

MINUTES OF THE MEETING
JUDICIARY COMMITTEE
50TH LEGISLATIVE SESSION
HOUSE OF REPRESENTATIVES

March 6, 1987

The meeting of the Judiciary Committee was called to order by Chairman Earl Lory on March 6, 1987, at 8:00 a.m. in Room 312-D of the State Capitol.

ROLL CALL: All members were present with the exception of Rep. Bulger and Rep. Hannah who were absent and Rep. Daily who was excused.

SENATE BILL NO. 134: Senator Beck, District No. 24, sponsor, stated this was a bill to make the crime of conveying a dangerous drug to a person, subject to official detention, a felony punishable by a prison term not to exceed ten years. He presented Mr. Chisolm of the Department of Institutions who spoke further on the bill.

Kurt Chisolm, Deputy Director of the Department of Institutions, explained it was the department's desire to make it a felony to smuggle a weapon into an inmate of the prison. They want to include the provision it is also a felony punishable by ten years in prison for smuggling a dangerous drug into the prison. Approximately 4 or 5 times a year, individuals are caught trying to transfer illegal soft drugs into the prison. A person convicted of the offense of unauthorized communication shall be fined not to exceed \$100.00 or imprisoned in the county jail for any term not to exceed 10 days, or both. This bill would help correct some of the major problems in the Montana prison system.

There were no further proponents, no opponents and no questions from the committee.

Senator Beck closed the hearing on Senate Bill No. 134.

SENATE BILL NO. 102: Senator Story, District No. 41, stated this was a short technical bill that was simple and straight forward. It was a correction to the water right laws passed recently. Where there are ditch rights, they are measured simply by flow rights. Reservoirs which have, historically, been measured by both flow and volume will still be measured by flow and volume. Other rights, such as water spread, are measured by volume. The reason for the amendment and the importance of it, was that most of the rights were for irrigating and were ditch rights. The new constitution guarantee the old rights which were measured in flow.

PROPOSERS: Phil Strobe, Attorney, representing the Sweet Grass Company Preservation Association, stated the bill would ease people's fears. The water court would be able to go on and there would be a quicker adjudication of the remaining rights. He urged passage of SB #102.

Eugene Manley, former chairman of the Granite County Water Users Association, and secretary to the Allendale Irrigation Company, represented the concerns of the water users in the Flint Creek Basin and what should be the concerns of the water users in Rock Creek Basin. He stated the bill attempted to address the problems with, and the removal from adjudication the necessity of the so called "volume caps". He submitted written testimony. (Exhibit A).

Carol Mosher, representing the Montana Cattle Women and the Montana Stockgrowers, stated they supported the bill because it helped to reaffirm that their rights are secure and being treated in the same way as they had historically been treated down through the years. She also asked the Farm Bureau Federation be added to the record in support of the bill.

Debra Brammer, representing the Montana Association of Conservation Districts, went on record in support of the bill.

There were no further proponents and no opponents.

QUESTIONS (OR DISCUSSION) ON SENATE BILL NO. 102: Rep. Cobb asked Senator Story how the department was now measuring the water. Senator Story stated they were not measuring them, they were objecting to them. They were objecting on the basis that the volume was far more than anyone needed. Water is never wasted, it is used in one right and then flows back into another stream and then is used in another right. He said there was no practical way of monitoring volume.

Rep. Grady noted there was nothing in the bill about miners inches. Senator Story said that miners inches and cubic feet per second were both measures of flow. All the old rights were in miners inches and this bill referred to flow rate. Rep. Grady asked Senator Story what effect this would have on the present adjudication system. Senator Story said the effect would be that they no longer would be asking ranchers to add volume as well as flow rate to their adjudication. Senator Story asked Mr. Strobe to answer the question. Mr. Strobe stated for 40 or 50 years in Montana history, one almost could not abandon a water right by non-use. Whatever was on paper would stand up in court

proceedings. Currently, a holder of a right must put the water to beneficial use.

Rep. Lory asked Senator Story, since 1973, one had to file on both flow and volume. Senator Story said if a new right were filed, as of 1977, it required filing on both flow and volume.

Senator Story closed the hearing on SB #102 by stating the bill was a necessary and good bill.

SENATE BILL NO. 225: Senator Halligan, District No. 29, stated the bill was a uniform act and dealt with marriage and dissolution and was a uniform premarital agreement act. This act is allowed under Montana statute presently but there were no guidelines set up. The uniform act was a tool for setting up a premarital agreement.

PROPOSERS: Bruce Barrett, Attorney for the University of Montana students, presented written testimony. (Exhibit A). He stated the major points of the act were that it allowed agreements which may be amended by parties during marriage. The act would require a judge to observe the agreements, which are difficult to overturn, and those who chose one would be given certainty and predictability.

