

MINUTES OF THE MEETING
SENATE NATURAL RESOURCES COMMITTEE
MONTANA STATE SENATE
March 19, 1985

The twenty-second meeting of the Senate Natural Resources Committee was called to order at 7:51 p.m. by Chairman Dorothy Eck, March 19, 1985, Room 405, State Capitol Building.

ROLL CALL: All members of the Senate Natural Resources Committee were present with the exceptions of Senator Fuller.

FURTHER CONSIDERATION OF HB680: Chairman Eck opened the meeting on HB680 by stating this is an executive session. Chairman Eck stated there are three sets of proposed amendments which need to be reviewed by the committee, including a proposed amendment to the Statement of Intent. Chairman Eck called the committee's attention to the amendments to HB680 already adopted by the committee (Exhibit 1). Chairman Eck reminded the committee members of her intent to not reopen the hearing for testimony and to keep questions to members of the audience specific.

Senator Shaw moved Senator Weeding's amendment retaining the ban on coal slurry, which was previously adopted by the committee, BE REJECTED (Exhibit 2).

Mr. Bob Thompson, staff researcher, stated this would simply involve reinserting the stricken language and striking the language inserted by No. 3 of the proposed amendments.

Senator Gage stated he had voted in favor of Senator Weeding's amendment for two reasons. The first reason was to speed up a determination by the courts on the coal slurry ban. This determination involves determining whether the use of water for coal slurry is beneficial, and whether it is a water conservation measure. Since this time, Senator Gage was informed there is a law which would allow the State of Montana to sue itself in a "friendly" suit to make this determination. Senator Gage feels this would be less costly to the State than an adversary lawsuit. The second reason concerned his fear that if coal slurry takes revenue from the railroads, the freight charges on other commodities shipped by the railroads would skyrocket. Senator Gage feels since water is now covered under interstate commerce, the economic concerns cannot be addressed by a coal slurry ban. Senator Gage stated he does not know whether the coal slurry ban is constitutional, and we will have to get a determination on this from the courts. Senator Gage stated that after speaking with Judge W. W. Lessley, State Water Judge, he does not think it is crucial that the coal slurry ban is in the bill.

Senator Weeding stated he has spoken with persons residing in his district and has discovered these people are concerned about marketing water, a substance so dear to the people of the state of Montana.

Mr. Don MacIntyre, representing the Department of Natural Resources and Conservation (hereafter DNRC) stated some of the factors in the decision-making process involve employment, social and economic effects.

Senator Halligan, referring to the handout from Representative Iverson on the constitutionality of the coal slurry ban (Exhibit 3) stated he needed more specifics on the issue.

Mr. John Thorson, Environmental Quality Council, stated the case of Sporhase v. Nebraska suggests there cannot be an absolute ban on the exportation of water. The coal slurry ban bans the exportation of coal slurry to another state, regardless of whether there is excess water available.

Senator Daniels feels the issue of the constitutionality of the coal slurry ban will have to be decided by the courts, but feels the real issue before the committee is whether to protect the railroad workers' jobs.

Senator Anderson questioned Mr. Thorson as to how the Sporhase v. Nebraska case affects the Montana State Constitution which states the water is the property of the State of Montana. Mr. Thorson replied this case was a blanket rejection that the states have control over the water, and the state Constitution is subject to federal law.

Senator Daniels feels that if the coal slurry ban is left in, freight rates will not escalate. Senator Daniels stated all the citizens of Montana will benefit from leasing state water if the money is placed in the general fund. Senator Daniels reminded the committee that it was evident from testimony at the hearing that if the state does not adopt a water policy, Montana could lose its water. The ban on coal slurry will eventually end up in court anyway, and in the meantime, Montana needs to adopt a water policy act in order to control its water.

Senator Harding questioned Representative Iverson as to whether railroad workers' jobs was given consideration by the interim committee. Representative Iverson stated this issue was given consideration; however, the most important concern of the committee was to adopt a water policy to protect Montana's water.

Representative Iverson stated the Sporhase case made it clear that economic protection is something the federal courts would not tolerate. If the coal slurry ban is left in, it could be construed as a protectionalist policy.

