MINUTES

MONTANA HOUSE OF REPRESENTATIVES
51st LEGISLATURE - REGULAR SESSION

COMMITTEE ON NATURAL RESOURCES

Call to Order: By Chairperson Bob Raney, on February 1, 1989, at 3:02 p.m.

ROLL CALL

Members Present: All members present with exception of:

Members Excused: Rep. Tom Hannah

Members Absent: None

Staff Present: Claudia Montagne, Secretary; Hugh Zackheim, Staff Researcher, Environmental Quality Council

Announcements/Discussion: None

HEARING ON HB 461

Presentation and Opening Statement by Sponsor:

REP. BOB REAM, House District 54, opened on the bill, which he said dealt with the Water Development Program. He said that under the state's Resource Indemnity Trust Fund, 30% of the revenues were earmarked for water development projects. He said HB 461 added or encouraged water efficiency programs or projects, and recognized these as a valid use of the funding. It would not change the priorities already established in the law, but recognized an additional factor to consider in the evaluation process on water development projects.

Testifying Proponents and Who They Represent:

Stan Bradshaw, Montana State Council of Trout Unlimited
George Ochenski, Alliance for Montana Water
Jo Brunner, Montana Water Resources Association
Robert A. Ellis, Helena Valley Irrigation District
Carol Mosher, Montana Stockgrowers Association, Montana Cattlewomen's Association
Jim Jensen, Montana Environmental Information Center

Proponent Testimony:

STAN BRADSHAW said Trout Unlimited had been actively involved in the last few years in the State Drought Task Force and also in water planning processes in the state. In both cases, he said there was considerable discussion about water use,

efficiency, and water conservation, discussions made more intense because of the drought. A sense emerged from that process that water use efficiency could in many instances enhance the state's capability to deal with a scarce resource.

MR. BRADSHAW said it was appropriate to be looking at the Water Development Grant Program, and what in that program specifically addressed water use efficiency. He said grants had been made for projects whose primary function was to increase water use efficiency. Ironically, he added, the statute did not make water use efficiency as one of its specific objectives. He said the language in HB 461 provided some encouragement and legislative intent that development or rehabilitation projects which increase water use efficiency are a legitimate and valid use of the grant moneys.

GEORGE OCHENSKI said he urged the bill be given a do pass recommendation.

JO BRUNNER testified as set forth in EXHIBIT 1.

ROBERT ELLIS said he concurred with Ms Brunner's statements, and added that all federal projects had for the past two years been under mandate to increase their water efficiency and to report to the Bureau of Reclamation. He also said that improvements in efficiency often meant moving to a sprinkler system. He commented that the cost of electricity would have to be part of the water efficiency program.

CAROL MOSHER testified in support of the bill because it could allow for a larger acreage usage with the same amount of water. She said the irrigator would then find it beneficial to go the Resource Indemnity Fund to ask for money to improve his/her methods of irrigation.

JIM JENSEN said the bill addressed the water development programs that the State of Montana funded. He said it was a matter of public policy that MEIC supported the efficient use of a scarce resource, and thus supported the bill.

Testifying Opponents and Who They Represent:

None

Opponent Testimony:

None

Questions From Committee Members:

REP. BROOKE asked Rep. Ream if the proposed language in this bill would mean Mountain Water Company could come in with a grant application to fix its leaky pipes and improve its

efficiency in its water delivery. REP. REAM stated that was not what he had in mind when he introduced the bill. He commented that there had been grants made that dealt with leaky ditches or water delivery systems.

REP. BROOKE stated that she knew of two projects in the Missoula area, one being the leaky pipes and the other the Rattlesnake water system, to provide more efficiency for water delivery, and said that a section of the bill did state "promotion of private water development." She asked if these projects could qualify for grants under this bill. REP. REAM said both of those were owned by Mountain Water Company, rather than the city, and deferred to a representative of DNRC.

GARY FRITZ, Department of Natural Resources and Conservation (DNRC) said that a private corporation or company or private individual could apply for a grant in the Water Development Program.

REP. CLARK asked Robert Ellis if he was requesting that his electric bill be paid for running the sprinkler system. MR. ELLIS said no, that he was asking that it be stabilized. He said his electric bill had tripled since the time he installed his sprinkler system. He said Montana Power had told him that they had a surplus of cheap power in the summer months. Now they said that they had other uses for it, and the prices kept climbing. He suggested that there be some method to stabilize the cost of electricity so that it would not escalate beyond the means of the owner to operate.

Closing by Sponsor:

REP. REAM stated that he had served on the State Water Planning Advisory Council where there was much discussion on water use efficiency. He said the kind of efficiency that he was speaking of in HB 461 would benefit everyone. He encouraged the committee to give the bill a DO PASS.