Anne Hamilton, stated the premarital agreements were a good thing and it was good that the bill had flexibility to allow changes after marriage.

There were no opponents.

QUESTIONS (OR DISCUSSION) ON SENATE BILL NO. 225: Rep. Mercer asked Mr. Barrett about the new section on page three, regarding the unconscionable standard. Mr. Barrett said the section was what made it hard to overturn an agreement by a judge. Basically, the law allows someone to enter into an unfair agreement as long as he knew what he was doing. Rep. Lory stated he received a letter from a lady in Western Montana pursuant to this kind of agreement, and she requested an amendment be added stating that when assets are found that are not listed in the agreement, they should be listed as community property. Rep. Lory asked what Mr. Barrett thought of the idea. Mr. Barrett said that first, the seriousness of the non-disclosure would have to be decided and then the judge would have to decide what to do with the property. He felt the bill was better without the amendment.

Rep. Mercer said the letter referred to was asking for us to require that any agreement such as this had to specify the property, and if it was not listed, it should be treated as

joint property. Mr. Barrett said there was a right to waive disclosure in the bill.

Rep. Eudaily asked Mr. Barrett when it would go into effect. He said it would go into effect on the date of marriage.

Senator Halligan closed the hearing on Senate Bill No. 225.

EXECUTIVE SESSION:

ACTION ON SENATE BILL NO. 134: Rep. Brown moved that SB #134, Be Concurred In. Question was called and a voice vote was taken. The motion carried unanimously. SB #134 BE CONCURRED IN.

ADJOURNMENT: There being no further business to come before the committee, the hearing was adjourned at 9:25 a.m.



Earl Lory, Chairman

DAILY ROLL CALL
JUDICIARY COMMITTEE

50th LEGISLATIVE SESSION -- 1987

Date March 4, 1987

NAME	PRESENT	ABSENT	EXCUSED
JOHN MERCER (R)	✓		
LEO GIACOMETTO (R)	✓		
BUDD GOULD (R)	✓		
AL MEYERS (R)	✓		
JOHN COBB (R)	✓		
ED GRADY (R)	✓		
PAUL RAPP-SVRCEK (D)	✓		
VERNON KELLER (R)	✓		
RALPH EUDAILY (R)	✓		
TOM BULGER (D)		✓	
JOAN MILES (D)	✓		
FRITZ DAILY (D)		✓	✓
TOM HANNAH (R)		✓	
BILL STRIZICH (D)	✓		
PAULA DARKO (D)	✓		
KELLY ADDY (D)	✓		
DAVE BROWN (D)	✓		
EARL LORY (R)	✓		

STANDING COMMITTEE REPORT

MARCH 6,

19 **87**

Mr. Speaker: We, the Committee on **JUDICIARY**

report **HOUSE NO. 134**

do pass
 do not pass

be concurred in
 be not concurred in

as amended
 statement of intent attached

Chairman

TRIP

reading copy (**BLUE**)
color

MR Chairman, MR Vice Chairman, members of the committee, for the record, I am Eugene Manley, former Chairman of the Granite County water Users Association, and Secretary of the Allendale Irrigation Company.

I represent the concerns of the water users in the Flint Creek Basin and what should be the concerns of the water users in the Rock Creek Basin on this bill that attempts to address the problems with and remove from our adjudication the necessity of the so called "volume caps".

I would like to direct your attention to Senate Bill 102, Section 1, paragraph (5) (b), subsection (i). I believe the bill would be more acceptable if subsection (i) read "by flow rate only for direct flow rights such as irrigation rights". (PERIOD)

It was in the Flint Creek basin that the controversy first arose over attempts to quantify irrigation water rights by volume. As DNRC members and the Water Courts are aware, I have been the most vocal opponent. I am well aware of the disastrous long range consequences if we continue in the present direction in our basins. You cannot define ~~a limitation on~~ beneficial use by attempting to generically cap all water rights! This is a simplistic approach to a very, very complex problem. (Our current approach to the adjudication process is analagous to the continuing approach to the farm credit problem).

1. First, I will address the Flint Creek Basin and what we have learned from experience over the past 48 years. The Allendale Irrigation Company once operated with a system of volume caps. The tendancy during those years was that water users started "saving water" very early in the Spring when it was plentiful and readily available. Thus, we did not get the maximum early season usage in the upper basin. This heavy early season usage is vital in order to recharge the aquifer which in turn starts an early return flow and stabilizes stream flow later in the year. As a result of the early spring "water saving" practices, we annually developed a logistics problem in that we could not meet the demands for water later in the season. I was finally able to convince the water users to forget the volume caps and promote heavy use during the spring in the upper basin. Benefits from the heavy use were realized almost immediately. Within a very few seasons using this practice, there was a noticable difference in a heavier down stream flow every year and it has continued that way ever since. In 1985, the driest year we have had in the Flint Creek Basin, we still had stable stream flow and were able to fill

all rights. Under the system of volume caps, we would have had a dry creek bed!

