

MINUTES

MONTANA SENATE
51st LEGISLATURE - REGULAR SESSION

COMMITTEE ON AGRICULTURE

Call to Order: By Chairman Tom Beck, on February 3, 1989,
at 1:00 P.M.

ROLL CALL

Members Present: Senators: Hubert Abrams, Gary Aklestad,
Esther Bengtson, Gerry Devlin, Jack Galt, Greg
Jergeson, Gene Thayer, Bob Williams, and Chairman Beck

Members Excused: None

Members Absent: None

Staff Present: Doug Sternberg, Legislative Council
Debbie Thompson transcribed the minutes

Announcements/Discussion: None

HEARING ON SENATE BILL 169

Presentation and Opening Statement by Sponsor: Senator
Bengtson presented the water rights bills as a package.
She presented testimony on Some Basics concerning the
Water Rights Adjudication Process (Exhibit 1). She
said this explained the division of the Montana water
courts, the current adjudication laws, review of
claims, and the issuing of decrees by the water courts.

Senator Bengtson discussed the water rights adjudication
bills by request of the Water Policy Committee (Exhibit
2). She explained the hiring of the consultant firm of
Saunders, Snyder, Ross & Dickson to evaluate the
adjudication process and make recommendations. She
said the package of four bills, SB 169, SB 166, SB 167,
and SB 168 were a result of these recommendations.

List of Testifying Proponents and What Group They Represent:

Jack Ross representing Saunders, Snyder, Ross & Dickson
Jo Brunner representing Montana Water Resource
Committee
Carol Mosher representing Montana Stockgrowers and
CattleWomen and the Montana Association of State

Grazing Districts
Lorna Frank representing Montana Farm Bureau
Ed Steinmetz representing Montana Water Court

List of Testifying Opponents and What Group They Represent:

Don MacIntyre representing Department of Natural
Resource and Conservation

Testimony:
Proponents:

Mr. Jack Ross, member of the firm of Saunders, Snyder, Ross & Dickson, P.C., of Denver, Colorado, testified in support of the bills. He said that his firm was the one employed by the Water Policy Committee to make a review of the adjudication process. He made a brief statement of why the recommendations had been made.

Mr. Ross said the Colorado water rights adjudication system was similar to the Montana system. His firm has over 128 years of actual experience in adjudicating water rights and has seen most of the problems emerge when one tries to adjudicate rights. They were able to bring to the study their background on the issue to the Water Policy Committee.

The consulting firm did not conclude that the Montana system required a massive overhaul or change, but did suggest some fine tuning. He said if the process worked better it would assure that when the person has his water right decreed and had been through the entire process, he would know that it is going to be a valid water right throughout the entire watershed in which his subbasin was located.

Mr. Ross said that SB 169 does two things of real substance. The first one is that it gives legislative approval to the historic practice of water courts entering temporary preliminary decrees. He said the statute provides for preliminary decrees, but in those subbasins where the adjudication process has been suspended because of the existence of federal or Indian claims, courts were confronted with the problem of what they do when they got through with their work. They couldn't enter a preliminary decree until they had the federal and Indian claims to blanket into it, so they hit upon the technique of

using temporary preliminary decrees. Since there was some question about the status of the temporary decrees, it was the judgment of the firm to have the legislature say it was a sound practice.

Mr. Ross said that the second thing the bill does, which is critically important to the viability of the whole process, is the expansion of notice. Under the current practice, notice of the issuance of a temporary decree or a temporary preliminary decree is heard by mail only to those people who are located within the subbasin where that decree is issued, even though water rights decreed in that subbasin may have an effect on the availability of water to owners of water rights of other subbasins in the same watershed. The owners of those rights in the other subbasins do not under the current statute receive adequate notice; this would give them an opportunity to come in and to protest, if need be, decrees in a particular subbasin. So the second feature, which is to expand the notice and to make that notice one of a published notice in the rest of the watershed, is in our view very much of a necessity for this process to move forward and have ultimate finality, so people can't many years from now question the adequacy or legitimacy of the decree.

Mr. Ross said that the one issue that arose in connection with expanding the notice to other basins dealt with the question of what happens when someone has already litigated an issue. The firm attempted to deal with that in the portion of page 6 of the bill under section 3, (b). He pointed out that lawyers that work on legislation can go back the day after the original piece and would like to improve it. He offered a recommendation to the committee to make an additional amendment to the bill as it is presented (Exhibit 3). He said the reason for the amendment was the problem that if you read the language too precisely you wouldn't be able to have an extension for the second 90 days unless application was made before the expiration. This amendment will clarify that.

Because of the number of claims that may need to be considered and claimants from other subbasins, it was the firm's judgment that the time needed to be expanded to allow for people to review those claims in other basins and respond to them. This

section does that by giving an opportunity for the total period of time for an objection to be heard to be as much as a year. With that set of changes it will strengthen that part of the adjudication process and bring you to a point where you can be sure that the decrees finally issued and finally resolved will have a much stronger and better capability of being protected against attack.

Jo Brunner, Executive Secretary for the Montana Water Resource Association, testified in support of the bill. She said her association supported the bill with the exclusion of one paragraph, Section 3, paragraph (1) and subparagraph (b), lines 7-15. (Exhibit 5)

Carol Mosher, Montana Stockgrowers and Montana Cattlewomen, testified in support of the bill (Exhibit 4). She said there has always been a question and the bill seems to codify the power they are asking for. She asked if there was a chance of getting some written testimony to the committee before executive action is taken; due to the weather they could not bring in their people for expert testimony.

Lorna Frank, representing the Montana Farm Bureau, spoke in support of SB 169.