DISPOSITION OF HB 461

Motion: REP. ADDY moved the bill DO PASS.

Discussion: None

Amendments, Discussion, and Votes: None

Recommendation and Vote: The motion CARRIED unanimously.

HEARING ON HB 367

Presentation and Opening Statement by Sponsor:

REP. O'KEEFE, House District 45, said the bill had been drafted at the request of the Department of Natural Resources and Conservation (DNRC), and had been reviewed by both administrations. He said it was designed to deal with the problem having to do with loans made to private entities by the Water Development Program. He said HB 367 would allow the department to use funds in the Water Development Special Revenue Account and Water Development general bond proceeds to protect loans made to private individuals in Montana under the program. He said that, to date, about 55 loans had been made totalling over $4 million.

REP. O'KEEFE then pointed out some important items in the bill. First, he said the bill allowed the department to use these funds, but did not require that the funds be used on projects that were about to go into default. Second, the bill was an attempt to protect Montana's security interests. Lastly, he referred to the Statement of Intent (EXHIBIT 2) and directed the committee to pay particular attention to the last sentence which read that "every effort will be made to avoid forced loan collections". He said the state did not want to be in the banking business any more than it was right now.

Testifying Proponents and Who They Represent:

Gary Fritz, Department of Natural Resources and Conservation
Jo Brunner, Montana Water Resources Association

Proponent Testimony:

GARY FRITZ said the state was in the lending business through the Water Development Loan Program, a part of which included loans to private individuals. That is what this bill addresses. He said there were 55 loans out, made over a period of time since 1983. He said it was inevitable that at some time, the state would be in a default situation on one or more of these loans, and that it would be necessary that the state have the tools to collect on those loans. He said HB 367 would allow the department to do that.

MR. FRITZ said that loan recipients used real estate to secure their loans, and that often there were liens ahead of the department. To collect on the loans in default, he said it could be necessary to buy out the lien in order to gain control of the property. The state would then sell the property and use the proceeds from the sale to recoup the cost of buying out the first lien, as well as to pay off the loan itself. He said that when the department had a loan in default, it sometimes needed to be able to spend money to

operate or maintain that particular project until a buyer could be located.

MR. FRITZ said there were two sources of funds to provide revenues for the department to do these kinds of things. One was the Water Development Special Revenue Account and the other was the Water Development Account, where the general obligation bond proceeds went. The reason that there was money available was that bonds were sold in anticipation of making these private loans. He said there were times when those private loans fell through, creating unused bond proceeds that could be used for the purpose addressed in the bill. He said the proceeds that the department received from selling the property would go back to repay the original costs.

JO BRUNNER testified as set forth in EXHIBIT 3.

Testifying Opponents and Who They Represent:

None

Opponent Testimony:

None

Questions From Committee Members:

REP. GILBERT asked Rep. O'Keefe if there was any language in the bill that would require the state to actively market the property at fair market value or at a value that would retrieve the purchase price plus the lien. He said he would feel more comfortable if that language could be included. REP. O'KEEFE said he would not have any objections to that, and said it could even address some of the concerns that Jo Brunner expressed. He asked Gary Fritz how that could be worded so that the fair market value could be obtained as soon as possible. MR. FRITZ said the department would follow standard banking procedures. He said they were not interested in owning property, but were interested in making certain the loans were secure. He suggested including language in the Statement of Intent, making it clear that the department would follow those kinds of procedures when property was acquired.

REP. GILBERT said he had a problem with the Statement of Intent, because it did not become part of the statute. REP. O'KEEFE said he would work with the researcher and the Department of Natural Resources and Conservation on this and bring it back to the committee.

REP. BROOKE asked Gary Fritz if the scenario described in the fiscal note was typical, if the lands held in lien were less than the value of the repayment costs, and how often those kinds of figures would exist. MR. FRITZ responded with an

example of a potential problem loan to a person in the Fairfield Bench area. He said the security was 130 acres, appraised at approximately $100,000. He said there was a prior lien of $41,000, and the water development loan was in the amount of $48,568. He suggested that this situation might be one in which the tool provided in the bill would work. He said there were other situations in which that would not work. He said there were situations in which there was not enough security to cover both the prior lien and the loan due to the declining values in agricultural land. He said the approach used in that instance would not be the process being talked about in this hearing. Instead the department would work with the borrower to make certain that the payments would keep coming in. REP. BROOKE commented that in that case, the department would still be second in line, and MR. FRITZ agreed. REP. BROOKE asked how frequent the occurrence of this scenario would be, considering declining property values in Montana. MR. FRITZ said there were possibly several such instances, but did not have an exact count.

