MINUTES OF THE MEETING
SENATE NATURAL RESOURCES COMMITTEE
MONTANA STATE SENATE
March 13, 1985

The nineteenth meeting of the Senate Natural Resources Committee was called to order at 1:05 p.m. by Chairman Dorothy Eck, Room 325, State Capitol Building.

ROLL CALL: All members of the Senate Natural Resources Committee were present.

CONSIDERATION OF HB680: Representative Iverson, sponsor of HB680, stated the bill is the result of the directive of HB908 introduced in the 1983 legislature and took approximately one and one-half years to complete. The bill was originally intended to be a water marketing bill; however, the result is a water policy bill. Representative Iverson feels HB680 properly addresses the concerns of the people of Montana. HB680 addresses primarily the export ban of water, the coal slurry ban, the placement of certain pipelines under the Major Facility Siting Act, and the creation of a water leasing program. The export ban of water was repealed in the last session; however, this ban will expire in 1985. Representative Iverson feels the export ban should be permanently removed because it is unconstitutional. This decision is reaffirmed by two court cases, Sporhase v. Nebraska and El Paso v. Reynolds. These cases allow for state control of water for conservation purposes. Representative Iverson feels since the state cannot prohibit shipping water out of state, it should use public interest criteria. Representative Iverson explained HB680 provides for a trigger level of 4,000 acre feet and 5.5 cubic feet per second. Of the 8,000 water use permit applications filed since 1983, only 56 are above this level for nonconsumptive use. Representative Iverson feels this bill will offer the state of Montana some protection for its water. HB680 also recommends the coal slurry ban be removed. According to Representative Iverson, the coal slurry ban has not done Montana any good, since coal slurry can be accomplished without the use of water. Moreover, the coal slurry ban has not prevented water from being taken from the state and is in violation of the commerce clause and the equal protection clause of the State and U. S. Constitution. Representative Iverson stated the coal slurry ban neither protects water nor encourages coal development. HB680 also provides that pipelines more than 30 miles in length and 17 inches in diameter (inside diameter) shall fall under the Major Facility Siting Act.

Since large consumptive use is the biggest threat to Montana's water, HB680 also provides for a water leasing program. Representative Iverson feels since we cannot tell anyone they cannot use the state's water, the only alternative would be to lease water to anyone using over 4,000 acre feet and 5.5 cubic feet per second

for consumptive use. Lessees of Montana's water will be required to meet public interest criteria and comply with MEPA. The price for leasing water will be negotiable, and a person will not be able to lease water for more than 50 years. Representative Iverson stated because Montana will become a proprietor of leased water, it will be able to discriminate prices in favor of agricultural users. Representative Iverson stated there will eventually be a conflict regarding the use of water in the Missouri River Basin and, one day, Montana will have to defend its water in court. For this reason, he is recommending a water resource data managing system be started for the Missouri River Basin. Representative Iverson stated although reservations will be exempt from the leasing program, the public interest criteria will still apply.

HB680 will also require the Department of Natural Resources and Conservation (hereafter DNRC) to work quickly on reservation projects. DNRC will provide technical and financial assistance to those wishing to reserve water in the Missouri River Basin. July 1, 1987, is the deadline for anyone to apply for reservations of water in the Missouri River Basin. Representative Iverson explained the bill requires the DNRC to prepare a management plan for review by the legislature. HB680 will also establish a permanent water policy committee.

PROPONENTS: Mr. John Thorson, representing the Environmental Quality Council, went through the sections of HB680 explaining to the committee the provisions of water leasing, public interest, permit criteria, MEPA, definitions, reservation of water, penalties, rule-making authority, and the repeal of the coal slurry ban.

Senator Blaylock, who served on the interim committee, stated the committee had drawn up a good policy regarding the use and disposition of the state's water. Senator Blaylock supports HB680.

Mr. K. M. Kelly, representing the Montana Water Development Association, endorsed the testimony given by Representative Iverson.

Senator Shaw also served as a member of the interim committee and feels the policies presented in HB680 are in the direction the State of Montana should be going.

Representative Dorothy Bradley stated she, at one time, was a skeptic but now believes the committee has done an excellent job of dealing with people's concerns. Representative Bradley stated the House of Representatives was concerned mainly with the coal slurry ban and the reservation process. However, Representative Bradley feels the coal slurry statute is unconstitutional. She stated since we cannot use all of our water, we need to make a legitimate claim on water we want to use in the future, and HB680 responds to this need.

Mr. Larry Fasbender, representing DNRC, feels HB680 is an excellent piece of legislation. Mr. Fasbender stated he supports the amendments which Representative Iverson will be submitting to the committee. Mr. Fasbender urged the committee to work with the members of the interim committee if they find any problems with HB680. Mr. Fasbender recognizes the State of Montana is short of funds, but he feels this should not be a deterent from making any long-range plans for our water.

Mr. David Lackman, representing the Montana Public Health Association, submitted written testimony (Exhibit 1) in favor of HB680.

Mr. Jim Flynn, representing the Montana Department of Fish, Wildlife and Parks, submitted written testimony (Exhibit 2) in favor of HB680.

Mr. Mons Teigen, representing the Montana Stockgrower's Association, submitted written testimony (Exhibit 3) in favor of HB680.

Mr. Terry Murphy, representing the Montana Farmers' Union, stated he supports the legislation because it will allow the State to make money by marketing surplus water. Mr. Murphy believes the revenue generated by marketing surplus water should be used to save water. Mr. Don Skaar, representing the Montana Chapter of the Sierra Club, believes HB680 is a step forward in helping Montana protect its resources. Mr. Skaar likes the water leasing provision of the bill, but he feels farmers, cities and recreation should be given priority on surplus water in Montana. Mr. Skaar stated the Montana Chapter of the Sierra Club supports HB680 only as a package. Mr. Skaar submitted written testimony (Exhibit 4).

Ms. Jo Brunner, representing Women Involved in Farm Economics, stated she believes in being prepared and supports HB680.

Mr. Don Reed, representing the Montana Environmental Information Center, submitted written testimony (Exhibit 5) in favor of HB680.

Mr. Russ Brown, representing the Northern Plains Resource Council, submitted written testimony (Exhibit 6) in favor of HB680.

Ms. Willa Hall, representing the League of Women Voters, submitted written testimony (Exhibit 7) in favor of HB680.

Mr. Pete Test, representing the Montana State Council of Trout Unlimited, stated water preservation is important to the members of this organization. Mr. Test feels preservation of

the Missouri River is important to Montana's economy. Mr. Test urged the committee for favorable consideration of HB680.

Mr. Dan Heinz, representing the Montana Wildlife Federation, stated he supports HB680 as a package.

Mr. James Mular, representing the United Transportation Union, stated he supports HB680, but he would like to see the bill amended since he is opposed to marketing Montana's water. Mr. Mular supports the amendments to be proposed by Mr. Jim Goetz (Exhibit 8). Mr. Mular questions whether there is a surplus of water in the state because the water is not all appropriated and decreed by the state water court. Mr. Mular feels the coal slurry ban is constitutional, since it has never been constitutionally challenged. Mr. Mular is convinced if the coal slurry ban is permanently repealed, it could jeopardize the jobs of 8,500 railroad workers. Mr. Mular is very concerned about these people.

OPPONENTS: Mr. James H. Goetz, representing the Brotherhood of Railway and Airline Clerks; International Association of Machinists and Aerospace Workers; the United Transportation Unions; the Brotherhood of Maintenance of Way Employees; and the Brotherhood of Locomotive Engineers, submitted written testimony (Exhibit 9) as an opponent to the parts of HB680 which repeal Montana's ban on coal slurry. Mr. Goetz also submitted a report he prepared on the constitutionality of Montana's prohibition of the use of water for coal slurry (Exhibit 10).

Mr. Bill Asher, representing the Agricultural Preservation Association of Gallatin County, testified as an opponent to HB680. Although Mr. Asher feels the interim committee on water marketing did a good job with a very complex issue, Mr. Asher also feels the water courts should be totally funded to adjudicate water. Mr. Asher suggested amending HB680 on page 40, lines 11 and 12, by striking "temporary preliminary decree, a preliminary decree under 85-2-231;." Mr. Asher feels by doing this, the committee will have addressed the water adjudiciation process.

Representative Bachini stated he would only support HB680 if it is amended and the coal slurry ban is left in. Representative Bachini was supported by Representative Mary Ellen Connelley, Representative Ray Peck and Representative Bob Raney.

Representative Ted Schye stated he supports HB680 only with the proposed amendment of Jim Goetz.