Ed Steinmetz, water master for the Montana water court, testified in favor of legislation authorizing temporary preliminary decrees. He said there were certain sections that would need to be amended. The first section was Section 1, subsection (5) that appears on page 3. The particular concern was the last line that states that preliminary decrees shall address all claims in the basin except those affected by the extension. He said the temporary preliminary decree now just addresses those claims which are based on the state laws of Montana. He said they do find that there are several basins throughout the state that do have federal reserved water rights which will never be submitted to the compact commission. They contacted the federal government and they do not intend to litigate these rights. "It is our view that those rights should not be included until we get to the preliminary decree stage." This language would require us to include those types of claims at the temporary stage. His concern was that those federal reserved rights are

entirely different and are based on federal law and have no relation to state law. He feels it would confuse the process to require those federal claims to be included at the temporary decree stage.

He recommended language to clear this issue up. It could read "the temporary preliminary decree shall address all claims in the basin which are based upon the laws of the state of Montana". In Section 1, subsection (6), he recommended striking the first sentence and just using the last, and just say that the preliminary decree when issued shall supersede and replace the temporary.

The next comment on Section 2, subsection (2), on page 5, was concerning the provision dealing with the notice. He said these comments tie in with the comments on SB 167. "It is our idea, is that what Mr. Ross is saying is that you have to give people in all of these other basins throughout the water divisions one fair shot. And we don't think that it is necessary that you have to give this division-wide notice at the temporary preliminary decree stage; we would rather keep the adjudication of the basin more localized, take care of the problems within that basin, when you go to preliminary decree at that time you can provide your division-wide notice and properly bring in everybody else in the water division. Economically that would be cheaper and would also let the process adjudicate faster at the temporary preliminary decree stage."

Mr. Steinmetz' other comment addressed Section 3, subsection (b), which is the section on reviewing the objections. "If you wait until the preliminary decree stage before providing the notice division-wide, I think it is very important that you don't exclude any persons in these other basins who haven't had notice or an opportunity to participate. In my own mind, I would prefer to see some language that says if people had notice of that particular decree and have had an opportunity to participate, they are now precluded from coming back in. What that would do is allow all of these other people in these other basins who haven't had notice or an opportunity to come back in. The concern there is that you don't want these claimants who have had to go through one litigation to keep litigating the same issues. If you didn't require the division-wide notice until

the preliminary decree and then you limited objections to those that had notice and opportunity, that would take care of the concerns of the claimant that it would not have to be re-litigated."

Testimony:

Opponents:

Don MacIntyre, DNRC, testified against the bill generally and against the objection process in particular. His concern was that by limiting the objection procedure prior to the final decree determination, the due process rights of water users who chose to wait would be impaired.

Questions from the Committee:

Senator Galt asked Mr. Ross, "In case Fort Peck will be entered into court, will that take precedence or stand up, be opened up?" Mr. Ross replied that under the provisions of the statute, the other water users have a right to appear, given the legislatures approval.

Senator Aklestad asked if most of this information had come out at the previous water hearings. Mr. Ross replied that new information had come out in these hearings. Senator Aklestad asked, "If the bill was killed what would happen?" Mr. Ross said he believed that the issue would not have been addressed to protect the decrees against challenge of water users in other subbasins within a watershed. "As it stands now, a water user in another basin who has not received notice may be able to come in at any time and challenge a decree issued in another subbasin. This mechanism provides a vehicle for saying to him, there has to be finality." At the present time there is a serious due process issue with respect to people who have water rights in other subbasins and have no current opportunity to appear in the proceedings and haven't appeared in the past. Ultimately you are going to have to integrate water rights on every major watershed among each subbasin. This bill provides a vehicle for getting that done so you don't have somebody coming in to spoil it later on."

Senator Aklestad asked if they could challenge on old issues. Mr. Ross explained that if you have a water right and go through the procedure, you get

a decree from the court. The noted provision like in this bill is not available, that you tell someone in the subbasin upstream about your decree, it is our judgment that your decree is not safe against that upstream person unless they are notified and given a deadline.

Senator Galt asked Mr. MacIntyre about his objection to the whole bill from DNRC, "But the only thing you have to be concerned about is that you think the objection that the preliminary decree is done away with if they haven't protested the temporary?" Mr. MacIntyre replied that temporary preliminary decrees are a valuable tool. "By requiring the finality, Mr. Ross speaks of, this stage creates a hardship on non-Indian, nonfederal water districts. Some point in time, he is absolutely right, that integration has to take place. The water court spends much of its time in temporary preliminary decrees and preliminary decrees. By going through that process, people are given an indication of what their rights are. Given that indication, they will be in a better position when it comes to integration to make objections. So what it is really saying is the finality problem can be dealt with later. The water court should be left with the flexibility to try and integrate those without trying to put that kind of restriction on it. With respect to subsection (b) the objections, we are adamantly opposed to that. That is a key portion of this bill which would in fact cut off rights of those who might otherwise object if they had a better idea of what the water rights were. For example, you're a basin that does not have a preliminary decree on it, but you are in a basin that could be affected by that. All you have is your statement claim to go on, those are all your neighbors in your basin. Temporary preliminary decree comes out in the other basin and you ask yourself or your counselor or engineer, 'What effect does it have on my rank?' The attorney will say, 'I can't tell you with great assurance what effect it has on your rights because I don't know. I do know what your statement of claim says is limiting your right; how does it affect by up here? If I had a preliminary temporary decree on my rights and this other one came out, I would be in a much better position. I have a little better definition of what your right is now, how its affected in that basin, how its affected outside that basin.' What we are seeing is a wild temporary preliminary