REP. MOORE asked if the department looked at the market value before granting the loan. MR. FRITZ said the department went through an evaluation process, which was quite thorough in the analysis of the property and prior liens, and what the project would return to the individual in terms of being able to repay the loan. He said the department was in the same situation as many banks and lending institutions, which was that agricultural land had declined in value significantly over the last few years, and what had appeared to be sufficient security a few years ago might not be today.

REP. COHEN asked Gary Fritz if he would give the committee an idea of a few of the other projects under this program. MR. FRITZ said another good example was a hydropower project, the loan on which the department was pursuing foreclosure. He said the bill would allow the department to step in and operate that project, so that the department would at least get some revenues back to help repay the loan until a buyer could be found. He added that the vast majority of these projects were agriculture and irrigation projects.

Closing by Sponsor:

REP. O'KEEFE closed, stating that the main purpose for the private loan program's development was that it was illegal for legislators to appropriate state money to private individuals. He said the Department of Natural Resources and Conservation was asked to manage this program. He said the department was now asking the committee to untie its hands so that the financial decisions that the Legislature asked the department to make on its behalf could be accomplished to the best advantage of the state.

DISPOSITION OF HB 367

Motion: REP. O'KEEFE moved the bill DO PASS.

Discussion: None

Amendments, Discussion, and Votes: REP. O'KEEFE moved an amendment to address Rep. Gilbert's concerns. REP. GILBERT stated he would like to see language requiring the state to make an active effort to sell the property and to receive the proper amount, or fair market value.

REP. RANEY suggested that the researcher develop this language and review it with DNRC. He said the committee would then consider the amendment in executive action at a later date.

Recommendation and Vote: REP. O'KEEFE WITHDREW his motions.

HEARING ON HB 399

Presentation and Opening Statement by Sponsor:

REP. MARK O'KEEFE, House District 45, said the bill was the traditional biennium permit system water rights clean-up bill. He said it essentially dealt with general revisions to the water rights statutes. He said there were four major sections. He said the first stated that the only way a person could irrigate was with permission from the landowner. The second section stated that permits would only be issued when water was reasonably available at the point where it was to be withdrawn from the source. He said section three allowed for a three year trial change of water use. He said this would come into play when a type of use or place of use was changed. Currently, there was a burden to prove that the change would not adversely affect other water rights users in the basin, a long and involved process. He said this section would allow the department to try that change to see if it would adversely affect the situation. Section four provided for the measuring and distributing of water by the water commissioner, including permitted rights. He said that currently, there were water commissioners throughout the state who, because of the existing statute, were unsure whether they were just allowed to deal with existing, pre-1973 water rights or could deal with post-1973 permitted water rights as well.

Testifying Proponents and Who They Represent:

Don MacIntyre, Department of Natural Resources and Conservation
Stan Bradshaw, Montana Council, Trout Unlimited

Proponent Testimony:

DON MACINTYRE, attorney, testified as set forth in EXHIBIT 4.

STAN BRADSHAW said he was not there to support or oppose the bill, but rather was there to point out a potential problem with Rep. Iverson's bill that the committee might be considering in a week or so. He referred specifically to the possessory interest language in HB 399 under the change section that Mr. MacIntyre had discussed. He said that as he understood it, a person changing a right or place of use in irrigating somebody else's property would need the permission of the owner of the property to be irrigated. He said that if HB 707, a bill to allow leasing to in-stream flow purposes under the change proceeding, and this bill both passed, there could be some difficulty. He said that in many cases on a stream, the streambed was owned by the adjacent land owner. If the leasing bill met with the committee's approval, this statute would inadvertently put the applicant with the burden of having to acquire permission of how ever many people there were down the stream through whose property the water was flowing. MR. BRADSHAW said he wanted to apprise the committee of this situation that could require some adjustments to either or both statutes if the committee should decide to approve both. He said it was not the intent of Mr. MacIntyre or Rep. O'Keefe to cause problems with HB 707.

Testifying Opponents and Who They Represent:

Carol Mosher, Montana Stockgrowers, Montana Cattlewomen, and Montana Association of State Grazing Districts

Opponent Testimony:

CAROL MOSHER said that she opposed the bill from the point of view as a water rights holder and an irrigator. She said the present law stated that, in order for DNRC to issue a permit, the department must look at the entire water source, while HB 399 identified the point of diversion. She said there was quite a difference in those two things. She said the statute would have the potential of conflict and adverse affects to a senior water user who might be remote from the point of diversion.