Upon question from Chairman Eck, Mr. Jim Molar stated he did have an opportunity to participate in the hearings conducted by the interim committee, and the railroad workers' jobs were not an issue.

Representative Iverson stated the interim committee attempted to reach a balance among all parties. The committee decided this kind of balance best protected the people of Montana. Representative Iverson feels Montana needs to have a policy which considers more than just a protection plan.

Upon question from Senator Harding as to whether the proposed amendment to the Statement of Intent (Exhibit 4) addresses this policy, Representative Iverson replied it did. Representative Iverson stated he is concerned about the railroad workers' jobs, but it is difficult to determine whether a coal slurry pipeline would affect these jobs.

Mr. James Mockler, Montana Coal Council, stated a pipeline which is only five miles within the border of Montana, but is ultimately over 1,000 miles long, would escape falling under the Major Facility Siting Act. Mr. Thompson explained this is incorrect, and the Major Facility Siting Act applies to the total length of the pipeline, not just the length of the pipeline to the Montana border. Mr. Thompson also explained that from his research, a pipeline with an inside diameter of less than 17" (which is needed to avoid the Major Facility Siting Act) would not be economically feasible.

Senator Weeding questioned Representative Iverson whether he had any indication of the probable course a pipeline from Montana would take. Representative Iverson stated a pipeline carrying coal would probably go to the midwest; however, not all pipelines leaving the state would be carrying coal. Representative Iverson feels it is a possibility a pipeline carrying water could go to the southwest.

Upon question from Senator Christiaens, Representative Iverson stated the 30-mile length for pipelines came from the DNRC. Although Representative Iverson was uncertain this was the proper length to use, he has not heard about any problems with it. Representative Iverson feels this length will cover as many pipelines as possible that carry water.

Senator Shaw's motion that Senator Weeding's amendment retaining the ban on coal slurry, which was previously adopted by the committee, BE REJECTED carried by roll-call vote (Exhibit 5).

Senator Weeding moved the proposed amendment to the Statement of Intent BE ADOPTED. The motion carried.

Mr. Don MacIntyre stated the board studies the impacts of major facilities on employment with or without this amendment to the Statement of Intent. The board requires the applicant and agencies to gather information on the proposed facility's economic and social effects. Mr. MacIntyre feels this amendment will strengthen the ability of the board and the DNRC to not only study these effects, but also to make well-informed decisions.

Senator Gage submitted proposed amendments (Exhibit 6) for the committee's consideration. Senator Gage feels as long as we are trying to protect Montana's water, we should also protect the water belonging to the Indians, since we may have to negotiate with them in the future. Senator Gage feels there are three parties involved in this issue: The Indians, the people of the state of Montana, and the downstream users. Upon question from Senator Christiaens, Senator Gage stated Montana will not be giving up anything by adopting this language.

Mr. John Thorson agreed with the amendments proposed by Senator Gage, stating they were a very good addition to the bill.

Mr. Bob Thompson suggested adding the word "requirements" after "including" in the first two amendments and changing "its boundaries" to read "the state's boundaries." The committee agreed with these proposed changes.

Senator Gage moved the amendments, as revised, BE ADOPTED. The motion carried.

Senator Shaw moved HB680 BE CONCURRED IN AS AMENDED. The motion carried with Senator Daniels voting in opposition.

Senator Halligan noted the bill provides for a lease of water for a term of 50 years and questioned why the 50-year time frame was used. Mr. Larry Fasbender, DNRC, stated it was felt anyone investing this much money in a project should be able to obtain a lease for up to 50 years.

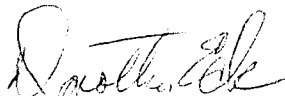
Chairman Eck assigned different aspects of the bill to committee members, so they would be prepared when HB680 is on second reading. Senator Christiaens will take the water leasing program; Senator

Minutes of the Meeting
March 19, 1985
Page 5

Shaw will address the ban on coal slurry; and, Senator Halligan will address the reservation process. Chairman Eck suggested the committee members spend some time with the staff of the Environmental Quality Council to become adequately prepared for their assignments.