decree, preliminary decrees to continue but don't go to the final decree stage until it is necessary to integrate the water rights within the state of Montana. Then if you pass SB 166, which I think is the most critical of all the bills you have, it gives the courts and the water commissioners the power to administer the water rights that are in a temporary preliminary decree, then those parties in the basin that have chosen to put themselves in and have those water rights administered as found by the water court at that period of time in history. When the state reaches that point in time when there is sufficient preliminary temporary decrees, that translates a more well defined--you'll have to bring them in if you can't settle what the contract is. At that point in time you can go with final decrees. I am afraid of what this bill is now with only 28 temporary preliminary decrees and 7 final out of 80 some. We are now going to say we are cutting off rights. You've got to get involved right now if finality is going to take place in the near future." He pointed out that the federal rights touch upon almost every basin in the state. "You may find that once those compacts are entered and the federal rights are determined, you have a little better handle on it. This is not the mechanism you want to choose at this time. Due process requires that you tell people that they have an opportunity and if they don't take advantage of it, it is cut off."

Senator Bengtson asked Mr. Steinmetz about the relationship of always issuing temporary preliminary decrees, "Or do you sometimes go right on to preliminary decrees?" Mr. Steinmetz said, "If they have a basin that doesn't have federal or Indian reserve rights that are before the compact commission, we can start right out with the preliminary decree, but again only about 11 out of the 85 basins are in that situation. The other 72 do appear to contain some form of federal or Indian reserved right."

Mr. Steinmetz clarified a previous question by Senator Aklestad. He said that state people had an opportunity to object at the preliminary decree stage of all the Indian and federal compact. "What the law says is that the water court can throw out the compact; we cannot alter the terms, we either have the option to uphold the compact or

to throw it out. The state-based claimants are going to have an opportunity at the preliminary decree stage to object to that. Also at that time your federal and Indian rights claimants also have an opportunity to object to any state-based claim they want. Again there has to be good cause for their objection."

Closing by Sponsor:

Senator Bengtson said the reason is to cooperate with the water courts and get some finality to these decrees. "The big problem was whether the water courts were making any progress. The objections that were being filed by the departments of state agencies was part of the problem. We have addressed this as trying to get the job done. It is expansion of the notice, taking into account those subbasins. They are all interrelated. We have addressed the problem and will consider taking out some of the language. However, I object to taking out the language that says that after you have had your objections litigated that you should not be able to reopen that. That means that can go on and on forever. We have to have some finality."

HEARING ON SENATE BILL 166

Presentation and Opening Statement by Sponsor:

Senator Bengtson said this bill enables the District Court to administer or enforce water rights according to a temporary preliminary decree as modified after hearings and objections or a preliminary decree under existing law, so that final decrees may be administered, thereby, emphasizing the court's adjudicating function. The water courts will not be administering the decree, it will be the District Court. Sections 1 and 8 strike references to section 3-7-213, which provides for designation of all the judges by the water judge from the population of District Court and retired District Court Judges. This change still allows a water judge from another division to sit as water judge if requested by the Chief Justice of the Supreme Court or the water judge pursuant to subsection (2) of this section. That language is a little bit hard to understand. It takes away the ability of the water judge to

appoint an alternate judge for himself. It has to be one of the existing water judges, so there is a choice of three water judges than can be appointed to be an alternate judge. Section 8 actually repealed that one section, then it puts the description in subsection (2) of section 1. Section 2 is amended so that the exclusive authority for administration of decrees lies with the District Court and not the water court. The amendment emphasizes the role of the water court that is adjudicating existing water rights, not administering water rights. Water commissioners appointed by the District Court have authority to distribute water according to the terms of the decree. Section 3 is fundamental to this bill. Note that District Court has jurisdiction and the court can administer not only a final decree but also temporary preliminary and preliminary decrees. In section 5, under existing law, a properly filed claim of existing rights constitutes prima facie proof of its content until a final decree is issued. This amendment modifies the final face of status of a claim or administrates only by stating the claim is superseded by issuance of a temporary preliminary decree as modified after hearings and objections or by a preliminary decree. The change ensures that the rights will be administered according to the most accurate determination available. Section 6, this section describes the process for resolving water distribution controversy. Again the district supervises this process; however, if the matter involves a preexisting July 1, 1973, water right that has not been adjudicated in the final decree, the power of the controversy involving the determination of the pre-1973 right is referred to the water courts. The water court resolves the matter and then refers it back to the District Court for conclusion with other matters within the controversy. The District Court then administers the decree. It just sets up a process. Section 7, note the amendment in subsection (2) which provides for appointment of water commissioners upon application by DNRC and areas or basins that have a temporary preliminary decree, preliminary decree, or final decree. Subsection (1), which provides for a water commissioners upon petition of water right holders, is not amended because it references "any decree".

List of Testifying Proponents and What Group They Represent:

Jack Ross representing Saunders, Snyder, Ross, and Dickson

Don MacIntyre representing the Department of Natural
Resources and Conservation

Jo Brunner representing the Montana Water Resource Committee

List of Testifying Opponents and What Group They Represent:

Carol Mosher Representing the Montana Stockgrowers and
CattleWomen and the Montana Association of State
Grazing Districts

Ed Steinmetz representing the Montana Water Court

Testimony:

Proponents:

Jack Ross testified for SB 166. He said it was the second piece of the package of legislation proposed to the Water Policy Committee. The whole purpose of that bill is to make it possible for those who have water rights that have not been finally adjudicated under old decrees or have not reached a final decree stage or enjoy the administration of those streams where water supply gets so slow that someone has to have administration. Old law says you have a right to administration only when you have a final decree under the old terms. This bill will change that and make it possible for people that have been through the process to get relief when water is short and it provides it in recognition of the fact that the adjudication process under SB 76 is going to take some time to complete. During that period of time, those people have the opportunity to get administration if they need it and the water supply is short. That is the basic purpose of the bill and the objections we are trying to reach. I would address only one other point and that has to do with the question of the jurisdiction between water courts and District Courts. As we looked at the existing statute we found that the existing program was for concurrent jurisdiction in both courts for administration. It is simpler to have the controversy and all the administration handled by the District Court that has jurisdiction over the area where controversy arises. There is a problem here in those cases where the issues involving the adjudication of the

water right have not been resolved. The statute provides a basis for the District Court referring those questions to the water court where they have special expertise in those matters.

