

MINUTES

MONTANA SENATE
51st LEGISLATURE - REGULAR SESSION

COMMITTEE ON AGRICULTURE

Call to Order: By Chairman Tom Beck, on March 15, 1989, at
1:00 P.M.

ROLL CALL

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

Members Excused: None

Members Absent: None

Staff Present: Doug Sternberg, Legislative Council

Announcements/Discussion: None

HEARING ON HOUSE BILL 465

Presentation and Opening Statement by Sponsor:

Representative Iverson stated, "HB 465 will provide a definition in the law. "Simply what it says is that the dealer is a person purchasing livestock for immediate sale or in-state shipment. It goes on to define immediate resale as the sale of livestock within 60 days of purchase. This is a department bill. They do what the departments always do with this bill and they used a vehicle to do some other clean-up things. This bill does two things: (1.) It deletes the annual financial report currently requiring all livestock dealers to file their financial report every year. However, they are never current. They really don't amount to much and don't mean anything as far as the department's concerned. The department would like to save a whole bunch of paper work on both ends and simply ask the statute to be changed to say 'the department requested'. (2.) It deletes the requirement for state law. That's also unnecessary; they consider it a duplicate because nearly all of the 600 and some-odd dealers currently were operating under a federal bond. They would like to be able to let the federal bonds suffice."

List of Testifying Proponents and What Group They Represent:

John Skufca representing the Department of Livestock
Jerry Jack representing the Montana Association of State
Grazing Districts and the Montana Stockgrowers
Lorna Frank representing Montana Farm Bureau

List of Testifying Opponents and What Group They Represent:

None

Testimony:

Proponents:

John Skufca-See exhibit 1.

Jerry Jack-"We certainly rise in support of this bill. Back in October of 1988, the Montana Stockgrowers, and the Transportation Brand and Theft met with Mr. Graham and members of the Department of Livestock and strongly supported the concept at that time. We strongly support the bill."

Lorna Frank-"We are in support of this bill."

Questions From Committee Members: Senator Aklestad-"I haven't gone through the bill in its entirety, but how would this affect registered bull sale operations where ranchers--let's say two ranchers go together and have registered bull sales, and that type of sales?"

Representative Iverson-"If they resale within 60 days, they may come under this law."

Closing by Sponsor: Representative Iverson closed.

HEARING ON HOUSE BILL 707

Presentation and Opening Statement by Sponsor:

Representative Iverson stated, "This issue was something that was discussed at the state water plan meeting. It was also discussed at the Water Policy Committee hearing earlier. While either of those groups proposed legislation along these lines, the Governor decided to issue that it certainly had to be addressed and it should be addressed during this legislative session. There were several bills in the process that dealt with this. There weren't any of them that have the safeguards that I considered adequate for this kind of a program. So what happened

was a group of people including Senator Galt, myself, and Senator Yellowtail, got together and wrote what we thought would be the safest way to go about this. That's what we offer today. I want to tell you off the top what it doesn't do. It doesn't adversely affect the other user's rights. It doesn't confiscate anybody's water. It doesn't force anybody to do anything that they don't want to do. I want to emphasize this, it's not a radical change in Montana water policy."

"Water rights as we know them in Montana are a constitutionally guaranteed right of property. As such, under current law they can be sold, traded, leased, severed from the land, you can do all kinds of things with them. As long as you don't hurt anyone else by doing it. You can deal with that just about in the same manner you can deal with any problem. You can sell your water to industry; you can sell your water to Montana Power to cool generators. You can sell it for coal slurry. You can sell it for drinking. You can sell it to Albuquerque; you can pipe it down there so people can wash their cars with it, but you can't lease it in the creek. What this bill does and what it is designed to do is expand your right, your constitutional right in that property, to that one and remaining option. It allows you to leave it in the creek without losing it and you get paid for doing it."

"The bill is really pretty simple. First of all, The Board of Natural Resources can designate up to ten. They don't have to designate ten but they can not designate more than ten. They can designate up to ten streams or stream reaches. That is portions of streams. That might be a 100-yard portion of streams. They can designate up to ten of these stream reaches as being eligible for leasing. They can only do that if they can establish that there is a necessity to do it. You find when you read this bill closely, we pretty well gathered that it's got to be done carefully and in a considerate manner." See exhibit 2.

List of Testifying Proponents and What Group They Represent:

Carol Mosher did not testify but handed in testimony
Glenn Marks representing the Policy Aide Natural Resources
for the Governor's Office
Ron Marcoux representing The Department of Fish, Wildlife,
and Parks
Lorents Grosfield representing himself and the DNRC Board
members

Karen Barkely representing the DNRC
Ted Doney representing himself (attorney in Helena)
Jo Brunner representing Montana Water Resources Association
Jack Salmond representing Western Environmental Trade
Association
George Ochenski representing AMU
Chris Hunter representing 150 professional fisheries that
make up the membership of the Montana Chapter of the
American Fishery Society
Bill Kane representing Montana Trout Unlimited
Peggy Haaglund representing the Montana Association of
Conservation District 10
Jim Ingamar representing himself
Richard Ormsbee representing Bitterroot Conservation District
Marshall Bloom representing Bitterroot Chapter of Trout
Unlimited
Janet Ellis representing the Montana Audubon
Tony Schoonen representing The Skylines Sportsman Club of
Butte and the Anaconda Sportsman Club
Kim Wilson representing the Montana Chapter of the Sierra
Club
Bob Whalen representing Trout Unlimited
Charley W. Frey representing Hi-Line Sportsman's Club

List of Testifying Opponents and What Group They Represent:

Albert Hengle representing himself, a hydrologist from
Victor Montana
Carl M. Davis representing water users of Lima, Montana, an
attorney from Dillon
Representative Vernon Westlake, House District 76, Gallatin
County
Carl M. Davis handed in list of signed opponents
Ron Waterman representing the Montana Stockgrowers, the
Montana Cattleman, and the Montana Association of State
Grazing Districts
Richard Grosman representing himself
Dave McClure representing Montana Farm Bureau
Louise Monroe representing herself, from the Bitterroot
Valley
Shirley Bugli representing WIFE
Ole Ueland representing Headwaters Agriculture Water
Resources Committee
Walter A. Steingruber representing Agriculture Preservation
Association
Curt Diegl representing himself, from Broadwater County
Eugene Melvey representing Headwaters Committee
Randall Smith representing himself, from Glen, Montana
Maynard Smith representing himself, from the Big Hole River
Bill Garrison representing himself, from Glen, Montana
Wilbur Anderson representing Vigilante Electric Cooperative
in Dillon, Montana