Mr. Vernon Westlake, representing the Agricultural Preservation Association, submitted written testimony (Exhibit 11) in opposition to HB680.

Mr. Phil Rostad, representing Meagher County Preservation Association, submitted written testimony (Exhibit 12) in opposition to HB680.

Mr. Pat Underwood, representing Montana Farm Bureau Federation, submitted written testimony (Exhibit 13) in opposition to HB680.

Representative Brandewie, appearing as a private citizen, feels this piece of legislation should be held until Judge Lessley has completed his work in adjudicating water rights. Representative Brandewie is also concerned about what the coal slurry will do to railroad workers. Representative Brandewie feels the state may save in one area, but will pay a high price in other areas. He opposes coal slurry pipelines.

Representative Iverson closed the hearing on HB680 by submitting the Statement of Intent (Exhibit 14) and proposed amendments (Exhibit 15).

There being no further opponents, the hearing was opened to questions from the committee.

Senator Mohar questioned how much money was involved in the water policy program, and where this money would come from. Representative Iverson stated although there was no fiscal note, they are presently working on appropriations. Representative Iverson stated they would need some money to get the program started and for financing reservations.

Senator Shaw questioned whether the bill would have an impact on water development for irrigators or whether the bill would impact on the payback. Representative Iverson stated no to both questions.

Senator Fuller stated some witnesses expressed concern about the constitutionality problem with the coal slurry ban, and asked Mr. Doney to address this problem. Mr. Doney stated he feels the coal slurry ban is unconstitutional because it creates a burden on interstate commerce.

Mr. John Thorson, Environmental Quality Council, stated the constitutionality issue on HB680 has been addressed by many attorneys, and these attorneys are split in their decisions. Mr. Thorson stated there is an attorneys' fees consequence for losing this issue, and the prevailing party can collect attorneys' fees.

Senator Harding questioned how the water leasing program will affect Indian reservations. Representative Iverson answered it will not affect water on the reservations. Whether it will

affect water after it leaves the reservation will be determined by the Water Compact Commission. Representative Iverson suspects the Compact Commission will make tribal waters subject to state laws once they leave the reservation.

Senator Fuller questioned whether HB680 took into consideration the issue of federal eminent domain. Representative Iverson responded the issue was addressed in HB1010, which was killed in the House of Representatives.

Senator Gage stated the committee should take a look at the condition of the Indian people. Senator Gage feels the state might do well to recognize that Indians do own water.

Senator Weeding questioned whether the Major Facility Siting Act would afford any protection to the railroad workers' jobs. Representative Iverson answered it would not.

Chairman Eck wondered whether any of the coal being shipped from Montana was being shipped south. Mr. Doney replied there were no pipelines running south. Chairman Eck then questioned whether there were any coal slurry pipelines taking coal to the midwest. Mr. Doney replied there have been proposals to move coal to the midwest by pipelines.

There being no further questions from the committee, the meeting was adjourned at 2:57 p.m.

Dorothy Eck

Senator Dorothy Eck, Chairman

ROLL CALL

Natural Resources COMMITTEE

48th LEGISLATIVE SESSION -- 1985 Date 03/13/85

SENATE SEAT #

NAME	PRESENT	ABSENT	EXCUSED
ECK, Dorothy (Chairman	✓		
HALLIGAN, Mike (Vice Chairman)	✓		
WHEELING, Cecil	✓		
MOHAR, John	✓		
DANIELS, M. K.	✓		
FULLER, David	✓		
CHRISTIAENS, Chris	✓		
TVEIT, Larry	✓		
GAGE, Delwyn	✓		
ANDERSON, John	✓		
SHAW, James	✓		
HARDING, Ethel	✓		

Each day attach to minutes.

DATE 3/13/85

COMMITTEE ON Natural Resources Senate

1:00 P.M. Old Supreme Ct.

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One Support	Check One Oppose
David Lackman	MT Public Health Assn.	HB680	X	
Rich Lorus	APA	HB680		X
Rich Lorus	APA	HB680		X
Don Reed	MEIC	HB680	✓	
Pat Underwood	Mont. Farm Bureau	HB680		X
K.M. Kelly	Mont. Water Develop. Assn	HB680	X	
Ted J. Doney	Self	HB680	X	
Russ Brown	Northern Plains Res Council	HB680	X	
Susan Cottingham	Sierra Club	HB680	X	
Don Sleeper	Sierra Club	HB680	X	
Dan Heinz	Mont. Wildlife Federation	HB680	X	
Terry Murphy	Mont. Farmers Union	HB680	X	
Pete Test	Trout Unlimited	HB680	X	
Phil Rostad	Meagher Co Pres Asn	HB680		X
Richard O Barber	APA			X
Chet Linnieux	APA	HB680		X
Vernon Westlake	APA	HB680		X
Bill Asher	APA, DCLA + MCPA	HB680		X
Rep Bob Bachini	Self	HB680		X
Calvin Burr Jr.	B.L.E.	HB680	AMEND	X
Joe Brand	Self	HB680	[redacted]	X
Jim Muller	BRAC	HB680	AMEND	
Carl Knudson	BMWE	HB680	AMEND	
Jim Goetz	BMWE BRAC BLE			
Mons Teigen	Mt Stockgrowers	HB680	X	
J. Brennan	W.I.F.E.	HB680	—	

(Please leave prepared statement with Secretary)

VISITORS' REGISTER

SENATE AND HOUSE COMMITTEE _____

BILL HB 680 DATE 3/13/15

SPONSOR Iverson

NAME	REPRESENTING	RESIDENCE	SUPPORT	OPPOSE
Ted Schye	Self	Glasgow HB680	Amend	
John Shontz	Self	Sidney	X	
Mary Wright	Trout Unlimited	Helena	X	
Nikki Kolb	League of Women Voters	"	X	

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

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

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

NAME: DAVID LACKMAN DATE: Mch 13,1985 Wed.

ADDRESS: 1400 Winne Avenue, Helena, MT 59601

PHONE: 443-3494

REPRESENTING WHOM? Montana Public Health Association (Legislative Lobbyist)

APPEARING ON WHICH PROPOSAL: HB 680 (Iverson and others) Water Policy Revisions

Senate Natural Resources (Senator Dorothy Eck, Chmn.) Old Supreme Ct room. 1:00 P.M.

DO YOU: SUPPORT? XXX YES AMEND? _____ OPPOSE? _____

Our category : Environment

COMMENT: We feel this legislation protects our ability to go after a stream-flow reservation; as we did in the case of the Yellowstone River. Although the specifics of 680 deal with the Missouri River Basin; the precedents established have far-reaching, favorable implications. Fish, Wildlfie & Parks is coming in for a stream reservation on the upper Clark Fork (Warm Springs Creek to the Milltown Dam). Our over-riding purpose is to preserve the quality of waters in the rivers and streams of Montana. Anyone familiar with the lower Bitterroot River will agree that a reservation is also needed for that river. P// Contrary to opponents, this legislation would not interfere with the rights of agriculturalists to appropriate water. P// I have seen the fiscal note - $1,787,000. However, not all would come from the General Fund. Even though full funding may not be available, we feel that precedents established have much significance for the future. They provide solids guidelines for the most beneficial uses of our precious water. P// The committee is to be commended on a job well done.

We urge your favorable consideration of this bill.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

I agree with Senator Matt Himsl that a surtax on income is a desireable method of raising additional revenue- we survived it once; and can do it again- but that is a subject for another day !

THANK YOU

SENATE NATURAL RESOURCES COMMITTEE
EXHIBIT NO. 1
DATE 031385
BILL NO. HB680

HB 680

Testimony Presented by Jim Flynn
Department of Fish, Wildlife and Parks

March 13, 1985

Mr. Chairman, members of the committee, I appear before you today in support of HB 680, a bill to maximize Montana's interest in the interstate allocation of water, to provide for water reservations in the Missouri River Basin, and amend criteria for water appropriation. Water has always been a critical commodity in the west, and the creation of a permanent Water Policy Committee, proposed by this bill, addresses the seriousness of this issue.

The concept of "water marketing" was introduced in the 1983 legislature. It was unfamiliar to many and left many questions unanswered. The Select Committee on Water Marketing investigated the water marketing issue in detail and recognized the need to address broader water policy concerns.

We have reviewed HB 680 and commend the Select Committee for its efforts. This bill is timely and comprehensive. It protects Montana's fair share of the Missouri River and provides safeguards for existing and future needs. It provides for accurate and timely adjudication which is needed to quantify existing use in the Basin. The timetable for the Missouri River water reservations will ensure that future consumptive and instream uses of water are quantified.