Mr. Don MacIntyre, representing the Department of Natural Resources, spoke in support of SB 166. He said the department supports the bill and feels that it is the most critical bill coming before the legislature.

Jo Brunner offered some amendments to SB 166. See exhibit 5.

Testimony:

Opponents:

Carol Mosher-See exhibit 6.

Ed Steinmetz-See exhibit 10.

Questions From Committee Members: Questions were limited due to the lack of time.

Closing by Sponsor: Senator Bengtson closed.

HEARING ON SENATE BILL 167

Presentation and Opening Statement by Sponsor: Senator Bengtson stated, "With certain limitations this bill reopens all temporary preliminary decrees, preliminary decrees, and final decrees that have been issued by the water courts for reexamination and objections. Section 1 of the bill would be a new section in Title 85, chapter 2, part 2, this is the adjudication laws." See exhibit 2.

List of Testifying Proponents and What Group They Represent:

Jack Ross representing the Water Policy Committee from the Firm of Saunders, Snyder, Ross, and Dickson

List of Testifying Opponents and What Group They Represent:

Ed Steinmetz representing the Montana Water Court
Jo Brunner representing the Montana Water Resource Committee
Don MacIntyre representing the Department of Natural Resources and Conservation
Carol Mosher representing the Montana Stockgrowers

Association, the Montana CattleWomen and the Montana
Association of State Grazing Districts

Testimony:
Proponents:

Jack Ross said the reopening of decrees was necessary in order to provide adequate notice to all claimants in a basin so objections could be addressed. However, no objection would be allowed on an issue that had been previously litigated and resolved. He also presented an amendment to clarify language relating to extension periods.

Testimony:
Opponents:

Ed Steinmetz felt the language should be added to incorporate "notice of intent to appear" provisions. The section limiting objections should be reviewed carefully. This section would limit objections to "those who have had notice an opportunity to participate" to by letter? It does not seem fair to prohibit certain state claimants from objections even though they never had proper notice of the contested action. As a practical matter, a claim already objected to and resolved by the water court would not be objected to a gain unless strong evidence exists. Should the provision of this bill applied within 180 days of the effective date or would it be better to just make it apply at the preliminary decree stage? If it is applied at temporary preliminary decree, would division-wide notice again be necessary at the preliminary decree?

Jo Brunner stated the Montana Water Resource Committee opposes SB 167 as it now reads.

Don MacIntyre said the department objected to reopening all decrees.

Carol Mosher-See exhibit 7.

Questions From Committee Members: None

Closing by Sponsor: Senator Bengtson closed.

HEARING ON SENATE BILL 168

Presentation and Opening Statement by Sponsor: Senator

Bengtson stated this is a bill that adds a subsection to section 85-2-234, MCA. Currently, the adjudication laws do not state that the water courts can correct clerical mistakes (e.g., misspelled names) in final decrees. Explicit authority for the court to correct clerical mistakes will eliminate any uncertainty about the legality of making these changes.

List of Testifying Proponents and What Group They Represent:

Jack Ross representing the Water Policy Committee from the firm of Saunders, Snyder, Ross, and Dickson
Carol Mosher representing the Montana Stockgrowers Association, the Montana CattleWomen and the Montana Association of State Grazing Districts
Jo Brunner representing the Montana Water Resource Committee
Ed Steinmetz representing the Montana Water Court
Lorna Frank representing the Montana Farm Bureau
Don MacIntyre representing the Department of Natural Resources and Conservation

List of Testifying Opponents and What Group They Represent:

None

Testimony:

Proponents:

Jack Ross said the bill is essentially a house keeping bill to allow correction of nonsubstantive clerical errors by the water court.

Carol Mosher-See exhibit 8.

Jo Brunner indicated Montana Water Resource supported SB 168, and she urged the committee to pass the bill.

Ed Steinmetz felt SB 168 was a good law. He stated that when a clerical correction is made, there may be a substantive effect. Mr. Steinmetz stated that the water judge has discretion to provide appropriate notice to those individuals possibly affected.

Lorna Frank stated that the Montana Farm Bureau recommended the committee to pass SB 168.

Don MacIntyre stated the department's support for the bill to allow clerical corrections

Questions From Committee Members: None

Closing by Sponsor: Senator Bengtson indicated SB 168 was a clerical correction bill and she urged the committee to do pass.

ADJOURNMENT

Adjournment At: 3:03 p.m.



TOM BECK, Chairman

TB/JJ

ROLL CALL

AGRICULTURE

COMMITTEE

DATE 2/3/89

51st LEGISLATIVE SESSION 1989

NAME	PRESENT	ABSENT	EXCUSED
SENATOR HUBERT ABRAMS	✓		
SENATOR GARY AKLESTAD	✓		
SENATOR ESTHER BENGTSO	✓		
SENATOR GERRY DEVLIN	✓		
SENATOR JACK GALT	✓		
SENATOR GREG JERGESON	✓		
SENATOR GENE THAYER	✓		
SENATOR BOB WILLIAMS	✓		
SENATOR TOM BECK	✓		

Each day attach to minutes.