Nick Schutter representing himself, from Manhattan, Montana
Bill Murphy representing himself, from Garrison, Montana
Mark Cambridge representing himself
Mark Etchart representing the Glasgow Irrigation District
and the Malta Irrigation District
Pat Barnes representing himself
Bill Spring representing himself, from Stevensville, Montana
Allen O'Hare representing himself, from Livingston
Jack Perkins representing the Deer Lodge Valley Conservation
District
George Vogt representing himself, from the Ravalli County
Robert VanDerVere representing himself
Frances Stordtman representing herself, from the Big Hole
Valley
Jay Chamberlin representing the Bitterroot Irrigation
District
Senator Elmer Severson representing himself
John Bailey representing Dan Bailey's Fly Shop
L.M. Powell representing The Bitterroot Conservation
District
Richard A. Ormsbee representing Bitterroot Conservation
District, from Hamilton, Montana
Allen Martinell representing the Water Users Irrigation
Company
Donald R. Marble representing himself, from Chester, Montana
Eugene Mangley representing Granite County Commissioners
Headwaters Agriculture Water Committee

Testimony:

Proponents:

Carol Mosher handed in testimony. Ms. Mosher did not
testify at the hearing-See exhibit 1A.

Glenn Marks-See exhibit 3.

Ron Marcoux-See exhibit 4.

Lorents Grosfield-"I would like to read a letter that was
written by the Chairman of the Board of Natural
Resources." See exhibit 5.

Karen Barkley-See exhibit 6.

Ted Doney-"Our firm specializes in water law. 80 to 85% of
our practices are done on water law. I think this bill
is a bill of critical importance to our state. I
didn't testify on this bill in the House. I wanted to
hear the testimony and listen to what people are saying
and think about some of the points being raised. While
I was in that hearing I kept thinking to myself, I've
been here before. For some reason I felt like I had

seen the same scene. I couldn't remember what that was."

"Finally, it dawned on me--stream access. If you remember, stream access was a big issue in 1981 and 1983 in the legislature. The legislature did not address stream access during those sessions. Because of the failure of the legislature to address that issue, it wound up in court. We wound up with two cases that none of us could live with."

"We need to address this issue today or we're going to wind up in court or worse yet, it's a constitutional amendment which I'll talk about. It will change the law forever in this state. I think it will make a large impact on our water rights system. In other words, if we don't have the leasing bill this session, I feel we will be facing worse alternatives."

"What are some of those alternatives? One, we keep muddling along like we are now, hoping things work themselves out, but they won't. We know they won't."

"Two, we get a court case which other proponents already alluded to that says you can already lease water rights for instream flow. I tend to feel the courts in Montana are not going to uphold that kind of case. I don't think there is such a thing as leasing water rights for instream flow under current law. Somebody may get a court decision out of it."

"The third alternative, we will have a court case that says that all water rights in the State of Montana are subject to the public trust, and water must be left in the streams for recreational use by the people. I think that is a very real possibility. It's happened in other states."

"The fourth alternative, we have an initiative on the ballot. I think this is the most likely alternative. If you read last night's IR (Independent Record), I think you can understand the proponents of this kind of legislation are thinking of that alternative. If I were a proponent of instream flow, I would propose a constitutional amendment, not a statute. This would amend Article 9, section 3 of our Constitution, the water article. That currently says, the current law in the constitution says water is its own right of the state and subject to 'beneficial uses by the people'. I would add a clause to that section that says beneficial uses are subject to the right of the people to obtain access to such waters for

recreation. That's all it would take people. A simple constitutional amendment that we have water rights in the State of Montana subject to the public trust doctrine."

"I'm not going to stand up here and tell you today that by passing this bill you will prohibit the court from saying the public trust super-imposes on water rights or you will be guaranteed that it will not be a constitutional amendment, but it will go along with--it will keep things out of court in my opinion. It will encourage people to try and work with the system. I think it is critical we have the bill."

Jo Brunner-"Our association has come to a difficult decision." See exhibit 7.

Jack Salmond-See exhibit 45.

George Ochenski-He stated there were people who have come from all over the state and he indicated he would appreciate if the proponents would keep their testimony short and to the point.

Chris Hunter-"We strongly support this legislation. We would have liked to see it be more far-reaching. We think the bill as it is, is a good compromise."

Bill Kane-"Trout Unlimited strongly supports HB 707 in its present form."

Peggy Haaglund-See exhibit 10.

Jim Ingomar indicated he supported HB 707.

Richard Ormsbee-"In the Bitterroot we have succeeded in welding a combination of sportsman, landowners, recreationists, fish, game, and parks, The Department of Natural Resources and Conservation, and most of the landowners in the Bitterroot. We believe that the conservation district can secure water in an adequate and effective way." See exhibit 50 for further testimony.

Marshall Bloom-"We are supporting this bill and I would like to thank Representative Iverson, Governor Stephens, and the other individuals who have worked so hard to get it to this point."

Janet Ellis-"We are in support of HB 707."

Tony Schoonen-"We rise in support of this bill."

Kim Wilson-"We also support this bill and we urge you to do the same."

Bob Whalen-"I'm representing 250 Trout Unlimited members. We wish to voice our strong support of HB 707 without amendments. We ask these people, to just give it a chance." See exhibit 11.

Charley W. Frey handed in testimony. See exhibit 40

Testimony:

Opponents:

Albert Engel-"I am a hydrologist and geologist with a Ph.D and a DSC. I've taught in three major American Universities. I've consulted for the U.S. Government. Since the Bitterroot has been used as an example here, I have brought segments of a chapter of a book I'm writing." See exhibit 12.