The fish and wildlife of the Missouri River Basin are nationally recognized. They are assured adequate consideration in this water reservation process as well as by the adoption of reasonable use criteria. The department supports HB 680 and would urge this committee to adopt the measure.

WITNESS STATEMENT

Name Mons Teigen

Address Helena

Representing Mont. Stockgrowers & Cowbellys

Bill No. HB 680

Committee On Senate Nat Resources

Date 3/13/85

Support X

Oppose

Amend

AFTER TESTIFYING, PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

1. This bill is necessary to provide some strategy for the future use of the state's water.
2. Our organization supported a similar proposal in the 1983 Session and believe the state's inability to pass that act resulted in a real lost opportunity
3. The letter of intent provides assurance as to the
4. Legislature's intentions as far as agriculture's (continued) use of this vital resource.

Itemize the main argument or points of your testimony. This will assist the committee secretary with her minutes.

FORM CS-34
1-83

SENATE NATURAL RESOURCES COMMITTEE
EXHIBIT NO. 3
DATE 031385
BILL NO. HB680

WATER AVAILABILITY -- UPPER MISSOURI RIVER

Recently there have been serious concerns regarding the availability of water for new consumptive uses in the upper Missouri River Basin above Great Falls. These concerns are the result of several things:

1. Since 1977, the Montana Power Company has objected to applications for water use permits in the Missouri Basin upstream from Cochrane Dam at Great Falls. They claim a water right of 10,000 CFS and that no water is available for appropriation upstream unless Cochrane spills; which generally occurs only during spring runoff.

2. The Bureau of Reclamation objects to new water use above Canyon Ferry on the basis that all water originating upstream from Canyon Ferry Dam is necessary for filling the reservoir and generating hydropower. They claim new water users must obtain water from USBR through a contract rather than from DNRC with a water use permit.

3. The BLM claims a federal Reserved Right in the Wild and Scenic portion of the Missouri River. Some claim this right will severely curtail upstream water development.

What is the water availability situation in the upper Missouri Basin? Is the basin really closed to further water development? If so, why is there such concern for a water reservation and protecting instream flows above Canyon Ferry?

For many years, there was a water availability problem in the Upper Missouri Basin. Both MPC and USBR were objecting to all new applications for water use permits and the permits were held up in the administrative hearings process with no new permits being issued. This is no longer the case. In April 1984, DNRC issued the Canyon Ferry Water Right Order which discounted both MPC's and USBR's objections. This resulted in the bulk issuance of 170 water use permits totaling over 25,000 AF of water, with over 14,000 AF of that above Canyon Ferry. That order has been appealed; however, water use permits continue to be applied for and issued by DNRC.

The BLM claim for the Wild and Scenic reach is just that, a claim. It has not been negotiated with the Reserved Right Compact Commission. No compromises have been discussed, and it must be ratified by Congress or the Legislature. It is premature to judge what impact the BLM reserved right on the Wild and Scenic will have on upstream water availability.

In summary, water is still available for consumptive use in the upper Missouri Basin, and water permits are still being issued. They are issued, however, on a random, first come-first served basis and may affect existing users, future users and the river environment. There is strong support for reserving water for instream purposes as well as for future consumptive use through a well thought out planning and allocation process. The water reservation process will do just that.

Why is there considerable support this session for the water policy bill (HB 680) when there was so much opposition to "water marketing" last session?

The water marketing issue was first introduced in the 1983 legislature. It raised questions about the availability of excess water and the need for state control. In a semi-arid state, selling water to out-of-state users seemed foreign, and a common reaction was one of skepticism.

The original water marketing bills did not pass. Instead, an interim committee, the Select Committee on Water Marketing was formed to investigate the water marketing issue. During the past two years, the Select Committee not only studied water marketing but recognized the need to address the broader water policy concerns to insure adequate state control over water.

The recommendation of the Select Committee on Water Marketing (HB 680) have found considerable support for several reasons. The Committee was able to thoroughly research many of the issues which were left unresolved last session. Questions of unconstitutionality of existing laws and recent Supreme Court decisions were examined. Hearings were held to enable the public to voice their concerns and express their opinions.

The resulting recommendations and proposed legislation of the Select Committee provide substantial safeguards to insure future control of Montana's water and protect the interests of the people of Montana in the future. These safeguards include:

1. Accurate and timely adjudication of existing water rights is encouraged.

2. The water of the Missouri River Basin would be allocated for future consumptive and non-consumptive uses through the water reservation process.

3. An EIS would be required for all leases over 4,000 AF a year or 5.5 CFS and leases must satisfy a set of public interest criteria.

4. A maximum amount of 50,000 AF could be leased without legislative approval.

5. Water would be leased only from existing or future reservoirs and only from those basins which have issued a preliminary or final decree.

6. Reservation are exempted from the leasing program to avoid hardships on agricultural users.

The marketing of water is no longer the mystery it once was. The issues this session are much more clearly defined, and adequate safeguards have been built into the legislation to protect Montana's diverse interests. In addition, the strong water policy statement and reforms put Montana in a much better position to claim its fair share of the Missouri River's waters.

TESTIMONY IN SUPPORT OF HB 680

By Don Reed, Montana Environmental Information Center
March 13, 1985

Madame Chair and members of the Senate Natural Resource Committee, I'm Don Reed and I'm here on behalf of the members of the Montana Environmental Information Center in support of HB 680.

The Montana EIC has participated extensively in the interim committee's deliberations and endorses the package of recommendations in HB 680.

I would like to direct my comments to one little-discussed element of HB 680, placing pipelines under the Major Facility Siting Act. The Select Committee specifically requested comments on what pipelines to cover. We offer our comments here not to criticize the bill, but to let you know what we think is most appropriate.

Section 10 of HB 680 calls for placing all pipelines over seventeen inches in diameter and 30 miles in length under the Siting Act. The key strength of the provision is that it covers all lines regardless of what is transported in the line. This is crucial given the finding of the Select Committee that future coal slurry pipelines might not use water as the transportation medium. More likely candidates are carbon monoxide and methane. Limiting Siting Act coverage to lines which use water would not cover such coal slurry lines.

Second, the determination of which lines ought to be covered should revolve around the environmental impacts of the pipelines. Major pipelines crossing diverse terrain have environmental impacts similar to those found with large electrical transmission lines, which are currently covered by the Siting Act. Such "linear facilities" cross diverse terrain, streams, roads, and environmentally sensitive areas. Moreover, a large pipeline requires the building of a level earthen pad in construction. This has a significant environmental impact. The right-of-way is graded. This creates the potential for noxious weed infestations in the right-of-way and requires the seperation of topsoil for reclamation.

According to the Department of Natural Resources and Conservation, pipelines sixteen inches in diameter and greater require the building of earthen pads. We believe that this is the most appropriate cutoff for which pipelines ought to be covered by the Siting Act. It is based on environmental impacts, not what is carried in the line.

SENATE NATURAL RESOURCES COMMITTEE
EXHIBIT NO. 5
DATE 031385
BILL NO. HB680

Those who oppose placing pipelines under the Siting Act often argue that the process is too cumbersome and takes too long to permit a facility. Such arguments seemed to be based on the experience with power plants. The Siting Act also covers power transmission lines. Numerous powerlines have been permitted under the Siting Act.

An analysis of those power lines already covered by the Siting Act shows that some eighteen transmission lines have received Siting Act certificates. The average time between submission of a completed application and receiving the certificate has been fourteen and a half months. This shows that the Siting Act is capable of dealing with facilities similar to pipelines rather quickly.

We believe that experience shows that the regulation of pipelines under the Siting Act will not present an undue regulatory burden. The benefits of covering pipelines far outweigh those limited regulatory costs.

In summary, Montana EIC supports HB 680 in general, placing all pipelines regardless of contents under the Siting Act, and setting a size cutoff for pipelines that would cover piplines sixteen inches in diameter and greater.

Thank you for this opportunity to comment.

exhibits

PIPELINES UNDER THE MAJOR FACILITY SITING ACT

HB 680, SEC. 10

HB 680, recommended by the Select Committee on Water Marketing, Sec. 10 would place pipelines over 30 miles in length and seventeen inches in diameter under the Major Facility Siting Act (MFSA).