The following Senators were appointed to the subcommittee to study HB913: Senator Mohar, Senator Gage and Chairman Eck. Chairman Eck encouraged any other members of the committee to attend.

There being no further business to come before the committee, the meeting was adjourned at 9:08 p.m.



Senator Dorothy Eck, Chairman

ROLL CALL

Natural Resources COMMITTEE

48th LEGISLATIVE SESSION -- 1985

Date 031985
7:30 PM

SENATE
SEAT
#

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

Each day attach to minutes.

Adopted

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 healthy 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.

SENATE NATURAL RESOURCES COMMITTEE

EXHIBIT NO. 1

DATE 031985

BILL NO. HB680

PAGE 2

STATEMENT OF INTENT HB 680

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"

Proposed Amendments to HB 680
Third Reading Copy
March 15, 1985

1. Title, line 20

Following: "~~75-20-216,~~"

Insert: "75-20-202,"

2. Page 33, following line 12

Insert: "Section 9. Section 75-20-202, MCA, is amended to read:

"75-20-202. Exemptions. (1) A certificate is not required under this chapter for a facility under diligent onsite physical construction or in operation on January 1, 1973.

(2) The board may adopt reasonable rules establishing exemptions from this chapter for the relocation, reconstruction, or upgrading of a facility that:

(a) would otherwise be covered by this chapter; and

(b) (i) is unlikely to have a significant environmental impact by reason of length, size, location, available space or right-of-way, or construction methods; or

(ii) utilizes coal, wood, biomass, grain, wind, or sun as a fuel source and the technology of which will result in greater efficiency, promote energy conservation, and promote greater system reliability than the existing facility.

(3) This chapter does not apply to a facility defined in 75-20-104(10)(c) that has been designated by the governor for environmental review by an executive agency of the state for the purpose of complying with Title 75, chapter 1, pursuant to Executive Order 4-81 and prior to [the effective date of this act]."

Renumber: subsequent sections.

Adopted (~~by~~^{Sen} Weeding)
Rejected!

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

Adopted (~~by~~ ^{Sen} Weeding)
Rejected

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. 2

DATE 031985

112100

March 19, 1985

TO: Members, Senate Natural Resources Committee

FROM: Rep. Dennis Iverson, Chairman, Select Committee on Water
Marketing 

RE: Constitutionality of Coal Slurry Ban (MCA § 85-2-104)

On Monday your Committee voted to retain Montana's ban against the use of water for coal slurry purposes, MCA § 85-2-104. This action rejected a major conclusion unanimously reached by the Select Committee (chaired at the time by then-Sen. Jean Turnage) after 18 months of study. During that time, the Committee heard from 18 legal experts on this and other legal issues. Because of your Committee's willingness to reconsider the coal slurry ban issue, I want to summarize the basis for the Committee's recommendation:

I. Arguments in Favor of Retaining the Coal Slurry Ban

The chief proponents of retaining the coal slurry ban have been attorneys Jim Goetz and Karl Englund, both of whom were retained by the Select Committee to critically analyze the policy options facing the State. Goetz has made the following arguments supporting the constitutionality of the ban:

1. That the ban is a water conservation measure fulfilling the state constitutional requirement that "the Legislature shall prevent unreasonable depletion and degradation of natural resources." (Art. IX, § 1)

2. That such conservation measures are allowed under the U.S. Supreme Court's decision in Sporhase v. Nebraska (1982) because the Montana ban is not facially discriminatory (applies equally to intrastate, as well as interstate, pipelines) and does not unduly burden interstate commerce.

Mr. Goetz has since been retained by unions representing railroad workers to advance this position in order to preserve railroad jobs.

SENATE NATURAL RESOURCES COMMITTEE

EXHIBIT NO. 3

DATE 031985

4B1680

Karl Englund, for his part, argued:

3. That the Sporhase case does not automatically apply because it concerned groundwater.

4. That the ban is part of an overall state policy of water conservation evidenced by constitutional and statutory provisions including the reservation, compact, and reservation processes. This policy should satisfy the criteria of the Sporhase case.