"This bill is well-intentioned but it will not work. It will not work because of the ignorance of the people who are proposing it. There are three major users of water and let's take the Bitterroot Valley as an example. There are the diversionary uses--largely farmers and ranchers and that sort of thing. Then there are the well owners."

"In 1960 there were less than 1,000 wells in the Bitterroot, today there are almost 7,000. In 1960, each well used less than half acre-foot. Today, the wells averaged about 3 acre-feet per year. If my neighbor and I leased our water to whomever, Fish and Game, whatever, if we leased it, we would dry up 78 wells in one aquifer. We would create losses on the order of 20 millions dollars. Why? Because it is the leaky inefficient irrigation ditches and seep plugging especially on west side of the valley that recharges the Bitterroot aquifer. 90% of the recharge is from leakage and ditches and seep plugging. We proved this over a 20-year study and this (see exhibit 12) will indicate to you just that. This is not understood by the people who wrote this bill or by the people who are proposing to put it into operation. I suggest in the first place that on most aquifers and most in the valleys here no one knows the extent to which the recharge is dependent upon diversionary flow for agriculture uses. Until this is determined, the bill we have here would create havoc with the whole county. Here the person's well goes dry and the neighbor's, so on, and they don't know why. It's because up the slope

we've leased the water to instream flow. I am strongly for instream flow. I am strongly for diversionary water for ranches and diversionary water to seep into the unconfined aquifers to provide ground water. There's only one way we can do that in the Bitterroot Valley and most of the valleys in western Montana and that is to impound more water."

"Before we do anything like this bill, which is filled with all sorts of ambiguities and unknowns and wishful thinking, let us take twelve of the major contributories of the Bitterroot river and build dams on them. Each one of them you impound about 10 to 12 thousand acre-feet of water. We can pay for them if you wish in any number of ways. Water in California today costs \$2,000 an acre-foot. If we charge \$3 a foot we can pay for one of those dams in 20 years simply by user's fees and that would include fishermen, recreationists, ranches, and the well users."

"Until we impound more water, we are going to be totally without water in August. We don't have low flow in the Bitterroot in August, we have no flow in the tributary rivers. There is no water for the rancher. The aquifers are not being recharged and there is no water for fish. In a situation like that, this sort of law has no meaning. I urge you to not support HB 707."

Carl M. Davis-See exhibit 13. Mr. Davis handed in four signed sheets of opponents. See exhibit 16, 17, 18, and 19.

Representative Vernon Westlake-See exhibit 14.

Ronald F. Waterman-"Philosophically, we oppose this bill simply because of what it does to the existing water law. When a water user declines to use and put water to a beneficial use, that water then becomes subject immediately to junior appropriator rights. There is nothing to lease when you decide not to use it. This bill makes a radical change in 100 years of water law." See exhibit 15 for further testimony.

Richard Gosman-"We stand opposed to this legislation and to the concept of transferring water from off-stream to instream use for the following reasons: Studies made on the Redrock River by the water users irrigation company substantiated by over 40 years of records. They indicate that changing of water use from irrigation to reserving it for instream flow would be self-defeating. The retention of water to the stream

results in a corresponding loss to the under aquifer. A loss in the ability of that aquifer can replenish the stream. We have found on the Redrock--and we believe this is true of most headwater streams, that the cheapest and most efficient means of storage is water applied by the irrigator to lands adjacent to the streams. This irrigation water is returned to the stream in a uniform season-long flow of high quality water...The DNRC has progressively promoted the concept of transfer water use. What we have here is a proponent of a concept who will act as both judge and jury in the hearings involving these protests...This legislation appears to be an attempt by the Department of Natural Resources and Conservation and the Fish, Wildlife, and Parks to attain control over a resource that is vital to agriculture. This concept, as part of the Montana state water plan, has met with wide-spread opposition. In spite of this opposition, the DNRC can formulate proposed legislation to provide for this transfer. This committee consisted of 24 invited participants." See exhibit 36 for further testimony.

Dave McClure-See exhibit 20.

Louise Monroe-See exhibit 21.

Shirley Bugli-See exhibit 35.

Ole Ueland-See exhibit 22.

Walter Steingruber stated he was against HB 707.

Curt Diehl-See exhibit 41.

Eugene Melvey a member of the Headwaters Committee, stated that they opposed HB 707.

Randall Smith-See exhibit 23.

Maynard Smith-"I am also very opposed to this bill."

Bill Garrison-See exhibit 24.

Wilbur Anderson-See exhibit 34.

Nick Schutter-See exhibit 25.

Bill Murphy-"I oppose this bill. Furthermore, even if it does pass, what worries me the most is after the bureaucrats, we will be in worse shape than ever."

Mark Cambridge-"I'm a rancher and I definitely oppose HB 707."

Mark Etchart-"I am in opposition to the bill. I did offer a couple of amendments." See exhibit 26. See exhibit 27 for further testimony.

Pat Barnes stated he opposed HB 707.

Bill Spring-"I'm a manager at Union Ditch. We in the Bitterroot have 1,020 farmers who seriously take their living from water and we're all in a scare. I talked to three or four hundred of these fellows and they're all scared of this bill. I urge you, do not pass this bill." Mr. Spring handed in testimony written by John Robbins from Victor, Montana.

Allen O'Haire-"I'm a rancher south of Livingston and I'm also the chairman of the Park Ranch Union Association. I want to say I am adamantly opposed to HB 707."

Jack Perkins-"I'm chairman of the Deer Lodge Valley Conservation District. We met last night and voted to oppose this bill."

George Vogt-See exhibit 30.

Robert VanDerVere-"Please kill HB 707!"

Jay Chamberlin urged the committee to do not pass HB 707.

Senator Severson-"Water is decreed to land for one thing. Water is not decreed to people, it's decreed to land. It's not for sale. It's not for lease. As far as I'm concerned you can't even give it away. This probably is the greatest departure in water law in the history of Montana. Most streams in Montana are over-adjudicated...If you take water out of that stream or leave water in that stream to run into the Bitterroot River, you're going to hurt somebody. You're going to hurt the junior rights and you're going to hurt those people at the lower end of the creek. The day of big dams is over. But gentlemen and ladies, the day of small dams is not over...I urge you to do not pass this bill." See exhibit 31 for further testimony.