ENVIRONMENTAL IMPACTS

The environmental impacts of pipelines are similar to transmission lines, which are covered under the MFSA. Piplines belong under the act. They can have significant environmental impacts when covering varied terrain. The disturbance of native ground cover in the right-of-way can cause problems with noxious weed invasion. There is also a need to separate topsoil from sub-surface soils for use in reclamation. Crossing diversified terrain causes problems with stream crossings and other "sensitive" areas (such as fragile alpine slopes, marginal vegitative cover, erosion-prone hillsides, etc.). Another major problem is the use of large volumes of water for hydro-static testing (which can dewater marginal streams and cause water pollution).

COMMITTEE RECOMMENDATIONS

The Select Committee recommends placing pipelines under the MFSA. The committee's recommendations are based on the need for adequate environmental review of possible coal slurry or water pipelines. Covering all types of pipelines is necessary for the statute to be constitutional, since pipelines of a similar environmental impact should not be regulated differently.

OPTIONS TO THE LEGISLATURE

1. Adopt current HB 680 language of seventeen inches and thirty miles.
2. Raise the diameter to twenty inches as supported by the oil and gas industry.
3. Lower the diameter to twelve or sixteen inches to cover all lines that require building an earthen pad for construction.
4. Base the cut off on something other than size.

RECOMMENDATIONS

* *All lines that require the construction of level workpads should be covered by the MFSA. Such lines have significant environmental impacts since they require grading large right-of-ways (40 to 50 feet).*

* *Pipelines should be covered by the MFSA irrespective of the content of the line. Coverage of pipelines should be based on the environmental impacts, not the contents of the pipeline.*

SUPPORT PLACING PIPELINES
UNDER THE MAJOR FACILITY SITING ACT

NORTHERN PLAINS RESOURCE COUNCIL

Field Office
Box 858
Helena, MT 59624
(406) 443-4965

Main Office
419 Stapleton Building
Billings, MT 59101
(406) 248-1154

Field Office
Box 886
Glendive, MT 59330
(406) 365-2525

TESTIMONY PRESENTED BEFORE THE
SENATE NATURAL RESOURCES COMMITTE IN
SUPPORT OF HOUSE BILL 680 3-13-85

MADAM CHAIRWOMAN AND MEMBERS OF THE SENATE NATURAL RESOURCES COMMITTEE. FOR THE RECORD, MY NAME IS RUSS BROWN AND I'M TESTIFYING ON BEHALF OF THE NORTHERN PLAINS RESOURCE COUNCIL.

NORTHERN PLAINS IS A MONTANA, NON-PROFIT CITIZENS GROUP, WHOSE MEMBERSHIP IS MOSTLY AGRICULTURALLY BASED.

MANY OF THESE MEMBERS, FROM DEER LODGE TO POWDER RIVER COUNTIES, ARE WATER USERS WHOSE LIVELIHOODS ARE DEPENDENT ON THE RIVERS AND STREAMS THAT FLOW THROUGH MONTANA.

MADAM CHAIRWOMAN AND MEMBERS OF THE COMMITTEE, NORTHERN PLAINS HAS FOLLOWED AND SCRUTINIZED THE DEVELOPMENT AND EVOLUTION OF HOUSE BILL SINCE THE SELECT COMMITTEE BEGAN MEETING AFTER THE 1983 LEGISLATIVE SESSION. WE HAVE PARTICIPATED IN NUMEROUS MEETINGS AND HEARINGS AND HAVE SUBMITTED EXTENSIVE TESTIMONY ON THIS BILL. AS A RESULT OF THIS PROCESS, WE HAVE CONCLUDED THAT HOUSE BILL 680, AS A PACKAGE, IS AN EXCELLENT AND CRUCIAL PIECE OF LEGISLATION.

MADAM CHAIRWOMAN AND MEMBERS OF THE COMMITTEE. THE BI-PARTISAN GROUP OF LEGISLATORS THAT DEVELOPED THIS BILL (IN CONJUNCTION WITH THE ENVIRONMENTAL QUALITY COUNCIL STAFF), WAS ENTITLED THE SELECT COMMITTEE ON WATER MARKETING. HOWEVER, THE LEGISLATION THAT IS NOW BEFORE YOU IS NOT, I REPEAT NOT A WATER MARKETING BILL, BUT A COMPREHENSIVE WATER POLICY BILL THAT IS WELL DRAFTED AND VERY TIMELY.

MADAM CHAIRWOMAN AND MEMBERS OF THE COMMITTEE, NORTHERN PLAINS SUPPORTS HOUSE BILL 680, AS A PACKAGE, AND WE'D LIKE TO STRESS THIS. WE URGE YOU TO RESIST ANY AMENDMENTS THAT WOULD ALTER THE INTENT AND INTEGRITY OF THIS CRUCIAL LEGISLATION. "THANK YOU FOR THE OPPORTUNITY TO TESTIFY.

SENATE NATURAL RESOURCES COMMITTEE
EXHIBIT NO. 6
DATE 031385
BILL NO HB680

League of Women Voters of Montana

Testimony in support of HB 680
Senate Natural Resource Com.

March 13, 1985

The League of Women Voters would like to commend the Select Committee on Water Marketing and the Environmental Quality Council for the extensive research completed during the past two years. The League attended nearly all of their meetings and reviewed the resource material provided.

We support HB 680, not because we are particularily enthused about marketing water, but because we see the importance of making some changes in our water policy and laws to give Montana greater capabilities in managing this vital resource. There are no easy, sure-fire answers to water management. However in light of recent federal court cases, this bill with all its components, is a fair comprimise. Many of the provisions fit into the League's recently adopted water position.

The League is especially concerned about the protection of current water uses and minimum stream flows, as well as providing for future needs. Thus, we strongly support the completion of a reservation system on the Missouri river basin. Reservations will serve as an important tool in working cooperatively and effectively with other states in the basin and in the eventual allocation of the Missouri river between the basin states.

Equally important sections of this bill are the safeguards and criteria for issuing permits, use changes of large appropriations and the marketing of water. Since siting, construction and maintenance of pipelines can have a significant impact on the environment, we strongly support the section placing pipelines under the Major Facility Siting Act.

We support the establishment of a Water Policy Committee, the adoption of a State Water Plan and a water resources data management system as important methods for managing our water resources.

In conclusion, we wish to stress the importance of keeping <u>all</u> the components of this bill together. It is their inter-relationship that will give Montana the control and flexability to properly manage the water in Montana for the benefit of its citizens.

Willa Hall
1502 Peosta
Helena, MT

SENATE NATURAL RESOURCES COMMITTEE
EXHIBIT NO. 7
DATE 031385
BILL NO. HB680

Proposed Amendments to HB 680:

1. Page 1, lines 18-19
Strike: "REPEALING THE BAN ON THE USE OF WATER FOR COAL SLURRY;"

2. Page 1, line 24
Strike: "REPEALING SECTION 85-2-104, MCA;"

3. Page 6, line 1
Following: "purpose"
Insert: ", other than for the mixture of water for coal slurry pursuant to 85-2-104"

4. Page 56, lines 24 and 25
Strike: section 23 in its entirety

Renumber: subsequent sections

SENATE NATURAL RESOURCES COMMITTEE
EXHIBIT NO. 8
DATE 031385
BILL NO. HB680

JAMES H. GOETZ
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35 NORTH GRAND
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TO: Senate Natural Resources Committee
Montana Legislative Assembly

FROM: James H. Goetz

DATE: March 13, 1985

RE: House Bill 680, An Act Revising State Water Policy to Maximize Montana's Interests in the Interstate Allocation of Water; ...[and] repealing the ban on the use of water for coal slurry; etc.

FOR: Brotherhood of Railway and Airline Clerks; International Association of Machinists and Aerospace Workers; The United Transportation Unions; The Brotherhood of Maintenance of Way Employees; and the Brotherhood of Locomotive Engineers

COMMENTS: I testify on behalf of the organizations listed above in opposition to those parts of the bill which seek to repeal Montana's ban on coal slurry. Specifically, Section 323, page 56, of H.B. 680 would simply repeal M.C.A. Section 85-2-104, which provides as follows:

> Slurry Transport of Coal (1) The Legislature finds that the use of water for the slurry transport of coal is detrimental to the conservation and protection of the water resources of the state.
> (2) The use of water for the slurry transport of coal is not a beneficial use of water.

The rationale for repealing the coal slurry ban is not clear. It appears, however, that the select committee felt the constitutional validity of the coal slurry ban is a "close question" and the consequences of incorrectly relying on the ultimate defensibility of the ban are severe, including the possibility that water could be appropriated without significant payment to the State, the pipeline could be constructed outside any significant state regulations except for the Montana Environmental Policy Act, and the State could be liable for the prevailing party's attorney's fees. See p. 4, 10 "Report of the Select Committee on Water Marketing to the 49th Legislative Assembly, State of Montana, December , 1984."