SOME BASICS CONCERNING THE WATER RIGHTS ADJUDICATION PROCESS SB167
SB168

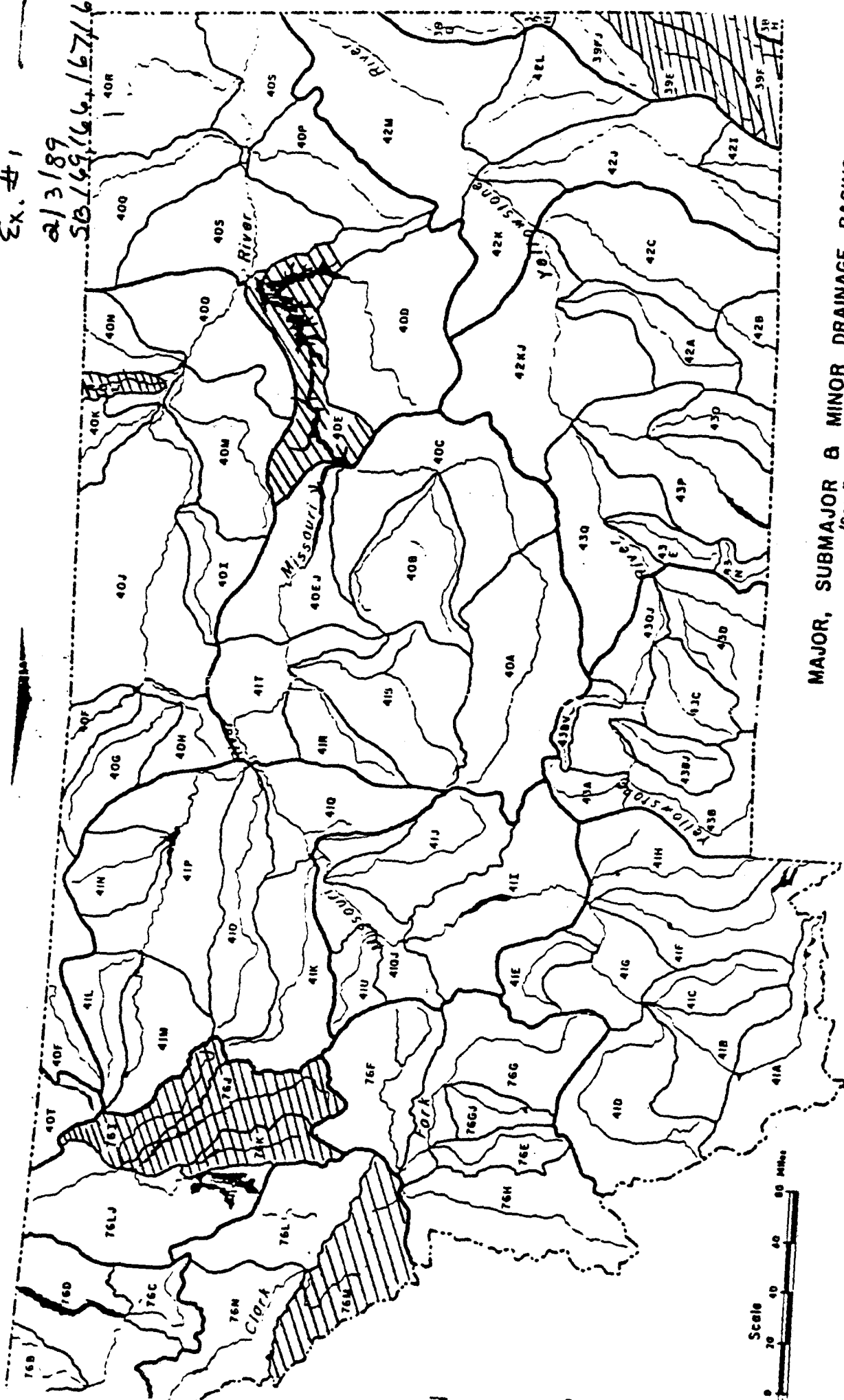
February 1989

1. The Montana Water Courts are organized into four divisions:
 - the Upper Missouri River Basin (Chief Judge W.W. Lessley);
 - the Lower Missouri River Basin (Judge Bernard W. Thomas);
 - the Clark Fork River Basin (Judge Leif Erickson); and
 - the Yellowstone River Basin (Judge Roy C. Rodeghiero).
 2. The current adjudication laws went into effect with the passage of Senate Bill 76 in 1979. The deadline for filing claims of existing (pre-July 1, 1973) rights was April 30, 1982. Over 203,000 claims were filed.
 3. Since 1982, the Water Courts have been reviewing the claims and issuing decrees in various subbasins. There are 85 subbasins in Montana.
 4. The Water Courts issue three types of decrees. A temporary preliminary decree is issued for non-federal and Indian claims in any basin where the federal and Indian claims remain unresolved because of negotiations with the Reserved Water Rights Compact Commission. A preliminary decree is issued when all claims (state-based and federal and Indian claims) are before the court. Senate Bill 169 ensures that both of these decrees are subject to extensive notice and opportunity for objections and hearings.
- Finally, after considering all objections and the evidence before it, the Water Court issues a final decree.
5. The Department of Natural Resources and Conservation is required to assist the Water Courts. The DNRC's functions include maintaining the data base and examining claims for accuracy. Claim examination normally involves in-house review, including air photo interpretation, but can at times involve examination by field office staff at the site of the claim.
 6. With funding from a special appropriation, the Water Policy Committee hired Saunders, Snyder, Ross & Dickson, P.C., of Denver, Colorado to examine the water rights adjudication process to determine if it is legally adequate, particularly if a challenge occurred under the McCarran Amendment (which allows states to adjudicate federal and Indian claims).