John Bailey handed in testimony. See exhibit 32.

L.M. Powell handed in testimony. See exhibit 33.

Allen Martinell handed in testimony. See exhibit 37.

Donald R. Marble handed in testimony. See exhibits 38 and 39.

Eugene Manley handed in testimony. See exhibit 42.

Questions From Committee Members: Senator Bengtson-"The question Carl Davis had on section 4, part 4, of the bill dealing with the lease must take into account the historical use of the water rights including but not limited to, the usual shutoff. How does that protect the stream? If it needs some clarification, what does it need? Does that address the historical use of the water?"

Representative Iverson-"I assume you are talking about the provision in the bill that attempts at least to make it clear that the only water that can be guaranteed in the stream is that portion of the diverted water that had been consumed. Well, I had the same question and maybe I still do. That section was rewritten several times. It finally, in the form you see it, was rewritten in a form that was satisfactory to the attorneys that we talked to. I'm convinced what it says, is that the only amount of water that can be guaranteed instream is that portion that had been consumed. As I said, that's an important part of the bill. I would caution you though, that section is important enough that if this committee decides to clarify it...Mr. Davis may be right that it needs clarification. Do it carefully and get more than one opinion when you do that. I think it's critical we maintain that provision in the bill."

Senator Bengtson-"Perhaps Mr. Davis could provide to us some clarification to that."

Senator Aklestad-"I have a general question for the public here today. I'm wondering if there is anyone here that would have leased water last year that this bill had been in effect?" One person replied that they didn't have any water to lease. Chairman Beck indicated that there were no hands raised.

Senator Aklestad-"I guess that makes my point, possibly I'm wondering how effective this bill can be. It appears to me that those that are against the bill are the very people that are putting the existing water in Montana to beneficial use at this time and those that are for the bill are the ones that are trying to get additional water to put into at least what I would call a less beneficial use for the State of Montana. Would this be

an enhancement for the economy of Montana? Is that a fair statement?"

Representative Iverson-"I think it is a fair statement Senator Aklestad, but I think you are only half right. I think the people you see in this room are water users that have come from an area where there are specific problems. That's why they're here. That's why they're afraid of it...What you saw from the Bitterroot today is a very clear indication to me that even if the Board of Natural Resources was foolish enough to designate that stream range and even if the fish, wildlife, and parks was foolish enough to decide wastes down there. What you saw today is precisely what's going to happen to that change hearing and it ain't going to happen."

Senator Aklestad-"The proponents of this bill haven't indicated and I'm wondering if they would indicate that this bill put to the proponents, gave to the affect that they would give any assurance that they are not going to bring litigation against the very users that I feel are putting beneficial use to this water at this time or through an initiative process. Have they made any overtures and would they make any overtures along those lines?"

Representative Iverson-"Senator Aklestad, I'm not sure who the people are that might be interested in bringing litigation. I don't know how anyone can fairly ask, if we pass a law that it will never be litigated. I think that is unreasonable to suggest. I will say though, if we do address the instream flow problem in this session, we will greatly diminish the possibility of litigation. I think without some action, it's almost a dead certainty."

Senator Aklestad-"I didn't mean to indicate that you could completely eliminate litigation. You and I both know better than that, because litigation is always available in the State of Montana. I guess what I'm getting at, would those that have been proponents today. Other than talking about officials, would they be willing to indicate that, they would not bring litigation or go through the process of an initiative. Why have they mentioned that at any point in time during all the time putting this bill together?"

Representative Iverson-"Not to me, I don't see really how that could happen. You're talking about a conservation group that may represent thousands of people. I certainly wouldn't ask for it. I think it would be improper for me to put a representative on that kind of spot...It isn't reasonable to promise that someone

won't sue."

Senator Aklestad-"Wouldn't the DNRC look at this if there was a dispute? If that is true, do you have any problem with that?"

Representative Iverson-"I don't have any problem with that, because the dispute we are talking about is the objection process. The Department of Natural Resources, representing the State of Montana, has supported the objection process--the change process as it exists right now. They've done a fine job in my opinion of handling those objections."

Senator Aklestad-"My concern is, I realize that only the department will be able to enter into the lease. But it's the availability of moneys to that department from entities that have far more money than farmers and ranchers, and they would be able to enter into that. The point, is the Fish and Game Committee pays more for ranches at this time, than a rancher would buy that same land for. Why wouldn't they pay more for water, if they'll pay more for land?"

Representative Iverson-"It seems to me the more money the better. I don't really care where it comes from. Whether it's conservation groups or foundations, you might want to decide who could contribute money to this account. The more money they are willing to pay for instream flows. the better as far as I'm concerned. The only person that can end up with that money, in his pocket, is the farmer."

Senator Aklestad-"My concern is that farmer that gets the money or a series of farmers may be drying up wells for several other people in that vicinity."

Representative Iverson-"If return flows weren't accounted for, that would be the case, but I'm convinced that the return flows are very clearly left out of the stream."

Closing by Sponsor: Representative Iverson-"I've been through less controversial hearings and I guess there have been hearings that I have had more fun at than this one. There were some benefits, too. One of the issues that was mentioned as being a particular concern was the damage to you and your users. It seemed to be a threat to ranchers through the whole thing. Because of the fact that only the consumed portion of the water can be maintained instream, I can tell you there will be no adverse affect to junior users or anyone else down the stream. In fact, the only water you're going to see in that stream was water that was never in there

to see in that stream was water that was never in there before."

"I might add when you are talking about junior users, that if you remember how these stream reaches work, lets say there is a mile stream that they're concerned about and they lease 30 or 40 acre feet of water. They maintain stream flow in that stretch. Remember there is a beginning and an end to that stretch. After that water leaves that protective stretch, it's going to be open to appropriation--those juniors. So the real the impact on junior users is, you're going to have some junior users below those protective reaches. They're going to have the opportunity to use water they haven't seen in years."