I believe the Select Committee is wrong on all points. First, it is my opinion that the question is not particularly close. Even if it is , however, the consequences of being wrong are not necessarily severe, particularly if anticipatory mitigative steps are undertaken. For example, if the balance of H.B. 680 is passed, then the state will be left in a

SENATE NATURAL RESOURCES COMMITTEE
EXHIBIT NO. 9
DATE 031385
HB680

position of having Montana waters appropriated without payment to the state, should the ban on coal slurry be found unconstitutional. Moreover, should such ban be found unconstitutional, it would appear that any coal slurry pipeline would fall within the ambit of the Montana Major Facilities Siting Act under the present amendments proposed in H.B. 680.

Further, generally speaking, a non-prevailing party is not required to pay the prevailing party's attorney's fees. While there are exceptions to the attorney's fees rule in cases where statutes specifically provide, it is doubtful that such exceptions would apply to a constitutional challenge to the Montana ban on coal slurry. Thus, the rationale of the Select Committee for eliminating the coal slurry ban is weak.

My most important point, however, is that the Select Committee is too cautious in its assessment of Montana's ability to defend the coal slurry ban. While there can be no guarantee that the Montana coal slurry ban would survive a constitutional challenge, Montana's chances of winning are strong. This is largely because the Montana ban is not discriminatory on its face--i.e., it applies to potential coal slurry which would be entirely intrastate, as well as interstate.

Thus, Montana's ban does not discriminate against interstate commerce. This aspect critically distinguishes the Montana ban from the Nebraska statute restricting the out-of-state sale of Nebraska ground water considered by the U.S. Supreme Court in Sporhase v. Nebraska, 458 U.S. 491 (1982). I have addressed that distinction at some length in a paper presented to the Select Committee on July 14, 1984 entitled "The Constitutionality of Montana's Prohibition of the Use of Water for Coal Slurry." I refer the Committee to that paper. The essential conclusion is that the Sporhase case dealt with a restrictive Nebraska ground water statute which explicitly discriminated against interstate commerce in that it forbade export of Nebraska ground water unless the state to which the water was to be exported reciprocally allowed the export of its ground water. The U.S. Supreme Court in the Sporhase case specifically focused on this reciprocity requirement and found it facially discriminatory. The Court said:

> "The reciprocity requirement does not survive the 'strictest scrutiny' reserved for facially discriminatory legislation, Huges v. Oklahoma..."

458 U.S. 958. Montana's ban, however, applies equally to in-state and out-of-state water use. Because of this feature, it is likely to survive a constitutional challenge. The United States Supreme Court has generally accorded states a wide latitude in natural resources cases in recent years except in cases where statutes have had explicit discriminatory features. See generally Commonwealth Edison Company v. Montana, 453 U.S. 609, 618 (1981). This is particularly true in the area of water use. See generally Sporhase, 458 U.S. at 956-957.

In sum, there appear to be no positive reasons advancedby the Select Committee for eliminating the coal slurry ban. Instead, the Select Committee has become too defensive based on a misapprehension of the constitutional vulnerability of the ban. Because the ban will likely survive constitutional challenge and because other less drastic actions may be taken to mitigate the difficulties should the ban not survive, the repealer should be deleted from the bill.

THE CONSTITUTIONALITY OF MONTANA'S PROHIBITION OF THE USE OF WATER FOR COAL SLURRY

by

James H. Goetz

THE CONSTITUTIONALITY OF MONTANA'S PROHIBITION OF THE USE OF WATER FOR COAL SLURRY

by James H. Goetz */

Montana law prohibits the use of water for the purpose of coal slurry by declaring such use not to be a beneficial one. M.C.A. Sec. 85-2-104 provides:

> Slurry transport of coal. (1) The legislature finds that the use of water for the slurry transport of coal is detrimental to the conservation and protection of the water resources of the state. (2) The use of water for the slurry transport of coal is not a beneficial use of water. 1/

This means that an appropriator may not procure a water use permit for coal slurry purposes under Montana law.

The policy underlying the prohibition on the use of water for coal slurry is, as the statute reflects, one founded on conservation of the resource. The Montana Legislature has determined that coal slurry would be detrimental to Montana's vital interest in conservation of its scarce water supplies. There can be no doubt as to the importance of the interest of Montana in preservation of its water resource. On the other hand, with

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1/ "'Slurry' means a mixture of water and insoluble material." M.C.A. Sec. 85-2-102 (12)

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the sizable coal resources in Eastern Montana and with the need for economical transportation of the coal to market, it is arguable that the coal slurry ban unduly burdens interstate commerce in conflict with the U.S. Constitution. In fact, a case has been filed by the Yellowstone Pipeline Company which challenges a broad array of Montana (and Wyoming) environmental laws, including the coal slurry ban: Yellowstone River Pipeline Co., A Wyoming Corporation, v. Montana Department of Water Resources and Conservation, No. CV-83-86 BLG, U.S. District Court, Montana District, Billings Division. 2/

THE COMMERCE CLAUSE

Among the most important of the powers delegated to the Central Government by the U.S. Constitution is the power of Congress to regulate interstate and foreign commerce. Art. I, Sec. 8, cl. 3 providesthat Congress shall have the power "to regulate commerce with foreign nations, and among the several states, and with the Indian Tribes . . . ." By its terms the Commerce Clause is an affirmative delegation of power to the Congress to regulate commerce. The clause, however, has traditionally played a dual role: it is a source of national power, and coupled with the Supremacy Clause (U.S. Const. Art. VI, Sec. 2), it is an inherent limitation on state power,

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2/ The Yellowstone Pipeline Company case was at a very preliminary stage when, on plaintiff's request, a stay order was entered on December 7, 1983, pending final resolution of Intake Water Co. v. Yellowstone River Impact Commission, Civ. No. 1184. The Intake case, which was decided on Oct. 25, 19 has been appealed. Accordingly it appears that there will be little action on the Yellowstone Pipeline case for some time.

commonly referred to as the "dormant" Commerce Clause power.[3] The U.S. Supreme Court recently put it this way:

> Although the Commerce Clause is by its text an affirmative grant of power to Congress to regulate interstate and foreign commerce, the Clause has long been recognized as a self-executing limitation on the power of the State to enact laws imposing substantial burdens on such commerce . . .

South-Central Timber Development, Inc. v. Wunnicke, Comm'r, Dep't. of Natural Resources of Alaska et al, ____ U.S. ____, 52 U.S.L.W. 4631 (May 22, 1984).

The purpose of the Commerce Clause was to promote commercial harmony among the states. As the Supreme Court has put it, the Commerce Clause was designed "to avoid the tendencies toward economic Balkanization that had plagued relations among the colonies and later among the States under the Articles of Confederation." Hughes v. Oklahoma, 441 U.S. 322, 375 (1979).

While the Commerce Clause serves as a limitation on the exercise of state power which burdens interstate commerce, it does not preclude all acts of the state simply because such acts result in some burden on interstate commerce. Some are allowed, some are not. The difficult question is, which are going to be tolerated, which precluded. An early case, Cooley v. Bd. of Wardens of the Port of Philadelphia, 53 U.S. (12 How.) 299 (1851), attempted to reconcile the competing concerns, holding that states are free to regulate those aspects of interstate commerce so local in character as to demand diverse treatment, while Congress alone can regulate those aspects of interstate

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[3] See generally Anson & Schenkkan, Federalism, The Dormant Commerce Clause, and State-Owned Resources, 59 Tex. L. Rev. 71 (1980).

commerce so national in character that a single, uniform rule is necessary. The Cooley text has proved vague. It is not easy to define those activities which are "local" in character and those which are "national."

The modern evolution of the Cooley text has been articulated by the Supreme Court in Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1969), as the following:

> [T]he general rule . . . can be phrased as follows: Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and whether it could be promoted as well with the lesser impact on interstate activities.

Again, the application of this text is not simple - it contemplates the weighing of the burden on interstate commerce against the putative local benefits of the legislation. For example, does the benefit to Montana resulting from the conservation of water by precluding coal slurry outweigh the effects on interstate commerce?