Ex. #1

2/3/89

50-169, 166, 167, 168



MAJOR, SUBMAJOR & MINOR DRAINAGE BASINS
(See Reverse Side for Index)

The Water Rights Adjudication Bills BILL NO. SB 167 SB 166
By Request of the Water Policy Committee SB 167 SB 168
Senator Esther Bengtson, sponsor

The Water Policy Committee's principal agenda item for the 1987-1989 interim was Montana's water rights adjudication process. This focus resulted from an appropriation by the 1987 Legislature to hire a consultant with no conflict of interest to review and analyze the adjudication process.

The consultant -- Saunders, Snyder, Ross & Dickson, P.C. of Denver, Colorado -- evaluated the adjudication process for over a year and delivered a comprehensive set of recommendations. Many of the recommendations stressed very positive aspects of the current adjudication, assuring the committee that the process is not "so grievously flawed as to require a massive legislative overhaul." The consultant did, however, recommend some minor legislative fine-tuning to ensure the results sought by the legislature in 1979 are achieved.

The committee seriously considered the consultant's recommendations and proposed legislation. The result of its deliberations is contained in the committee report and a legislative package of four bills.

I. Senate Bill 169

Senate Bill 169 provides explicitly that the Water Courts may issue temporary preliminary decrees (a practice already occurring) and makes certain modifications to the notice requirements and to the objections and hearings process.

Section 1

Subsection 5 states that a temporary preliminary decree may be issued in a basin where adjudication of federal and Indian claims is precluded by the suspension under 85-2-217. The suspension is provided so that the Reserved Water Rights Compact Commission may attempt to negotiate a settlement of these rights with the various federal and Indian entities.

Subsection 6 describes the relationship between the temporary preliminary decree and preliminary decree. The temporary preliminary decree must be used in issuing the preliminary decree, but upon issuance the preliminary decree supercedes the temporary preliminary decree.

Section 2

This section describes new notice requirements for temporary preliminary decrees and preliminary decrees. Notice by mail must be sent to each person or entity with a claim, permit or

reservation in the subbasin at issue. In addition, notice of the decree's availability must be published in at least 3 newspapers geographically distributed in the general basin in which the subbasin is located.

Section 3

The hearings process is identical for temporary preliminary and preliminary decrees. As stated in subsection (1) of the bill, the DNRC and persons within the entire basin, including the subbasin, may object to claims in the decree at issue. However:

no objection seeking to reopen and review any matter previously litigated and resolved as a result of any previous objection process is allowed." (p. 2, lines 4-6)

The exception provided for the federal government and the Indian tribes is necessary because of the ongoing negotiations with these entities by the Reserved Water Rights Compact Commission.

Subsection 2 extends the time period for filing objections and requests for hearing to 180 days after notice is given of the decrees. Two 90-day extensions, for good cause shown, are also provided. This helps to ensure that adequate time is available for interested parties to review the decree.

The amendments in the remainder of the section simply apply existing law to temporary preliminary decrees.

The effective date for this bill and Senate Bills 166, 167, and 168 is when the last bill is passed and approved (or killed).

II. Senate Bill 166

This bill enables the district courts to administer or enforce water rights according to a temporary preliminary decree, as modified after hearings and objections, or a preliminary decree. Under existing law, only final decrees may be administered.

The bill also removes water rights administration from the water courts, thereby emphasizing the courts' principal adjudication function.

Sections 1, 4 and 8

Sections 1 and 8 strike references to section 3-7-213, MCA, which provides for designation of alternate judges by the water judge from the population of district court and retired district court judges. This change still allows a water judge from another division to sit as a water judge if requested by the chief justice of the Supreme Court or the water judge pursuant to subsection (2) of this section.

Section 2

Section 3-7-211 is amended so that exclusive authority for administration of decrees lies with the district courts and not the water courts. The amendment emphasizes the role of the water courts in adjudicating existing water rights, not administering water rights. Water commissioners appointed by the district court have authority to distribute water according to the terms of the decree.

Section 3

This section is fundamental to this bill. Note that the district court has jurisdiction and that the court can administer not only a final decree but also temporary preliminary and preliminary decrees.

Section 5

Under existing law (85-2-227), a properly filed claim of existing right constitutes prima facie proof of its content until a final decree is issued. This amendment modifies the prima facie status of a claim for administration purposes only by stating that the claim is superceded by the issuance of a temporary preliminary decree as modified after hearings and objections or by a preliminary decree. The change ensures that rights will be administered according to the most accurate determination available.

Section 6

This section describes a process for resolving water distribution controversies. Again, the district courts supervise this process. However, if the matter involves an existing (pre-July 1, 1973) water right that has not been adjudicated in a final decree, the part of the controversy involving the determination of the pre-1973 right is referred to the water courts. The water court resolves the matter and then refers it back to the district court for inclusion with other matters concerning the controversy. The district court then administers the decree.

Section 7

Note the amendment to subsection (2), which provides for appointment of water commissioners upon application by the DNRC in areas or basins that have a temporary preliminary decree, preliminary decree or final decree. Subsection (1), which provides for water commissioners upon petition of water right holders, is not amended because it references any "decree".

7
III. Senate Bill 168

With certain limitations, this bill reopens all temporary preliminary decrees, preliminary decrees, and final decrees that have been issued by the Water Courts for reexamination and objections. Section 1 of the bill would be a new section in Title 85, chapter 2, part 2 (the adjudication laws).

Subsection 1

This subsection calls for reopening of all decrees within 180 days after this bill is enacted.