"There could be a tremendous beneficial impact. Take a look at the effective date. It's two years from now. What that means is, the board can go ahead and put together a lease. But that lease can't take effect for two years. I think that's safe. I think that's terribly safe. There won't be a drop of water leased instream until this legislature is back in session."

"If the problems that Carl Davis raised are real, then we can address them...If it turns out this is completely a bad idea, then we'll take it off the damn books. The fact is, it's safe...We seriously need to address instream flows."

ADJOURNMENT

Adjournment At: 3:03 P.M.

A handwritten signature in cursive script, appearing to read "Tom Beck - V. Ch.", written in dark ink.

TOM BECK, Chairman

ROLL CALL

AGRICULTURE COMMITTEE

DATE 3/15/89

51st LEGISLATIVE SESSION 1989

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

Each day attach to minutes.

Dpt. of Livestock

SENATE AGRICULTURE

EXHIBIT NO. 1

DATE 3/15/89

BILL NO. HB465

John Skufca

H.B. 465

Summary.

Montana has had a livestock dealer licensing law since 1971. Several changes have been made in the law through the years, mostly dealing with the definition of a dealer. H.B. 465 addresses the definition as well as the current procedures with bonds and financial statements.

Major Changes.

- 1.) Definition of dealer. Currently we do not have a definition of a livestock dealer. A Helena District Court has ruled our definition to be unconstitutional at this time. The proposed definition attempts to outline perimeters within which the dealer may operate.
- 2.) Financial Statement Requirement. The proposed legislation deletes the requirement that an annual financial statement is required. It inserts the language that will allow the Department of Livestock to request and receive a financial statement.
- 3.) Bonding Requirements. The new language will allow the Department to use the U.S.D.A. Packers & Stockyards Bonds in lieu of a state bond. Currently of the 600 plus dealers, almost all have P & S bonds. This would eliminate much paper work at the state level.

During the past 15 years the Department has had a very difficult time in enforcing this law. It is hoped that this will smooth out the entire process.

January 4, 1989

SENATE AGRICULTURE

EXHIBIT NO. 1A

DATE 9/15/89

BILL NO. HB 707

Mosher

Jess Kilgore
14979 Buffalo Jump Road
Three Forks, Montana 59752
(406) 285-6774

Montana State Economy

	1985	1986	1987	% of 1987 Total	% increase over 1985
Agriculture	1,469.5	1,479.6	1,716.5	32.	17%
Mining	566.5	587.3	581.8	11.	3%
Gas and Oil	869.3	444.5	456.3	9.	-48%
Travel	850.0	854.3	880.0	16.*	4%
Lumber	735.0	820.0	900.0	17.	22%
Manufacturing	NA	NA	800.0	15.	
			5,334.6		

*Travel: Includes all travel and tourism, Parks, Conventions, Recreation, Skiing, etc.

Agriculture: Average property tax annually 60,557,000.
60,557,000. X 60% = 36,334,000 to school fund
6 mill level - 11,992,414.
Livestock mill levy - 13,770,636.
Total: 86,320,050.
Plus State Income Tax

Cows - calves - 47%
Other livestock -- 9.9%

Total 56.9% of total Agriculture

Water leaving the state annually: 44,000,000 acrae feet.
Water totally consumed in state amounts to: 3,500,000 acre feet.
Agriculture uses 94% of the 3,500,000 acre feet consumed.
Additional storage would help retain more of the water now leaving
the state which would help increase the economy in terms of gross
income for agriclutlure as well as fishing and tourism.

Summary

The material shown states quite clearly that in the dry years (as 1988) much of the water flowing from August 1 on is water from the water tables created by the irrigation in May and June and part of July that largely was flood waters. We begin to see a shortage of stream flow in late July and all of August and the early part of September. The months of October on through April sees ample stream flow for fisheries as well as refilling storage lakes.

All the streams with storage bear this out. The only exception I could find was in the Ruby two years ago when a much publicized fish kill occurred. This was not lack of water but lack of management. It just wasn't noticed until the damage was done. In 1988, a much drier year, the water for fisheries was entirely adequate and as far as I know will be for the future due to the Ruby Dam.

Landowners don't like to see dry streams any more than do sportsmen. When you consider the volume of return flow in most streams it is easily seen that the irrigation process over the last century has built underground reservoirs to where they are supplying the rivers with water where they would otherwise be dry in years like 1988, as they were in 1934.

The Big Hole River is the only one of the example I have shown that does not have a reservoir. It does have a huge underground reservoir in the irrigated basin between Jackson and Wisdom. This does restore a good flow in the canyon below Wisdom. It is reused in an irrigated area above Dillon and the flow is below what we like.

You have the description of the Red Rock River in great detail. It shows the merit of storage and the return flow from irrigation. This effect goes a long way down stream as the letter from Tom Lane describes the area on the Jefferson River at Three Forks prior to the construction of Clark Canyon Reservoir.

It looks like the water shortage is about a 60 day affair. Diverting water from irrigated use to instream flow will reduce benefits to the state and particularly the schools. The need and the cure is upstream storage to replenish the 60 day shortfall. A study should be made of the potential. I suggest that increasing the capacity of existing storage would be the most economical where it exists. Raising the levels of some high mountain lakes could contribute in the same manner.

In viewing the economics as well as the numbers of people interested in recreation I believe the state should become involved.

The increased storage could be used in maintaining the fishery in the dry years. They should also participate in the cost. During the wet years in most irrigation districts the irrigators could lease the water if it is not needed for instream flow. By this method the users should bear the costs.

The Red Rock River

This analysis of the Red Rock River system is presented by Richard Gosman, a lifetime resident of the valley with 35 years experience operating irrigated ranches on this stream, served as court appointed water commissioner of the Red Rock Decree for 3 years, and currently is on the board of directors of the Water Users Irrigation Company. It has been edited for accuracy by Allen Martinell, President Water Users Irrigation Company, and also a lifetime operator and irrigator on this stream.