One thread running through many of the recent "dormant" Commerce Clause cases has to do with whether the statute is discriminatory. Ordinarily a state protectionist motive is disapproved. Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981). In the natural resources field the Supreme Court has recently invalidated a New Hampshire statute that prohibited a

corporation, which generated electricity by water power, from transmitting that energy out of state unless the New Hampshire Public Utilities Commission first approved. The Court observed, "Our cases consistently have held that the Commerce Clause of the Constitution . . . precludes a state from mandating that its residents be given a preferred right of access, over out-of-state consumers, to natural resources located within its borders or to the products derived therefrom." New England Power Co. v. New Hampshire, 102 S. Ct. 1096, 1100 (1982). See also South-Central Timber Development, Inc. v. Wunnicke, Comm'r., Dep't. of Natural Resources of Alaska, et al. supra (holding violative of the "dormant" Commerce Clause an Alaska statute requiring that the "primary manufacture" (partial processing) of timber sold from Alaska state lands take place in Alaska).

Conversely, one of the reasons the Montana coal severance tax was found not to be in violation of the Commerce Clause was that it is not discriminatory - i.e. the tax applies equally to Montana coal consumed in Montana and that shipped out of state.

In general, the natural resources cases decided in recent years by the U.S. Supreme Court indicate that the states enjoy a wide latitude in enacting legislation unless the legislation is facially discriminatory. The Court's guidelines can be summarized as follows: (1) The regulation may not blatantly discriminate against non-residents; (2) the impact of the legislation on interstate commerce may not be severe; and (3) the regulation must be based on legitimate local purposes. See Goetz, Federalism and Natural Resources, Prologue, 43 Mont. L. Rev. 155 (Summer, 1982.)

THE SPORHASE CASE

In July of 1982 the U.S. Supreme Court decided Sporhase v. Nebraska, 458 U.S. 941 (1982), invalidating on Commerce Clause grounds a Nebraska statute restricting the out-of-state sale of Nebraska groundwater. The statute required any person intending to withdraw groundwater from any well located in the state and transport it for use in a different state, to obtain a permit from the Nebraska Department of Water Resources. If the Director of Water Resources found that such withdrawal was reasonable, not contrary to the conservation and use of groundwater, and not otherwise detrimental to the public welfare, he would grant the permit, if the state in which the water was to be used granted reciprocal rights to withdraw and transport groundwater from that state for use in Nebraska.

The Court rejected Nebraska's argument that water is not an article of commerce and hence not subject to the Commerce Clause. The Court then strictly scrutinized the Nebraska statute, notwithstanding the Court's recognition of the vital interests of the states, particularly the arid Western states, in conserving their water:

> Because Colorado [the proposed destination state] forbids the exportation of its ground water, the reciprocity provision operates as an explicit barrier to commerce between the two States. The State therefore bears the initial burden of demonstrating a close fit between the reciprocity requirement and its asserted local purpose. Hughes v. Oklahoma, supra, at 336; Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951).
>
> The reciprocity requirements fails to clear this initial hurdle. For there is no evidence that this restriction is narrowly tailored to the conservation and

> preservation rationale. Even though the supply of water in a particular well may be abundant, or perhaps even excessive, and even though the most beneficial use of that water might be in another State, such water may not be shipped into a neighboring State that does not permit its water to be used in Nebraska. If it could be shown that the State as a whole suffers a water shortage, that the intrastate transportation of water from areas of abundance to areas of shortage is feasible regardless of distance, and that the importation of water from adjoining States would roughly compensate for any exportation to those States, then the conservation and preservation purpose might be credibly advanced for the reciprocity provision. A demonstrably arid state conceivably might be able to marshall evidence to establish a close means-end relationship between even a total ban on the exportation of water and a purpose to conserve and preserve water. Appellee, however, does not claim that such evidence exists. We therefore are not persuaded that the reciprocity requirement - when superimposed on the first three restrictions in the statute - significantly advances the State's legitimate conservation and preservation interest; it surely is not narrowly tailored to serve that purpose. The reciprocity requirement does not survive the "strictest scrutiny" reserved for facially discriminatory legislation. Hughes v. Oklahoma, supra, at 337.

Id. at 957-958 (emphasis added).

One federal decision has followed Sporhase. In 1983 the U.S. District Court in New Mexico held unconstitutional New Mexico's prohibition on the out-of-state export of groundwater. City of El Paso v. Reynolds, et al., 563 F. Supp. 379 (D. N.M. 1983). The Court stated:

> New Mexico's embargo bars the export of ground water absolutely; it is an explicit barrier to interstate commerce. Facially discriminatory, it is subject to

> the strictest scrutiny. Defendants must demonstrate that the embargo serves a legitimate local purpose, that it is narrowly tailored to that purpose and that there are no adequate non-discriminatory alternatives. Hughes v. Oklahoma, 441 U.S. 322, 336 (1979). The purpose defendants advance for New Mexico's overall system of ground water regulation is to conserve and preserve the state's internal water supply. They point to the state's long-standing water management laws, institutions, policies and public expenditures as evidence that the purpose is genuine.

Id. at 388-89. The Court rejected New Mexico's purported justification, stating: "The policy of maximizing all 'public welfare' uses of water in New Mexico, and the furthering of that policy by prohibiting interstate commerce in groundwater, is tantamount to economic protectionism." Id. at 390.

SPORHASE APPLIED TO THE MONTANA STATUTE

The pivotal aspect of the statute challenged in Sporhase was the facially-discriminatory reciprocity requirement. If the Montana ban on coal slurry applied only to out-of-state coal slurry, it would be subject to the "strictest scrutiny" and most likely would not survive. The saving feature of the Montana coal slurry ban, however, is the fact that it is not facially discriminatory - it bans coal slurry whether in-state or out-of-state. Accordingly, judicial review of the statute is likely to be more highly deferential.

Conceivably an attack could be made premised on the argument that, while the coal slurry ban is not facially discriminatory, it is de facto discriminatory because in fact virtually all of coal slurry originating in Montana would be destined for out-of-state. This argument would be dependent on facts that would

have to be developed. A similar argument, however, was not favorably received by the Supreme Court in the Montana coal severance tax case. There the Court refused to find that Montana's tax discriminates against interstate commerce even though 90 percent of the coal was shipped to other states under contracts that shift the tax burden to non-resident utilities, and therefore, to citizens of other states. In explanation, the Court observed:

> The Montana tax is computed at the same rate regardless of the final destination of the coal, and there is no suggestion here that the tax is administered in a manner that departs from this even-handed formula. We are not, therefore, confronted here with the type of differential tax treatment of interstate and intrastate commerce that the Court has found in other "discrimination" cases.

Commonwealth Edison Co. v. Montana, 453 US 609, 618 (1981).

In the absence of a discriminatory feature the coal slurry ban is likely to pass constitutional muster. As noted above, the Court has generally accorded states a wide latitude in natural resources cases in recent years. Language in Sporhase indicates that the latitude may be even wider regarding water issues - areas in which the states have traditionally exercised a great deal of control.

In speaking of the state's interest in conservation and preservation of groundwater the Sporhase Court recognized the potency of the state's interest:

> Moreover, in the absence of a contrary view expressed by Congress, we are reluctant to condemn as unreasonable measures taken by a State to conserve and preserve for its own citizens this vital resource in times of severe shortage. Our reluctance stems

> from the "confluence of [several] realities." Hicklin v. Orbeck, 437 U.S. 518, 534 (1978). First, a State's power to regulate the use of water in times and places of shortage for the purpose of protecting the health of its citizens - and not simply the health of its economy - is at the core of its police power. For Commerce Clause purposes, we have long recognized a difference between economic protectionism, on the one hand, and health and safety regulation, on the other. See H.P. Hood & Sons v. Du Mond, 836 U.S. 525, 533 (1949). Second, the legal expectation that under certain circumstances each State may restrict water within its borders has been fostered over the years not only by our equitable apportionment decrees, see, e.g. Wyoming v. Colorado, 353 U.S. 953 (1957), but also by negotiation and enforcement of interstate compacts. Our law therefore has recognized the relevance of state boundaries in the allocation of scarce water resources. Third, although appellee's claim to public ownership of Nebraska ground water cannot justify a total denial of federal regulatory power, it may support a limited preference for its own citizens in the utilization of the resource. See Hicklin v. Orbeck, supra, at 533-534. In this regard, it is relevant that appellee's claim is logically more substantial than claims to public ownership of other natural resources. See supra, at 7-9. Finally, given appellee's conservation efforts, the continuing availability of ground water in Nebraska is not simply happenstance; the natural resource has some indicia of a good publicly produced and owned in which a State may favor its own citizens in times of shortage. See Reeves, Inc. v. Stake, 447 U.S. 429 (1980); cf. Philadelphia v. New Jersey, supra, at 627-628 and n. 6; Baldwin v. Fish and Game Comm'n, supra. A facial examination of the first three conditions set forth in Sec. 46-613.01 does not, therefore, indicate that they impermissibly burden interstate commerce. Appellants, indeed, seem to concede their reasonableness.