II. Arguments Against Retaining the Coal Slurry Ban

Other legal experts, many of whom specialize in water law throughout the West, took the position that Montana's coal slurry ban is unconstitutional or is certainly suspect. Al Stone, Professor of Law at the University of Montana, has concluded that the constitutionality of the ban "is a close question...too close to permit reliance on the statute." He argues:

1. That while the ban purports to be a conservation measure, it is only a "cosmetic touching up" of a prior, unconstitutional statute that barred only the interstate transport of coal by water.

The Select Committee heard from Professor Charles DuMars of the University of New Mexico School of Law. DuMars has particular expertise in this area because he served on a commission appointed by his governor to develop New Mexico's legislative response to similar issues raised in the El Paso v. Reynolds litigation. In addition to his general conclusion that the ban is unconstitutional, DuMars noted:

2. That the ban does not set forth any social, economic, and conservation reasons for imposing the ban.

3. That it is difficult to deny that coal slurry is a useful or beneficial use under the policy stated at MCA § 85-2-101(4): "It is further the policy of the state...to recognize and confirm all existing rights to the use of any waters for any useful or beneficial purposes."

Steven Clyde is a partner in one of the foremost water law firms in the country (Clyde, Pratt, Gibbs & Cahoon of Salt Lake City). While his firm has been retained in the past by the ETSI pipeline firm, Clyde was retained by the Select Committee to give his independent opinion of Montana's ban. While also questioning the unconstitutionality of the ban, Clyde argued:

4. That, by their very nature, coal slurry pipelines involve interstate activity.

5. That Montana could serve its conservation purposes through means having less impact on interstate commerce.

Although not a witness before the Select Committee, Professor Dan Tarlock (who wrote the second most widely used water law case book in the United States with former Stanford Law School Dean Charles Meyers) has written about the Montana ban:

"Montana's special anti-slurry statute does not discriminate on its face against interstate commerce, but its discriminatory effect is clear and it will probably be treated as a per se export ban under Sporhase. The state will have trouble showing the compelling statewide need for the water that was required by the Court's opinion in Sporhase."

Your Senate Committee has also heard from Ted Doney, water attorney and former Director of DNRC, as to his opinion of the unconstitutionality of the ban.

III. Conclusions of the Select Committee

The Select Committee reached several other conclusions about the coal slurry ban:

1. That the ban fails either to protect Montana's jobs or to conserve its waters. All the ban does is to prevent the mixing of water and coal in the same pipeline. Water can still move out-of-state for other uses, and coal can move in a pipeline with a medium other than water.
2. That Montana's valid interests could be satisfied in other means and thus reduce the possibility of litigation.
3. That the state would be liable for the attorneys fees of the other side if it were unable to defend the ban (MCA § 85-2-125).

Thus, while recommending the removal of the ban, the Select Committee has constructed an elaborate means to protect both the economic and environmental interests of the State:

a. Water for virtually any coal slurry pipeline will have to be leased from the state. As a lessor, a state will have the ability to protect by the terms of the contract the important interests of the state and to require an appropriate payment for the water. Also, as a lessor, the state can differentiate in price and types of use.

b. In obtaining leased water, the applicant would have to satisfy the new public interest criteria, the provisions of the Major Facility Siting Act (which include economic effect), and MEPA.

c. In obtaining leased water for out-of-state use, the applicant would also have to satisfy special "out-of-state" public interest criteria which require an even more thorough scrutiny of the project.

In conclusion, members of the Select Committee believe that HB 680 provides carefully constructed protection for Montana's water and its economy. It does so constitutionally and does not invite costly and lengthy litigation.

Proposed Amendment to the Statement of Intent for HB680 (Third Reading
Copy)

March 18, 1985

1. Page 2, following the second (last) paragraph.

Add: "If an application for a slurry pipeline is received by the department of natural resources and conservation under the Montana Major Facility Siting Act, it is the intent of the legislature that the department and board of natural resources and conservation shall consider and document the potential adverse economic impacts, if any, on railroads and railroad employment as required by 75-20-301(3) and 75-20-503. The board shall also, to the extent feasible, require mitigation of these adverse impacts."

SENATE NATURAL RESOURCES COMMITTEE
EXHIBIT NO. 4
DATE 031985
BILL NO. HB680

ROLL CALL VOTE

SENATE COMMITTEE Natural Resources

Date 031985 House _____ Bill No. 680 Time 8:42 p.m.