MS MOSHER continued with the language that would basically approve a trial change for three years. She said this could invite large investments in new sprinklers and other irrigation equipment by that permit holder. At the end of that three year trial period, that permit holder would be hard to shut down because of that financial investment. She said she had been told there was no need for a three year trial period because there was plenty of data today to show who would suffer from a change. Again, she said, the senior water users in that system would suffer through periodic

diminishments of those private water users' rights during the trial period. MS MOSHER said this section could triple the amount of water litigation in the state. She claimed that the section making this law retroactive to all proceedings pending before the DNRC was changing the rules in the middle of the game and therefore inappropriate.

Questions From Committee Members:

REP. ROTH said Ms Mosher was describing a situation where there was a source and three water users with one water user downstream from numbers one and two. He said she stated that number one's rights could be infringed upon and asked how that could happen. MS MOSHER said it could occur because there would be unappropriated water available upstream. Thus the person could pump water from upstream and affect the other two below.

REP. ADDY asked Don MacIntyre to comment on this situation. MR. MACINTYRE stated that under the permitting process, the permit was junior in time to any existing right that was on the stream at the time. If there was not sufficient water for the senior, the junior permittee would not be entitled to take water. He said that was what the permit system was based upon. He said the proposed change was no different than the laws that existed before permitting existed in the state of Montana, or prior to July 1, 1973.

MR. MACINTYRE said the comment was made that there could be an adverse effect on some other party by this change. However, he directed the committee to the criteria, already in the law. There was no intention of altering those criteria. He repeated that the water rights for the prior appropriator would not be adversely affected. One of the criteria was that there was unappropriated water from the source of supply. He said the next test was whether or not that senior water right holder would be adversely affected. He said the department did not intend to change that, and would continue to look at it as it stood now.

REP. ADDY re-stated the issue. He said there were four water users, "one" with excess water, and "three" without. He said both tests would have to be met; i.e., there would have to be excess water at the new point of diversion, and no adverse effects to other water right holders before the permit would be issued. MR. MACINTYRE said if "one", "two", and "three" were already currently on the stream, and "four" was coming on, the permit would be denied if any of those current water rights were adversely affected. If "four" was further downstream, there would not be a problem because the water would have already left their return flows, and he would get the right. The problem would occur if he was above the others, and in that situation, the department would protect them.

REP. ADDY asked Ms Mosher if the explanation from Don MacIntyre answered her concerns. MS MOSHER said his explanation would be acceptable theoretically, but was not the way it worked practically. She said there could be unappropriated water upstream, and the permit could be issued to an upstream user. The senior water user downstream could be adversely affected. She said the difficulty was in the proof. REP. ADDY asked her if the theory that the statute set out answered her concern, but the actual practice did not. MS MOSHER said that was true and repeated that there could be unappropriated waters at that point of diversion. In order to satisfy the senior water rights user at some other point, there should not be a permit issued.

REP. GILBERT said he had some concerns regarding the three year change. He asked about the case in which a permit for a trial change or diversion was granted, and the individual made a substantial investment. He asked how the department could justify shutting the water user's rights off in a water shortage situation when the individual had the crop in the ground and the equipment in place.

DON MACINTYRE answered that the bill did not address permits, but instead was dealing with existing water rights and existing users, and changes in that use. He said that as the law stood at present, the user would attempt to prove that there were no adverse effects to people senior or junior to him. If his change would adversely affect either group, the change would be denied. If, however, it could be proven that the change did not appear to adversely affect either juniors or seniors, authorization would be given to go forward. At that point, the applicant for the change would also be at risk. The decision to make the investment to change to a sprinkler irrigation system would be based upon the decision of the DNRC.

MR. MACINTYRE continued with the same example, and made the assumption that the individual did affect another water right holder. Under the laws, that affected individual would have to go to district court, and if successful, the other would be forced to close down and lose the investment. He said the bill was not putting anyone at new risk, but might change the risk. It said that if the person applying for the change could give the department enough information so that it appeared that there would be no adverse effects, the department would give permission. The administrative agency would maintain jurisdiction so that after one, two or three years of a test period, a new determination could be made based on hard evidence. He said the risk was still the same, or perhaps greater under the present system.

REP. GILBERT commented that Mr. MacIntyre was assuming that the stream had no tributaries, and said that the department would allow an individual with a right to move the point of diversion. On a stream with two tributaries, when an

individual presently lower in a stream moved irrigation rights to a higher point upstream above a tributary, it could affect the source. He asked how the department would address that problem. MR. MACINTYRE replied that the department could do something about that, and that it was a part of the process. If that user wanted to move upstream, she/he would still have to show that there was a lack of adverse effect on others.