Id. at 956-57 (emphasis added). Thus, it appears that Sporhase would have been decided in favor of the State had it not been for

the facially discriminatory reciprocity provision. Since Montana's coal slurry law lacks the discriminatory feature and since its justification is found in the same principles as the Sporhase statute, conservation of scarce water resources, it probably would survive a Commerce Clause challenge. As the Sporhase Court observed:

> Obviously, a State that imposes severe withdrawal and use restrictions on its own citizens is not discriminating against interstate commerce when it seeks to prevent the uncontrolled transfer of water out of the State.

Id. at 455-56.

In sum, "evenhandedness" of application is the key to survival of a constituted challenge. Montana's law appears to be evenhanded and will probably survive.

FUTURE FEDERAL ACTION

It is possible that Congress may attempt to take action to authorize use of water for coal slurry purposes. Since water is an article of commerce (Sporhase), Congress would probably have the constituted authority to enact such legislation under the Commerce Clause. In Sporhase, for example, the Court rejected Nebraska's argument that it "owned" the waters within the State and that its provisions dealing with State waters were beyond the reach of the Commerce Clause:

> If Congress chooses to legislate in this area under its commerce power, its regulation need not be more limited in Nebraska than in Texas and States with similar property laws. Ground water overdraft is a national problem and Congress has the power to deal with it on that scale.

Id. at 953-54. Thus if Congress enacted legislation

which directly authorized use of water for coal slurry, such legislation would probably preempt Montana's ban on slurry.

Under the rules of preemption, however, the conflict between the Federal and State Statutes must be irreconcilable.. The test is laid out by the U.S. Supreme Court in Pacific Gas & Electric Co. v. State Energy Resource Conservation & Dev. Comm'n., _____ U.S. _____,75 L.Ed. 2d 752 (1983):

> It is well-established that within Constitutional limits Congress may preempt state authority by so stating in express terms. . . . Absent explicit preemptive language, Congress' intent to supercede state law altogether may be found from a "scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room to supplement it," "because the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or because "the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose." . . . Even where Congress has not entirely displaced state regulation in a specific area, state law is preempted to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," . . . or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

75 L.Ed. 2d. at 765 (citations omitted). So far the Congress has considered and rejected legislation to provide federal eminent domain powers for the taking of land for coal slurry purposes. If such legislation passed it is doubtful that it would preempt Montana's coal slurry ban because the arguable conflict between the Federal and State laws would probably not be direct enough to warrant displacement of Montana's statute. The resolution of such conf

would ultimately depend on rules of statutory construction and the precise language of the Federal statute.

It is also possible that the Congress may legislatively consent to Montana's coal slurry ban, thereby immunizing it from Commerce Clause challenge. In South-Central Timber Development, Inc. v. Wunnicke, supra, the Supreme Court stated:

> It is equally clear that Congress "may redefine the distribution of power over interested commerce" by "permit(ting) the states to regulate the commerce in a manner which would otherwise not be permissible." Southern Pacific Co. v. Arizona, 325 U.S. 761, 769 (1945).

Such enabling legislation, however, must be clear. In Sporhase, Nebraska argued that Congress had authorized the states to impose otherwise impermissible burdens on interstate commerce in ground water. It based its argument on 37 statutes in which Congress had deferred to state water law and on a number of interstate compacts dealing with water that had been approved by Congress. In rejecting Nebraska's argument the Court said:

> Although the 37 statutes and the interstate compacts demonstrate Congress' deference to state water law, they do not indicate that Congress wished to remove federal constitutional constraints on such state laws. The negative implications of the Commerce Clause, like the mandates of the Fourteenth Amendment, are ingredients of the valid state law to which Congress has deferred. Neither the fact that Congress has chosen not to create a federal water law to govern water rights involved in federal projects, nor the fact that Congress has been willing to let the States settle their differences over water rights through mutual agreement, constitutes persuasive evidence that Congress consented to the unilateral imposition of unreasonable burdens on commerce. In the instances in which we have found such consent, Congress' "intent and policy' to sustain state legislation from attack under the Commerce Clause" was "'expressly stated.'"

458 U.S. at 959-60.

Thus, it is possible to remove any doubt about the constitutionality of the Montana coal slurry ban through clear authorizing legislation from Congress. The political feasibility of that solution is, however, questionable.

CONCLUSION

Montana's coal slurry ban is probably constitutional because the state retains a very strong police power interest in conservation of its water resource and because the statute applies evenhandedly. In light of the statute's constitutional defensibility, efforts to modify the statute are not advisable.

March 13, 1985

Senate Natural Resources Committee
Dorothy Eck, Chairman

Senator Eck and Members of the Committee:

For the Record, I am Vernon Westlake, chairman of the water committee for the Agricultural Preservation Associations. Again, for the Record, Gallatin A.P.A., Park County Legislative Association, and Meagher County Legislative Association oppose H.B. 680 with reservations. I should like to explain why these groups have taken a position with reservations.

We believe that Montana should be developing a water marketing policy and a plan for use of the unappropriated water in-state and out-of-state. We feel that H.B. 680 is not the answer and that it will create a similar situation with water marketing that S.B. 444 did with adjudication and recording of the existing water use twelve years ago. S.B. 444 gave the authority and responsibility to the DNRC to adjudicate and create a centralized record of the existing water use, as Section IX of the Montana Constitution required. I am sure that you are aware of the result; the word in the Legislature was that at the rate the DNRC was progressing, the process would take 50 years and would cost $100,000,000. Let's not make this mistake again.

Our concern is that H.B. 680 gives too much authority to the DNRC, putting it in direct competition with all others for appropriation of surplus Montana water, including future agricultural needs. Not only that, but the jurisdiction of appropriation and adjudication of water could be taken out of the Court system and placed with the DNRC.

We are very concerned with Part A of the Recommendations to the 49th Legislature by the Select Water Marketing Committee. In our opinion, repealing "The Ban on Exportation of Water" at this time is premature, and Section 24 of H.B. 680 is not necessary.

SENATE NATURAL RESOURCES COMMITTEE
EXHIBIT NO. 11
DATE 031385
BILL NO. HB 680

We think that Montana should be very careful about using water for coal slurry. Our main concern is the possible effect of causing railroads an additional financial problem. This, in turn, could reflect in higher freight rates for transporting agricultural products to market. Our groups feel that existing statutes are adequate even though statements have been made to the contrary. Our position is best answered by asking this question: Why haven't export ban and water use for coal slurry been contested by the parties affected?

We also feel that changing the permit criteria from 10,000 acre-feet/year and 15 cubic feet/second to 4000 acre-feet/year and 5.5 cubic feet/second is not in the best interests of agriculture and especially for future in-state development of irrigated agriculture; 4000 acre-feet or 5.5 cubic feet/second is not a large water right. In terms of miners inches, 5.5 cubic feet/second is a flow of 220 miners inches, and I venture to say that the majority of water rights in Gallatin, Park and Meagher counties exceeds that amount.

We realize that the recommended change is addressing the unappropriated water in Montana, however, if this criteria is used to consider agricultural water right applications for the unappropriated water, it would, for all practical purposes, eliminate future development of irrigated agricultural land in Montana because the minimum is too small.

We would support coverage of pipelines under the Major Facility Siting Act, if and when, the pipelines were to be constructed. We believe that the general water adjudication process must be completed before any water pipeline construction should be permitted.

Part B of the Committee's Recommendations addresses the State Water Leasing Program. Our groups feel that this program is premature, and that no leasing should be permitted until the general water adjudication process is completed. I should like to include a very important

concept to consider in the future plan for water leasing.

Our groups are on record in support of the concept of Senator Story's S.B. 299. We recommend to the Committee that the DNRC should not have the authority to approve an application for either a permit or a temporary decree in the name of the Department for unappropriated water - to sell or to lease. We believe that only the Court system should have jurisdiction for water appropriation. The DNRC should function only as an administrative agency for the State of Montana, regarding water use in-state or out-of-state.

Part C of the Committee's Recommendations, titled Maximizing Montana's Fair Share of the Missouri River Basin Water, is the part of the bill that our groups very strongly support. We are on record as having supported general stream adjudication for the past several sessions, but we believe that the language in the bill is not adequate.