Lets look at another disturbing aspect of volume caps. On an adjudicated stream such as Flint Creek, rights at some point in the season are going to be prioritized by volume, not by priority date. I want you to think about the legal implications and the amount of litigation we will have at a point in time when a very senior right becomes subrogated to a junior right. Junior rights that in some cases were, in the past, enlarged contrary to law.

One of the things we have never understood in our Basin is that after the controversy over volume caps arose, changes were initiated in response to our concern. Volume caps were raised in other basins in July and August of 1984. Our objection period was ended on September 3, 1984 and on September 6, the Water Court issued the order raising our caps. Many of the attorneys with whom I worked told me that at that point in time, either the objection period should have been reopened or the Temporary Preliminary Decree withdrawn and re-issued. The raising of the volume caps drastically altered what the previous objections might otherwise have been.

In the Flint Creek Basin we have 1035 claims. There were 870 objections of which over 600 were over volume. We have already spent a tremendous amount of money and effort on the volume cap issue. Removal of the volume caps will speed up our adjudication process and eliminate the probability of needless costly litigation. We can adjudicate our irrigation rights on the basis of flow rate alone. *** (see footnote)

2. Rock Creek as you know is a Blue Ribbon Trout Stream. Volume caps on Rock Creek would have a devastating effect. Claimants on this creek have never had water measured. I doubt they can relate to flow rate, let alone volume. When the realization hits them that they have only 10 to 50 percent of the water necessary for crop production, it will be too late to rectify a very serious problem. They and the State of Montana will have lost 50 to 80 percent of their productive capacity. Land without water! A legally defensible right will be superceded by a number of claims that far exceed the flow rate of Rock Creek. Among them, claims by Fish, Wildlife and Parks to over 6800cfs which is the flow rate of Rock Creek at flood stage! None of these claims on Rock Creek were objected to!

Example: Last summer, on one large ranch in the Rock Creek Basin, we were able to work with the owner and set up measuring devices. That ranch, given the current volume caps, would have enough water to last until the first week in June.

In all of this controversy, please remember that the bottom line on every decreed ~~claim~~ now reads, "The volume of this right shall not exceed "X" number ~~acre~~ feet of water. A rather ~~convincing~~ finality.

Once the adjudication based upon flow rate is in place, and the need should arise in the future, we could have the necessary information documented to make a more judicious decision as to what volumes should be. Bear in mind that Montana is a water creating state and not a water consuming state such as Kansas and Nebraska.

*** Volume caps do not inventory water, rather, they give a very distorted picture of the amount of water that is available in any given basin.

Eugene Manning

EXHIBIT A
DATE 3-6-87
SB#225

UNIFORM PREMARITAL AGREEMENT ACT

Main points

I. Status of Pre-marital Agreements in Montana

- a. Virtually no case law
- b. Montana "Divorce" Laws require judge to consider Pre-nuptial agreements, but gives them no more weight than any other factor. (MCA 40-4-202(1)).
- c. No predictability for enforcement of agreement, difficulties in tax, estate, and other planning.

II. Parties Benefiting From Act

- a. Older parties entering 2nd marriage seeking to protect & preserve their estate for their first family
- b. Educated professionals who wish predictability and to formalize their economic relationship.

III. Major Points Of The Act

- a. Allows Agreements
- b. Agreement May Be Amended By Parties During Marriage
- c. Requires Judge To Observe Agreement, Agreements difficult to overturn
- d. Though agreements will not be common, those who choose one will be given certainty & predictability

TESTIMONY OF BRUCE BARRETT, ATTORNEY
1945 McDonald
Missoula, MT 59801 542-2563/243-6213

VISITORS' REGISTER

JUDICIARY

COMMITTEE

SENATE
BILL NO. 102

DATE March 6, 1987

SPONSOR _____

NAME (please print)	REPRESENTING	SUPPORT	OPPOSE
<i>Regene Miley</i>	<i>Senate Water Issues</i>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
<i>Carol Mosher</i>	<i>Nat. Cattle Women</i>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
<i>Lorna Frank</i>	<i>MT. FARM BUREAU</i>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
<i>Bob Grammer</i>	<i>MT. ASSOCIATION Conservation Districts</i>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
<i>Phil Stope</i>	<i>Wildlife Pres. Co</i>	<input checked="" type="checkbox"/>	<input type="checkbox"/>

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

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