REP. GILBERT asked if the change would be permitted with stipulations, and how the department intended to handle drought situations, or other acts of nature. MR. MACINTYRE said the department anticipated the trial changes to be conditioned on various facts. He referred the committee to the criteria in the bill, and said the applicant would have to show evidence that there would not be substantial injury. He would also have to show that there would be beneficial use, that he had adequate means of diversion, and that he could meet the new criterion of possessory interest. In other words, the applicant would have to show a likelihood of success, and the agency would be given the discretion to permit the trial change so that it could develop hard evidence as to the adverse effects.

REP. GIACOMETTO asked if an individual would still have to go to the district court to appeal. MR. MACINTYRE said an individual would not appeal a trial change in court since it would still be within the jurisdiction of the department. All the evidence would then be developed, the hearing process would be completed, and the permit would be either denied or granted. At that point it would be appealable to district court.

REP. GIACOMETTO asked if, in the middle of that process, there was a drought and adverse effects were experienced, an individual could then go to district court to try to stop that process. MR. MACINTYRE said that if the irrigator, for example, was actually taking water so that he was adversely affecting others, this law would not prevent the affected individual from going into district court. Generally the injured party would ask for temporary relief in the form of an injunction. He said the bill was not intended to take away anyone's remedy. He also reminded the committee that this bill gave the department the discretion to go to a trial change.

REP. GIACOMETTO asked Carol Mosher to comment on the section that Mr. MacIntyre was addressing. MS MOSHER said that an attempt to stop an illegal use of water took time, money and caused hard feelings. She said the committee was missing the point, and referred the members to the language which indicated that it was possible that all of the source of supply could be at the point of proposed diversion.

Closing by Sponsor:

REP. O'KEEFE said there was a great deal of difference between water law theory and water law practice, a point which Ms Mosher was trying to bring out to the committee. He said the committee would have to take some time with HB 399. He said the root of the problem with the Stockgrowers' complaint had to do with the language "shall issue a permit". He said that for years the department had been unable to use discretion in the issuance of permits. The Legislature was not willing to give it the "may" there. He said that the department was insuring that the "shalls" under which it operated were the "shalls" that protected people in situations like the ones Ms Mosher mentioned.

Regarding the change requirement, he referred to Rep. Thoft's experience in the Bitterroot in trying to get a trial change, in which he had to prove no adverse effects to the department. He said the change procedure could be just as expensive as stopping an illegal diversion with the department's help. He said he would bring other comments on the bill into the committee for consideration in its deliberations.

DISPOSITION OF HB 327

Hearing 1/27/89
Executive Action 1/27/89 and 1/30/89

Motion: REP. GIACOMETTO moved the bill DO PASS AS AMENDED.

Discussion: REP. COHEN said the bill directly involved leasing the Cenex lands on the North Fork of the Flathead. He said he had sent a copy of the bill to the Superintendent of Glacier Park, and would like to consult with him. He said the area of the North Fork that the Cenex leases were on was an area that had been under a great deal of discussion. He said that the Canadians had recently agreed not to mine the coal mines of the North Fork, and there were concerns regarding oil leases in proximity to Glacier Park. REP. COHEN asked for the opportunity to gather additional information.

REP. GIACOMETTO said the bill addressed the issue of the potential loss of the lease. He asked Rep. Cohen how the concerns he was expressing would affect the bill. REP. COHEN replied that, had Cenex complied with the letter of the law, they would have never been taken to court. He said they were appealing the District Court decision to the Supreme Court. He commented that if Cenex had believed it could get by with a short-cut, and it failed, it would not behoove the legislature to extend their the corporation's lease agreements. He added that once the legal question was answered and the leases expired, Cenex along with others

would have the opportunity to bid on those leases again, if it was still the policy of the state to lease those particular lands for oil development.

REP. COHEN continued, stating that when state-wide legislation was passed to provide relief for one specific case, the legislature was possibly opening a flood gate. He repeated that he wanted additional time to gather information, and if Rep. Giacometto did not want to wait, he would make a motion to "TABLE".

REP. RANEY said his concern was that everyone who took a lease with the intention of drilling and producing knew that they had to comply with the Montana Environmental Policy Act. He asked why the Legislature would want to consider an extension of the lease, when that was the very understanding from the very beginning. REP. GIACOMETTO replied that the language stated that despite due care and diligence and if the individual was making every effort to develop the mineral, the board could make the decision to offer or extend the lease. He asked what was wrong with letting that Board make that determination, and suggested that it would put some "common sense" into the law.

REP. GILBERT said according to the court decision, Cenex did not make the error. The Department of State Lands made the error by issuing a permit without doing an environmental impact statement (EIS). He said the court determined that it was necessary to do an EIS, and thus the judgement of the department was overruled. He added that the bill was intended to be a state-wide bill, and that the example used happened to be the one in that area. He said the bill stated that anywhere in the state when a lease was in litigation, the individual did not lose the lease. With the dollars that individual had tied up in the lease, the only recourse the individual had was to sue the state for the lease money.