Subsection 2

The notice and hearings process is identical to the process provided for temporary preliminary and preliminary decrees. The DNRC, and persons within the entire basin (including the subbasin) may object to claims in the decree at issue. However:

no objection seeking to reopen and review any matter previously litigated and resolved as a result of any previous objection process is allowed." (p. 2, lines 4-6)

The exception provided for the federal government and the Indian tribes is necessary because of the ongoing negotiations with these entities by the Reserved Water Rights Compact Commission.

Subsections 3 and 4

Notice requirements for the reopening of a decree is identical to notice provided for new temporary preliminary and preliminary decrees (see section 2, Senate Bill 169).

Subsection 5

A 180-day time period, with possibly two 90-day extensions, is provided for objections. Again, this matches the time period for new temporary preliminary and preliminary decrees (see section 2, Senate Bill 169).

Subsections 6 and 7

Subsection 6 ensures notice to claimants of objections to their claims. Subsection 7 allows the water judge to dismiss the objection or to modify claims based on the evidence before him.

Subsections 8

Appeals are allowed from the final decree. An appeal from a temporary preliminary or preliminary decree may occur when the applicable decree becomes a final decree.

Ex. #2

2/3/89

IV. Senate Bill 168

This bill adds a subsection to section 85-2-234, MCA. Currently, the adjudication laws do not state that the water courts can correct clerical mistakes (e.g., misspelled names) in final decrees. Explicit authority for the court to correct clerical mistakes will eliminate any uncertainty about the legality of making these changes.

Proposed Amendments to SB 167 and SB 169
Senator Bengtson
Senate Agriculture Committee
February 3, 1989

SB 167

1. Page 3, lines 6 and 7
Following: "within" on line 6
Strike: the remainder of lines 6 and 7
Insert: "the original 180 day period or any extension of it"

SB 169

1. Page 6, lines 22 and 23
Following: "made"
Strike: the remainder of lines 22 and 23
Insert: "prior to the expiration of the original 180 period or any extension of it"

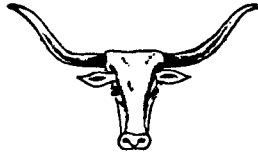
MONTANA STOCKGROWERS ASSOCIATION, INC.

P.O. BOX 1679 — 420 NO. CALIFORNIA ST. — PHONE (406) 442-3420 — HELENA, MONTANA 59624

SENATE AGRICULTURE
EXHIBIT NO. 4
DATE 2/7/89
BILL NO. SB169

OFFICERS:

WM. J. BROWN, JR. SAND SPRINGS PRESIDENT
JAMES COURTNEY ALZADA FIRST VICE PRESIDENT
EDWARD J. LORD PHILIPSBURG SECOND VICE PRESIDENT
JEROME W. JACK HELENA EXECUTIVE VICE PRESIDENT
KIM ENKERUD HELENA NATURAL RESOURCES COORDINATOR



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ROLAND MOSHER AUGUSTA
GREG RICE HARRISON

February 3, 1989

Mr. Chairman and Members of the Senate Agriculture Committee

My name is Carol Mosher and today I am representing the Montana Stockgrowers Association, the Montana CattleWomen and the Montana Association of State Grazing Districts.

We support Senate Bill 169. There has been a question if the water court had this power and this bill codifies that power.

Thank you for this opportunity to testify in behalf of this bill.

Carol Mosher

SENATE AGRICULTURE

EXHIBIT NO.

5

DATE

2/3/89

BILL NO.

SB166

Brunner

Senate Bill 166 - Amendments - MURA

page 4 - paragraph 2 line 19 - leave in - or other relief

page 6 - Section 7, line 11 - after the words - by a -

insert the words temporary, preliminary, preliminary and
final decree -

Go Brunner

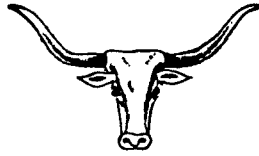
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NANCY ESPY	BOYES	BILL WOOD	HARRISON

EXHIBIT NO. 60
 DATE 2/7/88
 BILL NO. SB 166

February 3, 1989

Mr. Chairman and Members of the Senate Agriculture Committee

My name is Carol Mosher and today I am representing the Montana Stockgrowers Association, the Montana CattleWomen and the Montana Association of State Grazing Districts.

We oppose Senate Bill 166. This situation is rather like a double edged knife. We feel that many District Court judges are not knowledgeable on water issues but that, on the other hand, the Water Court is so backlogged that it may be difficult to get a decision from them. We have more trust in Water Court judges than District Court judges in matters of water.

Thank you for the opportunity to testify in opposition of this bill.

Carol Mosher

MONTANA STOCKGROWERS ASSOCIATION, INC.

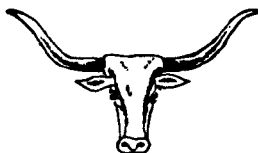
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SENATE AGRICULTURE
EXHIBIT NO. 7

DATE 2/7/89

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M.E. EDDLEMAN	WORDEN	ROLAND MOSHER	AUGUSTA
NANCY ESPY	BOYES	GREG RICE	HARRISON

February 3, 1989

Mr. Chairman and Members of the Senate Agriculture Committee

My name is Carol Mosher and today I am representing the Montana Stockgrowers Association, the Montana CattleWomen and the Montana Association of State Grazing Districts.

We are opposed to Senate Bill 167 but would like to support Mr. Stienmetz's amendments.

Thank you.

Carol Mosher

MONTANA STOCKGROWERS ASSOCIATION, INC.