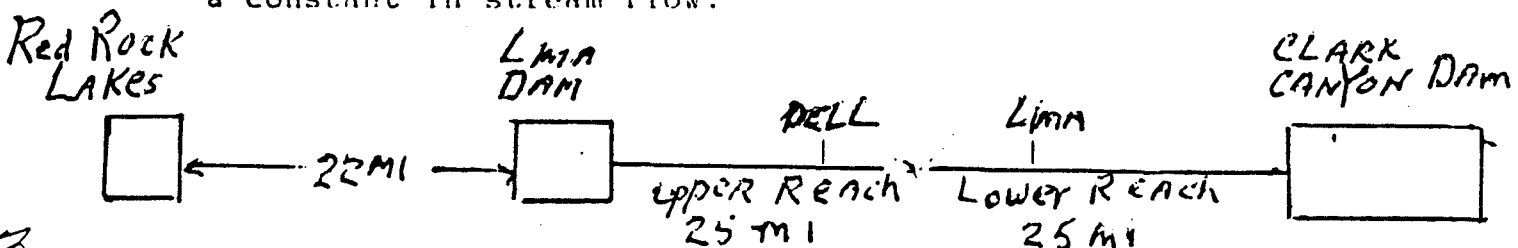
The Red Rock River is typical of many headwater Streams originating in high mountain basins of Montana. Typical in that it is highly appropriated, that a high proportion of the irrigation from it is flood irrigation using a high rate of water application, and in the fact that a high percentage of the water taken from the stream returns to the stream.

The Red Rock River originates in the Red Rock Lakes in the Centennial Valley of southwestern Montana. It follows a meandering course for app. 14 miles to where it flows into the Lima Reservoir. The only irrigation in this upper basin is from tributary streams and is of little consequence. Twice in the 80 year history of the Lima Dam this stream has been dry at its source. Once in the mid 1930's, and again in 1988.

Below the Lima Dam the Red Rock provides irrigation for app. 17,000 acres. It is estimated that app. two thirds of this is flood irrigation using a high rate of water application (estimates vary from 4 to 10 acre feet per acre per season).

Below the Lima Dam the river can be divided into two separate reaches. The upper reach extends for app. 25 miles. This section is characterized by little return flow, and is highly water consumptive. A large portion of the Lima Dam releases are used from this stretch of the river. Despite high irrigation demands this reach of the river has only been completely dewatered during the two dry years previously mentioned.

The lower reach extends for another 25 miles to its termination in Clark Canyon Reservoir. It is fed by many springs arising from a ground water aquafier which is directly charged by irrigation from the upper reach of the river. Two to three weeks after irrigation commences the return flow provides nearly all irrigation needs on the lower reach and insures a constant in stream flow.



The accompanying graphs point out the part played by irrigation in levelling off the stream flow, and insuring a constant more uniform flow in the lower reach. Of particular significance is the 1988 season. The Red Rock was dry at its source from June 2. The Lima dam discharges were high from storage through June 28 at which time the gates were lowered to release only natural flow (app. 17 C.F.S.). This decreased until the gates were completely closed on Aug. 26 and the Red Rock was dry from its source to about 25 miles below Lima Dam. During all this time the lower reach of the river maintained a constant flow of at least 102 C.F.S. and at the same time provided normal irrigation needs to users on this portion of the stream. If any significant amount of water had been reserved for instream flow during the early run off, that water would have been lost to the system and flows in the lower reach would have been reduced by at least that amount.

No amount of instream reservation would provide water for any portion of the stream once it became dry. It did not go dry because of irrigation demands. There just wasn't any water.

During the 1939 season a Mr. N. W. Blindauer, Irrigation Engineer made a study of the Red Rock River and in his report states, quote. " July 19, 1939 complete measurements of river at both ends as well as all river ditches were made by the U. S. Geological Survey between reservoir outlet and Scotts bridge above Armstead. A test for this stretch showed a gain of 57% from backflow. Aug. 18 a similar test was conducted by the same department from Barrats gauging station to Point of Rocks. This reach of river gained over 100% from backflow." He further states, " Part of the function of irrigation water on a stream is to hold the ground water up to a point where the river will flow."

In summary; On headwater streams supplying irrigation to high mountain valleys where nearly all the irrigated land is in close proximity to the stream, our experience and documentation show that transfer of water from offstream use to an instream reservation would be detrimental to sustaining season long stream flows. Occasional dewatering of short reaches on these streams may occur. This is a trade off that may have to be made to insure flows in other reaches. Increase in storage on upper drainages would certainly alleviate much of this problem.

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1982

Releases from Lima Dam in
acre Feet Per Month

Red Rock River at Clark Canyon
Dam in Acre Feet per month.

Jan.	818-----	10,914
Feb.	739-----	9,154
Mar.	818-----	10,626
Apr.	4,422-----	14,410
May	24,358-----	25,302
June	37,543-----	14,486
July	40,108-----	15,726
Aug.	31,418-----	11,102
Sept.	4,404-----	11,956
Oct.	814-----	15,770
Nov.	6,357-----	14,710
Dec.	4,083-----	13,190
	<u>155,882</u> + 11,464 =	<u>167,346</u>

1988

Releases from Lima Dam in
acre Feet Per Month

Red Rock River at Clark Canyon
Dam in Acre Feet per month.

Jan.	1,015-----	13,289
Feb.	497-----	11,501
Mar.	318-----	13,784
Apr.	1,369-----	11,436
May	12,618-----	7,552
June	21,688-----	7,552
July	1,178-----	9,671
Aug.	302-----	9,281
Sept.	0-----	6,270
Oct.	0-----	8,410
	<u>39,287</u> + 64,090 =	<u>103,377</u>

This is probably the driest year in 50 years. The return flow differential has moved back a month to August. This has to be from the water table created in the preceding wetter years. Note also that in 1973 and 1982 there was a much higher volume of water than in the earlier years. This suggests to me that it takes years to build the underground reservoir and also that we may expect a lesser flow into Clark Canyon until September even if we have a wet winter which will refill Lima Reservoir.

Value of Water (Hay Ranch)

100 acre feet - Alfalfa -

50 acres = 4 tons/acre = 200 tons X \$50/ton = \$10,000.
\$10,000 ./ 100 acre feet = \$100/ per acre foot water.