REP. ROTH reminded the committee that the state would be liable for those payments if it was determined that it was not the companies' fault. He encouraged support for the motion.

REP. HARPER commented that amendments had been adopted in previous executive action, and suggested that the committee look at some additional language. He said it was his understanding that there might be some problems with the amendments already placed on the bill. REP. RANEY said that the committee had reconsidered the bill on January 30, and had amended the amendments in question.

REP. GIACOMETTO responded to the issue on dealing with the lease and said that the language was now "lease or leases within the immediate area". He said in state law, a lease could only be one section, and that was expanded to include the

area of the entire lease, which could consist of a number of sections in the immediate area.

REP. HARPER asked if the litigation would then only apply to the leases in the immediate area, and REP. GIACOMETTO said yes. REP. HARPER commented that the committee was using the word litigation generically, and asked about the situation in which the litigation was initiated at the behest of the lease holder. He asked if that had been covered.

REP. RANEY requested that the secretary read the amendments to the bill and requested that copies of the amendments be provided to the Committee.

REP. KADAS asked when Rep. Cohen expected to hear from his constituent. REP. COHEN said he was attempting to make contact with the Superintendent of Glacier Park, and was hopeful that he would have his comments soon.

REP. OWENS suggested that the Glacier Park area did not have a lot to do with this. He said the leases in question were in another area and that Cenex had leased these in good faith from DSL. He said if there was a problem, it would be with the DSL. REP. RANEY said he could be correct, but his concern was taking action without reviewing the amendments further.

Recommendation and Vote: REP. GIACOMETTO WITHDREW his motion. REP. RANEY announced that executive action would be taken on Wednesday, February 8.

ADJOURNMENT

Adjournment At: 4:35 p.m.

Bob Raney

REP. BOB RANEY, Chairperson

BR/mc

2712.MIN

DAILY ROLL CALL

HOUSE NATURAL RESOURCES COMMITTEE

51th LEGISLATIVE SESSION -- 1989

Date 2-1-89

NAME	PRESENT	ABSENT	EXCUSED
Rep. Bob Raney, Chairman	✓		
Rep. Ben Cohen, Vice-Chairman	✓		
Rep. Kelly Addy	✓		
Rep. Vivian Brooke	✓		
Rep. Hal Harper	✓		
Rep. Mike Kadas	✓		
Rep. Mary McDonough	✓		
Rep. Janet Moore	✓		
Rep. Mark O'Keefe	✓		
Rep. Robert Clark	✓		
Rep. Leo Giacometto	✓		
Rep. Bob Gilbert	✓		
Rep. Tom Hannah			✓
Rep. Lum Owens	✓		
Rep. Rande Roth	✓		
Rep. Clyde Smith	✓		

STANDING COMMITTEE REPORT

February 1, 1989

Mr. Speaker: We, the committee on Natural Resources report that HOUSE BILL 461 (first reading copy -- white) do pass .

Signed: _____

Bob Raney, Chairman

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2-1-89
461

____HB 461_____Rep.Ream_____Feb. 1, 1989___

___Committee_____Natural Resources_____

___Support_____X_____Oppose_____Amend_____

Montana Water Resources Association_____ Jo Brunner, Ex. Secretary_

The Montana Water Resources Association is in support of HB461.

We recognize that it is financially beneficial to our individual operations, specifically, and in general to those who have their eyes on any water saved by more effecient irrigation programs, such as sprinkler systems, gaged gates, timed coverage and so on.

While we continue to have great concern for the aquifers normally replenished by what may seem to some as uncaring waste of water, and for the benefits derived to irrigators, municipalites, fisheries, and others from returned flows, we also recognize that there are also benefits in conservation methods, and we support this legislation to help irrigation projects and programs, as has been done in the past.

Perhaps our greatest concern is what will happen once this bill is made law. Is this a face value effort, or will funds be provided to ensure programs are funded? We realize that there is indeed a shortage of financial support for all programs, not just water, and that the funds have to be allocated and shared. We question the adviseability of passing these amendments if the programs cannot be carried out.

Montana Water Resources Association is a very strong advocate of storage facilities, in fact, we consider the most beneficial method of water conservation is to build storage facilities--you cannot seperate storage facilities from conservation.

You will note that the first amendment to this law is on line 18, page 1 of the bill, right after the words,----- development of offstream and tributary storage.------- On page 4, line 3 you will find-----the promotion of the development of offstream and tributary storage.--------

Again, we do support this bill, but, we have to be realistic about new programs being financed, when, in our opinion even more necessary and beneficial programs included in the existing law are not even being considered.