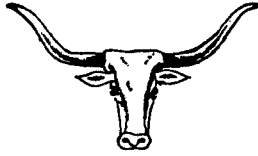
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SENATE AGRICULTURE
EXHIBIT NO. 8

DATE 2/7/89

OFFICERS:

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EDWARD J. LORD	PHILIPSBURG	SECOND VICE PRESIDENT
JEROME W. JACK	HELENA	EXECUTIVE VICE PRESIDENT
KIM ENKERUD	HELENA	NATURAL RESOURCES COORDINATOR



EXECUTIVE COMMITTEE:

CLARENCE BLUNT	REGINA	WM. T. HARRER	PORT BENTON
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M.E. EDDLEMAN	WORDEN	ROLAND MOSHER	AUGUSTA
NANCY ESPY	BOYES	GREG RICE	HARRISON

February 3, 1989

Mr. Chairman and Members of the Senate Agriculture Committee

My name is Carol Mosher and today I am representing the Montana Stockgrowers Association, the Montana CattleWomen and the Montana Association of State Grazing Districts.

We are in support of Senate Bill 168 to correct clerical errors. For example, if this law would have been in effect it would have saved our own ranch time and money. We sent over 100 water applications in under the name of Tee Bar Ranch Corporation. They came back T Bar Ranch and we had to correct each one and send back.

Thank you for this opportunity to testify in support of this bill.

Carol Mosher

SB 166 - Admin. of Decrees by Dist. Ct.

CHANGES:

- ① Abolishes WT ^{Judges} authority to administer final Decrees and appoint Water Commissioners.
- ② New Dist. Cts. responsible for administering all decrees (T.P., P. & Final) and exclusive authority to appoint water commissioners.
- ③ Alters prima facie status for administration.
- ④ Section 6 (85-2-406) Dist. Ct. relief restricted to injunctive relief. Status quo preserved only until resolved under subsection (3).
- ⑤ Subsection (3) Dist. Ct. shall settle controversy. At T.P. or P. decree, issues referred to WT CT for resolution. (No finality)

COMMENTS

1. Advantages of WT CT Judges vs. Dist. Ct. Judges (why change the present law?)
2. No need to restrict judicial relief to injunctive.
3. Neither Dist. Ct. nor WT CT can settle or resolve controversies between appropriators until Final Decree. Current law allows judicial order to preserve status quo until Final Decree.
4. Under Sec. 7, (85-5-101) Claimants and appropriators should have procedure to petition Court directly for administration of T.P., P. or Final Decrees.

5B 166

EXHIBIT # 9
2/3/89

Admin of Decrees by Dist Ct:

- Water use is unique - many uses are factually interrelated. Water is adjudicated by division (entire source) because of interrelatedness and need for wide-scope view.

WT Division Judges

- Currently district ct or retired judges required. Chosen because of their knowledge and interest in water related issues.
- Wide view (division wide). Can better understand effects on all users on river.
- These are the judges who have issued decrees which are to be enforced.
- Only 4 judges - become specialists.
- WTKT offices in Bozeman would be closed once adjudication completed.
- WT Judges can already call in local Dist. Ct. judge.

Dist. Ct Judges

- More physically accessible to the water users.
- 20 judges required - 1 from each judicial district.
- View of effects on other water users limited to boundaries of judicial district. (Jurisdictional disputes).
- Until enforcement action, most Dist. Ct judges would have little exposure to adjudication process or decrees.

- Provision stating that "all Dist. Ct jurisdiction over determined and interpretative shall be exercised by WT Division judges" needs to be addressed!

Ed Steinmetz
Montana Water Court

SB 167 Reopening of T.P., P. & Final Decrees

COMMENTS

- ① Currently, bill requires all decrees to be re-opened w/in 180 days. Does this cause a problem w/regard to T.P. decrees?
- ② Entire purpose of bill is to provide Notice & reasonable opportunity to participate to all those potentially affected. Section 1, (2)(b) defeats this. Better to prohibit objections where "Notice and opportunity to participate" have already been given.
- ③ Under Subsection (6), this should be amended to provide for Notice of Intent to Appeal procedure.

SB 167

- Reopening Decrees to all sub-basins:
- Language should be added to incorporate Notice of Intent to Appeal provisions.
- Section limiting objections should be reviewed carefully. Would limiting ~~effective~~ objections to "those who have had notice of an opportunity to participate" be better? It does not seem fair to prohibit certain state claimants from objecting even though they never had proper notice of the contested claim. As a practical matter, a claim already objected to and resolved by WT CT would not be objected to again unless new, strong evidence exists.
- Should the provisions of this Bill be applied within 180 days of effective date? - or would it be better to just make it apply at the preliminary decree stage?
If it is applied at T.P. decree, would division-wide notice be necessary at the Prelim Decree

SB 168 Correction of Clerical Mistakes in Final Decrees

COMMENTS

① Good law. When "clerical correction" may have substantive effect, wt judge has discretion to provide appropriate Notice to those possibly affected.

Ed Steinmetz
Montana Water Comm

SB 169 Provides for Temp. Prelim. Decrees

COMMENTS

- ① Sec. 1, Subsection (5) should be amended: "T.P. decree shall address all claims in basin which are based upon laws of the state of MT." This is consistent with past T.P. Decrees and WRCEB adopted by MT Supreme Court.
- ② Sec. 1, Subsection (6) - ~~§~~ Prelim. decree shall incorporate T.P. as modified by WCCT after objection and hearings.
- ③ Sec. 3, Subsection (1)(b) This objection provision would improperly restrict objections. Better to prohibit where "notice and opportunity to participate" have been given.
- ④ Sec. 3, Subsection (4). Is there a need to incorporate Notice of Intent to appear provisions?
- ⑤ Section 6 - Applicability. Should this be made retroactive? Problem is lengthed objection periods.

DATE

2/3/89 1989

COMMITTEE ON

Agriculture

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(Please leave prepared statement with Secretary)