NAME	YES	NO
ANDERSON, John		X
CHRISTAENS, Chris		X
DANIELS, M. K.		X
FULLER, David	X	(proxy)
GAGE, Delwyn	X	
HALLIGAN, Mike (Vice Chairman)	X	
HARDING, Ethel	X	
MOHAR, John		
SHAW, Jim	X	
TVEIT, Larry	X	
WEEDING, Cecil		X
ECK, Dorothy (Chairman)	X	

Annitha C. Peterson
Secretary

Dorothy Eck
Chairman

Motion: Senator Shaw moved the committee reject the amendments regarding the ban on coal slurry previously adopted.

6039*

Proposed Amendments to HB 680
Third Reading Copy
March 19, 1985

1. Page 11, line 19.
Following: "requirements"
Insert: ", including ^{requirements} for reserved water rights held by the United States for federal reserved lands and in trust for the various Indian tribes within ~~its~~ ^{the state's} boundaries."
2. Page 22, line 7.
Following: "requirements"
Insert: ", including ^{requirements} for reserved water rights held by the United States for federal reserved lands and in trust for the various Indian tribes within ~~its~~ ^{the state's} boundaries."
3. Page 49, line 22.
Strike: "a claim"
Insert: "an application"

SENATE NATURAL RESOURCES COMMITTEE

EXHIBIT NO. 6

DATE 031985

BILL NO.

HB680

STANDING COMMITTEE REPORT

MARCH 21

19 85

MR. PRESIDENT

We, your committee on NATURAL RESOURCES

having had under consideration HOUSE BILL No. 680

THIRD reading copy (BLUE)
(BLAYLOCK) color

WATER POLICY REVISIONS

Respectfully report as follows: That HOUSE BILL No. 680

be amended as follows:

1. Title, line 20.
Following: "75-20-2167"
Insert: "75-20-202,"

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

3. Page 11, line 19.
Following: "requirements"
Insert: ", including requirements for reserved water rights held by the United States for federal reserved lands and in trust for the various Indian tribes within the state's boundaries"

4. Page 20, lines 21 and 22.
Following: "by" on line 21
Strike: "clear and convincing"
Insert: "substantial credible"

~~XXXXXX~~

~~XXXXXX~~

5. Page 22, line 7.

Following: "requirements"

Insert: ", including requirements for reserved water rights held by the United States for federal reserved lands and in trust for the various Indian tribes within the state's boundaries"

6. Page 26, line 5.

Following: "IN"

Insert: "inside"

7. Page 29, line 4.

Following: "in"

Insert: "inside"

8. Page 33, line 13.

Following: line 12

Insert: "Section 9. Section 75-20-202, KCA, is amended to read:

"75-20-202. Exemptions. (1) A certificate is not required under this chapter for a facility under diligent onsite physical construction or in operation on January 1, 1973.

(2) The board may adopt reasonable rules establishing exemptions from this chapter for the relocation, reconstruction, or upgrading of a facility that:

(a) would otherwise be covered by this chapter; and

(b) (i) is unlikely to have a significant environmental impact by reason of length, size, location, available space or right-of-way, or construction methods; or

(ii) utilizes coal, wood, biomass, grain, wind, or sun as a fuel source and the technology of which will result in greater efficiency, promote energy conservation, and promote greater system reliability than the existing facility.

(3) This chapter does not apply to a facility defined in 75-20-164 (10)(c) that has been designated by the governor for environmental review by an executive agency of the state for the purpose of complying with Title 75, chapter 1, pursuant to Executive Order 4-81 and prior to [the effective date of this act]."

Renumber: subsequent sections

9. Page 44, line 15.

Following: "River"

Insert: "and its tributaries"

10. Page 49, line 22.

Following: "file"

Strike: "a claim"

Insert: "an application"

AND, AS AMENDED
BE CONCURRED IN

STATEMENT OF INTENT
ADOPTED AND ATTACHED

Page 3 of 3
STATE PUB. CO.
Helena, Mont.

.....
SENATOR DOROTHY ECK

.....
Chairman.