EXHIBIT 2
DATE 2-1-89
HB 367

STATEMENT OF INTENT

This bill would allow the Department to use funds in the water development special revenue account and water development general obligation bond proceeds to protect loans made under the water development private loan program.

The program has made approximately 55 loans totalling $4 million to private individuals for, primarily, irrigation projects.

In the event that any lien holder or the Department would have to foreclose on any of these loans, the Department would need to be in a position to protect its security interests. These loans are primarily secured with real estate mortgages. In those instances where the Department is not in first lien position and a foreclosure is necessary, the Department would need funds to buy out the first lien holder in order to gain control of the property. The property would then be resold to recoup the funds used to buy out the first lien as well as the Department's initial loan funds.

This bill would also allow the Department to use these funds to operate a project if a loan should go into default. If the loan recipient should walk away from a project, the Department may need to temporarily operate the project to secure its interests until foreclosure proceedings are complete. An example would be a hydropower project which requires continual attention to guard against breakdown or damage.

This bill is intended to give the Department access to funds which would be used to protect its security interests when other loan collection efforts have not worked. Every effort is and will be made to avoid forced loan collections.

EXHIBIT 3
DATE 2-1-89
HB 367

____HB367_____Rep. O'Keefe_____Feb. 1, 1989_____

____ Committee_____House Natural Resources_____

____Support____X_____Oppose_____Amend_____

____Montana Water Resources Association, Jo Brunner, Ex. Sec.___

The Montana Water Resouces Association is generally in support of HB367. We certainly appreciate the necessity of any investor being able to protect the investment. And when it means using the financial aid for our development programs to protect the programs, should it be necessary, we believe the amendments will provide that protection.

MWRA, however continues to have concerns over the state owning water projects that could be in conflict or competiton with private industry/water user interests. Section 3, page 10, (2) (b), lines 7-13 [c] and Section 4, line 19, page 10.

We would hope that should DNRC find it necessary to obtain properties under this procedure, that the Department also use the opportunity to lease or sell such properties to the private sector. Upon passage of this bill, MWRA will continue to encourage the department to handle any properites obtained in this manner, whenever feasible.

EXHIBIT 4
DATE 2-1-89
HB 399

TESTIMONY OF THE MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION HOUSE BILL 399

The proposed amendments to the water right statutes are intended to prevent unnecessary delays and litigation resulting from administrative processing. These amendments are expected to streamline and clarify some of the approval requirements for water rights permitting and administration. A brief explanation of each proposed revision is provided below.

Section 1

This section clarifies that a groundwater appropriator of less than 100 gpm (gallons per minute) must have an ownership interest in the proposed place of use. The law currently provides that the appropriator have an ownership interest in or consent from a landowner at the well location in the appropriation works. Now the DNRC can grant a Certificate of Water Right for the development of groundwater for use on property that is not owned by the developer. The landowner may not want the water development to proceed to protect his ownership interests. The DNRC receives a number of inquiries each year from landowners asking why the developer was allowed to appropriate groundwater for use on the landowner's property. The DNRC has explained that no restriction is placed on the developer under current law. If this revision were made to the statute the landowner would be protected from unnecessary water developments and the DNRC would spend considerably less time responding to complaints that have no administrative remedy.

This would effectively eliminate the development of groundwater on property owned by someone other than the developer, unless the developer has permission from the landowner. Water right ownership conflicts between a developer and a different landowner would be more easily resolved. This revision would also prohibit a person from acquiring exclusive water rights to a groundwater project controlled and owned by several individuals without their permission. As the statute is now administered, an appropriator may legally withdraw water from a well that is on another person's property and may apply for an increase for the place of use from the DNRC without the landowner's approval. This proposed amendment would make it clear that any new or additional appropriation of groundwater would need landowner approval.

EXHIBIT 4
DATE 2-1-89
HB 399

An example would be a tenant seeking a Certificate of Water Right for increased withdrawals from a well to expand irrigation for lawn, garden and horse pasture without the landowners knowledge. The landowner (landlord) may not want his property to be irrigated beyond historical practices, but will find that the tenant has committed considerable land to irrigation and has significantly altered the past land use practices. The landowner would have been protected from the unwanted development if the tenant would have been required to obtain landowner consent prior to receiving the groundwater Certificate of Water Right.

Another example would be when a homeowner seeks to appropriate water for a common use area within a subdivision without the consent of the owners of the common use area. If one owner wanted to install a pond or irrigate a garden within the common use area, appropriating water for that use would require permission from the owners of the common use area under the proposed revision.

