indian tribes
15 or their authorized representatives have agreed to a
16 compact, they shall sign a copy and file an original copy
17 with the department of state of the United States of America
18 and copies with the secretary of state of Montana and with
19 the governing body for the tribe involved. The compact is
20 effective and binding upon all parties upon ratification by
21 the legislature of Montana, AND any affected tribal
22 governing body, ~~and if legally necessary, the congress of~~
23 ~~the United States or other appropriate federal authority.~~

24 (3) Upon its approval RATIFICATION by the Montana
25 legislature and the tribe ~~or federal agency~~, the terms of a

1 compact must be included in the preliminary decree for
 2 informational--purposes as provided by 85-2-231, and unless
 3 renegotiated, the terms of the compact must be included in
 4 the final decree without-alteration. However, if approval of
 5 the state legislature and tribe ~~or-federal-agency~~ has not
 6 been accomplished by July 1, ~~1985~~ 1987, all ~~federal--and~~
 7 Indian claims for reserved water rights that have not been
 8 resolved by a compact must be filed with the department
 9 within ~~60-days~~ 6 months. These new filings shall be used in
 10 the formulation of the preliminary decree and shall be given
 11 treatment similar to that given to all other filings."

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

13 "85-2-704. Termination of negotiations. (1) The
 14 commission or any ~~other---party---to---the---negotiations~~
 15 negotiating tribe or federal agency may terminate
 16 negotiations by providing notice to all parties 30 days in
 17 advance of the termination date. On the termination date,
 18 the suspension of the application of part 2 provided for in
 19 85-2-217 shall also terminate. The tribe or federal agency
 20 shall file all of its claims for reserved rights within 60
 21 days 6 months of the termination of negotiations.

22 (2) Once negotiations have been terminated pursuant to
 23 subsection (1), they may be reopened only by mutual
 24 agreement of the parties."

25 THERE IS A NEW MCA SECTION THAT READS:

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

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

12 NEW SECTION. Section 8. Effective date. This act is
13 effective on passage and approval.

-End-