The same 100 acre feet is not totally consumed.

80 acre feet returned to stream and next user.

40 acres X 4 tons = 160 tons X \$50 = \$8000.

64 acre feet returned to down-stream users

32 acres X 4 tons = 128 tons X \$50 = \$6400.

50 acre feet returned to down stream users.

25 acres X 4 tons = 100 tons X \$50 = \$5000.

29,400.

Water is used and reused above on the basis of 40% consumption.

100 acre feet has a total value of \$294/acre foot.

\$294 is based on \$50 hay. Present market price is \$90 to \$100 per ton.

Value of Water (cow calf ranch)

100 acre feet:

50 acres X 4 tons = 200 tons of hay
200 tons = 100 cows = 90 calves X \$450 = 40,500.

80 acre feet:

40 acres X 4 tons = 160 tons of hay
160 tons = 80 cows = 72 calves X \$450 = 32,400.

64 acre feet:

32 acres X 4 tons = 128 tons of hay
128 tons = 64 cows = 58 calves X \$450 = 26,100.

50 acre feet:

25 acres X 4 tons = 100 tons of hay
100 tons = 50 cows = 45 calves X \$450 = 20,250.

119,250.

119,250. gross income from 100/acre ft. water = \$1192/acre ft.
Above based on current livestock values.

Above based on re-use of water 3 times and that 20% of the water each time will be totally consumed by the crop. The balance of the water will be in the water table. (40%)

Ex #1A
HB 707
3-15-89

Value of Water

In other statements to meetings and water hearings I have stated that at least half or more of the value of a cow-calf ranch unit is due to the possession and use of a water right and its use in the business.

I have arrived at a value of an acre foot of water based on the sale of calves at present market prices to be \$1192. per acre foot.

Ranch properties currently are selling at about \$2000 per cow unit if the ranch property is well balanced and has an adequate water right and land to produce approximately 2 tons of hay per cow.

200 cow unit at \$2000 per animal unit = \$400,000. Without the water right to produce winter feed the carrying capacity will be reduced by more than 50%.

50 % of the value = \$200,000.

200 acre feet of water = $200 \times \$1192 = \$238,400.$

It seems to be borne out by the above figures that an acre foot of water does have a value close to the \$1192 figure. This is the open market value approach to determine values.

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Ex. #1B

3/15/89

HB 465

HB 707

BILL SUMMARY--SENATE AGRICULTURE COMMITTEE
MARCH 15, 1989
PREPARED BY DOUG STERNBERG, COMMITTEE STAFF

HB 465 Section 1: adds definition of "immediate resale" and revises definition of "livestock dealer" for purposes of the Livestock Marketing Act

Section 2: requires proof of a USDA bond for licensure as a livestock dealer

Section 3: deletes requirement of a state bond as a criteria of livestock dealer license issuance or renewal

Section 4: removes state bond as a criteria for livestock dealer license termination

Section 5: adds requirement that a livestock dealer supply a current financial statement to the department upon request rather than annually

Section 6: deletes internal reference to repealed section

Section 7: repeals section that established requirements of the state livestock dealer bond

Section 8: extends present agency rulemaking authority

Section 9: provides immediate effective date

HB 707 Section 1: adds department of fish, wildlife, and parks streamflow lease to definitions of "appropriate" and "beneficial use" in the surface and groundwater law

Section 2: adds an exception for FWP streamflow leases not requiring appropriation works from the proof of adequacy necessary for approval of a change in appropriation rights

Section 3: provides that a FWP streamflow lease does not constitute abandonment of the lessor's appropriation right

Section 4: allows FWP, after July 1, 1991, to lease existing water rights to maintain or enhance streamflows during critical low flow periods; establishes lease application requirements; limits lease quantities to the lessor's historical amount or less; outlines criteria for lease term, modification or revocation, priority of appropriation and reversion; provides that a person issued a water use permit that is junior to the FWP lease may not object to exercise of the FWP lease; requires FWP to pay costs of monitoring

Section 5: requires DNRC designation of leasable streams and limits leasing to 10 streams in the state

Section 6: allows FWP to accept public and private contributions for leasing and development and provides for expenditure of the funds

Section 7: requires DNRC (as indicated in title) to report to each legislature concerning operation of the leasing program

Section 8: extends present agency rulemaking authority

Section 9: codifies sections 4 & 5 in DNRC law; codifies section 6 in FWP law

Section 10: terminates the leasing program October 1, 1999.

QUESTIONS AND ANSWERS ON THE INSTREAM FLOW LEASING BILL

SENATE'S
EXAMINED BY
THE HOUSE OF
DATE REPRESENTATIVE

BILL NO. HB 707

WHAT IS THE PURPOSE OF THE BILL?

The purpose of the instream flow leasing bill is to allow the Department of Fish, Wildlife and Parks (DFWP) to lease water rights from willing individuals or groups to maintain or enhance free-flowing water in certain streams for fish, wildlife, and recreation (Section 4(1)). Several of these points should be emphasized.

First, the only entity that is allowed to lease water for instream flow purposes is the DFWP. However, other public and private agencies are allowed to contribute funds and other resources to the DFWP for the purpose of leasing water for instream flow protection (Section 6).

The DFWP may also accept contributions for developing water storage to maintain or enhance streamflows (Section 6(1)(B)). The DFWP must expend such contributions exclusively for such storage facilities unless otherwise authorized under Section 87-1-514, MCA (Section 6(4)).

Second, the DFWP may only lease water only from "willing" parties. No one will be forced to lease water to the DFWP for instream flow purposes.

Third, the DFWP may lease water from willing parties to both maintain existing resources as well as to enhance or increase instream flows in dewatered streams. While the bill provides the DFWP an alternative mechanism to maintain existing instream resources (in addition to the reservation process (Section 85-2-316, MCA) and water storage), it is most likely to be used to enhance instream flows in dewatered streams.

Fourth, the DFWP's opportunity to lease water for instream flow purposes is limited to only 10 stream reaches identified by the DFWP and approved by the Board of Natural Resources and Conservation (Section 5). Fifth and finally, the DFWP may only lease water to protect and manage fish, wildlife, and recreational resources.