We believe that general stream adjudication must be completed in all basins of Montana and preliminary decrees issued to all claimants before unappropriated water can be filed on for selling, leasing, irrigation, domestic, or other purposes, either intrastate or interstate use. We realize that this bill does provide that a basin is adjudicated before unappropriated water could be filed on. Our groups do not approve a piece-meal basin-to-basin approach for allocation of unappropriated water. We feel that completion of the adjudication process will provide a complete inventory of the existing water use and, in turn, give a real basis for a responsible water plan, thus enabling the development of a realistic water policy.

We believe that completion of the existing water use record will put Montana in a much stronger position, legally, than pushing for the immediate sale or lease of water for out-of-state use. Judge Lessley is predicting a completion of general stream adjudication within the

next five to six years, and we feel that the Water Courts will be able to accomplish the task in this period of time, and will ussue preliminary decrees in all basins by 1990.

We support Section 13 of H.B. 680 only if stated as in Section 85-1-205 MCA in its entirety.

We question the need for new Section 15.

We support new Section 19, that there would be a permanent water policy committee of the Legislature.

We believe that former Senator Jean Turnage, now Chief Justice, was referring to these Sections in his letter to the Legislature. I quote: "Many of these recommendations specify those actions that should be taken by the 49th Legislature. Other recommendations set for an agenda of water issues that must be systematically addressed by the Legislature and citizens of the State in years to come."

I conclude by saying: Let's complete the general stream adjudication and then see how much unappropriated water we have for other uses, including sales, leases, and all other purposes. We should move with caution in the development of a policy for marketing Montana water. There is sufficient time and adwquate legislation to satisfy Constitutional requirements for control of Montana water to the benefit of all Montana water users.

Thank you for this opportunity to present our position.

Vernon L. Westlake

Vernon L. Westlake, chairman
Water Committee, Gallatin A.P.A.
3186 Love Lane
Bozeman, Mt. 59715

Mr. Chairman, members of the Committee....

I am Phil Rostad, representing the Meagher County Preservation Association.

I would object to the restriction from 10,000 A F and 15 Cu Second to 4000 A F and 5.5 Cu Second for in state users. If the intent of the legislation is to preserve water for beneficial uses, the larger appropriation would better serve that end. Also, with the trend to fewer and larger agricultural entities the larger reservations would be in the best interests of the state of Montana.

I urge the restoration of the language in the original bill for in-state uses. My further concern is the sale of water in extremely dry years. If an out-of-state concern has a long term contract, who's right will have the prior consideration?

Remove amendment calling for 4000 ft. and 5.5 cu. ft. per second and leave as originally proposed the 10,000 AF and 15 cubic feet per second

P 10 Lines 5 and 6
P 11 Lines 10 through 15 be restored to the bill

P 20 lines 19 and 20
P 21 lines 20 and 21

P 23 lines 24 and 25

SENATE NATURAL RESOURCES COMMITTEE
EXHIBIT NO. 12
DATE 031385
BILL NO. HB680

MONTANA FARM BUREAU FEDERATION

502 South 19th Bozeman, Montana 59715
Phone (406) 587-3153

TESTIMONY BY: Pat Underwood

BILL # HB 680 DATE MAR 13, 1985

SUPPORT _____ OPPOSE X

The Montana Farm Bureau must oppose HB 680, just on the basis that it removes the ban on coal slurry pipelines. We have always been in favor of this ban both in our state organization and our national American Farm Bureau on the national scene.

SENATE NATURAL RESOURCES COMMITTEE
EXHIBIT NO. 13
DATE 031385
BILL NO. HB680

SIGNED

MEMBERS OF THE COMMITTEE:

For the record, I am Jim Durgan, member of the Water Committee representing Park, Gallatin and Meagher Counties in the Agricultural Preservation Association. I have been involved in farming and ranching all my life, and am presently a partner in a farming and ranching operation south of Livingston, Montana. Water is the life blood of our operation, as it is for most of the farms and ranches in our valley. The implementation of the adjudication process as a result of S.B. 76 certainly emphasized the need to identify and document the many demands that are placed upon Montana's water. However, at the time of passage of this legislation everyone agreed that the primary goal - the most important task - was to begin the filing process that would eventually lead to a clear cut, logical distribution of water. Upon completion, water users across the state would have an up-to-date and valid filing on their water, based upon the final decision of the Water Court.

My fear is that H.B. 680 will not allow this adjudication process to reach its logical conclusion. Despite the assurances of the Select Committee, I find no specific reference to adjudication; nor any guarantee that the adjudication process will be completed and the needs of agricultural users be satisfied ahead of any sale to outside interests. I feel that the 49th Legislature should proceed very carefully on this matter. It has been said that here in Montana, "next to our children, water is our most precious resource". Let's not rush into this water marketing without knowing how much surplus water will be available. The directives in regard to policy making in H.B. 680 should be adherred to and given approval. However, the Legislature should hold the line on the appropriation and sale of water by the DNRC.

It should be noted in closing that several water basins in the state have been issued their preliminary, preliminary decrees by the Water Courts. In some instances, the water users were shocked and dismayed to find that their water rights had been altered considerably. They would no longer have the volume of water available to irrigate their crop that has historically and traditionally been necessary to give adequate moisture for optimum growth. All of the water which is no longer [illegible] user

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be siphoned off into the "Unappropriated Water" category? Thus making it available for appropriation and sale by the DNRC. Shouldn't the individual who owns the deeded water right have a share in the sale of said right if it is determined that there is excess water available? I feel that the Legislature is allowing a dangerous precedent to evolve which could set up a tremendous potential for abuse by the DNRC. Under H.B. 680 the traditional concept of "Prior Appropriation" is definitely weakened.

Finally, the change in consumptive use limit [illegible] more acre feet a year or 15 or more cfs down to 4,000 acre feet a year or 5.5 or more cfs of water is grossly unfair to the agricultural user. The original appropriations should be re-instated.

I submit these concerns for your consideration. I have no quarrel with the concept of marketing our water, provided the needs of Montana's water users are met and adequate provisions are made for future use. Only then should the marketing process be allowed to proceed

Thank you,

James R. Durgan

James R. Durgan

Livingston, Mont.

STATEMENT OF INTENT

HOUSE BILL 680

SENATE NATURAL RESOURCES COMMITTEE

A statement of intent is indicated for House Bill 680 because section 21 extends the authority of the board and the department of natural resources and conservation to adopt rules relating to the provisions of the bill. Such extension of authority would include the authority to adopt rules relating to the implementation of water reservations on the Missouri River basin under section 15 and relating to the leasing of water under section 12.

In their implementation of this bill, the long-range goal of the board and the department must be to conserve and protect the water resources of Montana for the use of all Montanans. Since agricultural uses of water constitute the largest uses by far, and a healthly economy of the state depends upon agriculture, the agricultural uses of water in Montana must be particularly conserved and protected.

In developing rules implementing this bill, and in entering into lease agreements with potential water users under section 12, it is the intent of the legislature that the department establish leasing rates which are commercially reasonable and take into account the financial abilities of a particular sector of the economy to lease water at various rates. Accordingly, it is contemplated that leasing rates for agricultural uses of water will be considerably lower than rates for industrial uses, as an example.

It is further the intent of the legislature that water be made available through the leasing program at minimal cost to potential users who may wish to benefit from a water use project of a third party. An example would be an irrigation district or a municipality in Montana that may desire to tap into a pipeline conveying water out-of-state. Provision for such incidental beneficial uses is authorized under section 12(8) of the bill.

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In entering into a lease of water, the department shall include a provision in the lease that other existing or planned uses of water in Montana will be fully protected during a low water year. All of the criteria listed in section 85-2-311, MCA, must be applied and considered by the department before it decides to enter into a lease of water.

In the implementation of water reservations in the Missouri River basin, it is the intent of the legislature that applicants for agricultural reservations be given equal treatment and opportunity to reserve water as that afforded applicants for instream uses. To the extent possible, equal treatment and opportunity includes the provision of financial resources and technical assistance to such applicants.

PROPOSED AMENDMENTS TO HB 680
THIRD READING COPY

1. Page 8, line 20.
   Following: "River"
   Insert: "and its tributaries"

2. Page 20, lines 21 and 22.
   Strike: "clear and convincing"
   Insert: "substantial credible"

3. Page 26, line 5.
   Following: "IN"
   Insert: "inside"

4. Page 29, line 4.
   Following "in"
   Insert: "inside"

5. Page 44, line 15.
   Following: "River"
   Insert: "and its tributaries"

SENATE NATURAL RESOURCES COMMITTEE
EXHIBIT NO. 16
DATE 031385
BILL NO. HB680