Section 2

Currently a water right permit may be granted by the DNRC when water is available anywhere within the drainage basin. The statute does not specify that water must be reasonably available at the point where it will be withdrawn from the source. This amendment would clarify that water must be reasonably available at the proposed point of diversion within the drainage. This amendment is consistent with pre 1973 water law. In addition the proposed change would make it clear that water right permits may be granted by the DNRC for amounts of water and intervals of time less than that requested in the application. Objectors have argued that the statute requires DNRC to deny a permit application when water is not available for the full amount and for the entire period requested in the application. This interpretation if accepted by DNRC could prohibit potential users from receiving a permit when lesser amounts of water may be available, or full amounts may be available for an interval of time less than requested in the application. The amendment makes it clear that DNRC can continue to issue permits for appropriations of water that would be of beneficial use, and for amounts and periods less than the maximums requested.

The possessory interest criteria in the proposed place of use described for groundwater appropriations of less than 100 gpm would also be incorporated into the review criteria for permit applications. The landowner would need to give consent to new water development before a developer could appropriate water on land where the landowner has an interest.

Section 3

Historically a person has had the right to change a water right. The central test as to whether the change may take place is adverse affect to other water users. Because lack of adverse affect is often difficult to prove prospectively, this amendment would allow the DNRC to approve a water right change for a limited time to determine whether an adverse affect actually occurs. In this way both objectors and applicants maintain an administrative remedy and can avoid potential costly and time consuming litigation. The water user would have an opportunity to test the feasibility of a change in the point of diversion, place of use, place of storage or purpose of use with this revision. The trial operation would provide the user with information on the suitability of the change. This would then add to the DNRC final decision-making process and result in a more informed and reasonable determination on the merits of the change. If an applicant for a change under current law received authorization and later found the change to be inefficient and desired to return to the previous use another authorization to revert back would be required. A trial change would avoid this result.

The possessory interest described for groundwater of less than 100 gpm and for permit applications would also be incorporated into the approval criteria for changes in surface and ground water appropriations. The landowner would need to confirm a change in a development using water on land where he has an interest.

Section 4

Existing law provides for the admeasuring and distributing of water, including permitted water rights, by a water commissioner. All water rights, whether judicially decreed or administratively permitted, are subject to a water commissioner's control and distribution. The proposed language clarifies that permitted water rights are subject to a water commissioner's responsibility on decreed sources

to require suitable headgates. Currently the argument could be made that the water commissioner has no authority to require a permittee to have a measuring device where water is being diverted from a source. This amendment would clarify that a measuring device (headgate) would be necessary for a permittee to withdraw water from a source on which a water commissioner has been appointed by the court.

An example would be when a water user with a permit is diverting water on a decreed stream without the benefit of a headgate. The rate of his diversion cannot be determined by the water commissioner, and thus the commissioner has no effective control on the water user. The user would be clearly subject to the distribution authority of the water commissioner if this amendment is made.

VISITORS' REGISTER

Natural Resources COMMITTEE

BILL NO. HB461 DATE 2-1-89

SPONSOR Rep Rehm

NAME (please print)	REPRESENTING	SUPPORT	OPPOSE
Marvin Barber	A.P.A.	HB461 X	
Stan Bradshaw	Trout Unlimited	✓	
GEORGE OCHENSKI	AMW	✓	
Carol Mosher	Mt. Stockgrowers Assoc.	✓	
Jim Jensen	MEIC	✓	
Jim Brunner	MWRA	✓	
Bill Ellis	MVID	C	
Kim Enkerud	State Grazing Dist.	✓	

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PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

VISITORS' REGISTER

Natural Resources COMMITTEE

BILL NO. HB 367 DATE 2-1-89

SPONSOR Rep O'Keefe

NAME (please print)	REPRESENTING	SUPPORT	OPPOSE
Marvin Barber	A.P.A.	HB 367 X	
~~[illegible]~~	~~[illegible]~~	~~X~~	
[illegible]	MKPA	✓	
Dean Dailey	DNRC	✓	

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

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VISITORS' REGISTER

Natural Resources COMMITTEE

BILL NO. HB 399 DATE 2-1-89

SPONSOR Rep O'Keefe

NAME (please print)	REPRESENTING	SUPPORT	OPPOSE
Marvin Barber	H.P.A.		X HB399
GEORGE OCHENSKI	A M W		
Stan Bradshaw	Trout Unlimited		
Jack Galvand	WETA		X
Carol Mosher	Mt. Stockgrowers Mt. Cattle Women		X
Lorna Frank	Farm Bureau		X
Jim Jensen	MECC	✓	
[illegible]	Mobil	✓	
Dave Darby	DNRC	X	
R H ENNIS	HVID	X	
Don McIntyre	DNRC	X	
Kim Enkerud	State Grazing Dist.		X

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