HOW DOES THE BILL PROTECT EXISTING WATER RIGHTS?

First, the DFWP can only lease water from a "willing" party. That is, instream flow leases are voluntary; they are not required and do not result in the confiscation of water rights without compensation. Where the two parties cannot be mutually benefited, a lease arrangement makes bad economic sense and is not likely to be entered into.

Second, according to the "Statement of Intent," it is anticipated that the DFWP will meet with appropriators along selected stream reaches to assess and consider any concerns before proceeding with an instream flow lease.

Third, the DFWP must provide the Board of Natural Resources and Conservation (BNRC) with a list of specific stream reaches on which leasing is desired (Section 5). The BNRC must then declare or designate only 10 stream reaches where instream flow leases may occur if it finds that leasing is necessary. Individuals or groups with existing water rights would have an opportunity to express their concerns before the Board regarding instream flow leases on particular stream reaches.

Fourth, a proposal for an instream flow lease must be processed through the same change of use proceeding as other water right changes and transfers (Section 2). In short, this means that individuals with water rights would have an opportunity to object to the lease and to provide evidence on how and why the lease would adversely affect the use of their water right. If a proposed lease would result in an adverse affect, it would not be allowed.

Fifth, the Department of Natural Resources and Conservation (DNRC) maintains jurisdiction to modify or revoke the lease during the lease period if third parties provide new evidence that the lease adversely affects the use of their water right (Section 4(6)).

HOW WILL THE BILL AFFECT FUTURE WATER PERMITTEES?

An individual or group that applies for and receives a water use permit with a priority date after the date of the instream flow lease authorization would not be allowed to object to the exercise of the lease, the renewal of the lease, or the reversion of the appropriation right to the lessor (Section 4(9)). This is consistent with the prior appropriation doctrine ("first in time, first in right), and does not constitute a change in Montana's water law.

HOW MUCH OF AN EXISTING WATER RIGHT IS LEASABLE?

The amount of water that may be leased from an existing water user for instream flow purposes is generally up to the lessor and the DFWP. However, the maximum quantity of water that may be leased is the amount historically diverted

by the lessor; only the amount historically consumed may be leased below the lessor's point of diversion (Section 4(4)). The DNRC may specify in the lease authorization that an amount of water smaller than that historically consumed by the lessor is leasable.

An instream flow lease must take into account the historical use of the water right, including but not limited to the shutoff of a diversion associated with a water right under normal irrigation practices, harvesting, climatic conditions, and cooperative practices with other irrigators (Section 4(4)).

HOW WILL THE LENGTH OF THE STREAM REACH TO WHICH THE LEASE APPLIES BE IDENTIFIED?

The length of stream reach to which an instream flow lease applies is generally up to the lessor and the DFWP. However, specific information on the length and location of the stream reach must be included in the instream flow lease authorization (Section 4(3)). In addition, the BNRC may establish the streams and stream reaches where leasing may occur.

HOW WILL THE INSTREAM FLOW BE MEASURED?

The details for measuring a leased instream flow are up to the DFWP. However, a lease authorization must include an instream flow measuring plan that describes the points where and the manner in which the instream flow will be measured (Section 4(3)).

The DFWP must pay all the costs associated with installing measuring devices or providing personnel to measure streamflows according to the measuring plan (Section 4(10)).

HOW LONG IS THE LEASE PERIOD?

An instream flow lease may be authorized by the DNRC for no more than 10 years (Section 4(5)). The lease may also be renewed (for up to 10 years per renewal) if nobody objects to the renewal and provides new evidence showing how the lease adversely affects the use of a water right, and if the leasing statute is recodified after the 10 year sunset provision.

HOW OFTEN MAY THE LEASE BE EXERCISED?

The DFWP may lease existing water rights only during critical low flow periods (Section 4(1)).

WHAT IS THE PRIORITY DATE FOR AN INSTREAM FLOW LEASE?

As in any water right change, the priority date for an instream flow lease authorization is the same as the priority of appropriation of the water right that is leased (Section 4(7)).

WHO MAY ENFORCE INSTREAM FLOW LEASES?

According to the "Statement of Intent," the lessor is responsible for taking action, if necessary, to protect the instream flow lease. However, the "Statement of Intent" goes on to say that the lessor and the DFWP may agree to a different arrangement if agreeable to both parties.

WILL A LEASED WATER RIGHT BE CONSIDERED ABANDONED?

In leasing an existing water right, the lessor does not abandon any part of the right (Section 3(4)).

WHEN CAN THE DEPARTMENT OF FISH, WILDLIFE AND PARKS BEGIN TO LEASE WATER RIGHTS?

The DFWP may not enter into a lease before July 1, 1991 (Section 4(1)). This will allow the DFWP and the BNRC to identify specific stream reaches where instream flow leases are needed and to determine if there are any parties willing to lease water. It will also give the legislature an opportunity to review the leasing program during the 1991 session before any leases are authorized.

REPORT TO THE LEGISLATURE

The DNRC must report to each regular session of the legislature on the operation of the instream flow leasing program (Section 7).

March 15, 1989

Policy Advisor
on Natural Resources

This bill is a compromise. And like a good compromise, no one is ~~really~~ ^{completely} happy with it.

For two months I've been working on water leasing. Sometimes I've felt like the process has been haunted by the ghost of water past--which is stream access--and the ghost of water future--which is the public trust doctrine.

~~Make no mistake, those ghosts are with us in the room today.~~

And the bill before you, in part, is a response to the past and to the future. And this bill has a lot of good things going for it.

It is small in scope--a water leasing pilot project.

It is completely voluntary.

Not one drop of water will be confiscated under this bill.

There's no sales under this bill...just leases.

There is a great deal of public involvement built in the leasing process under this bill.

No lease can take place until 1991, so the state can fine tune any leasing process approved here.

And we are maximizing our most precious resource--water.

I would add that if the Governor thought this bill in any way hurt agriculture--he would have me here opposing the bill and opposing it strenuously. The Governor is determined to pursue a progressive and responsible state water policy which recognizes the needs of all water users. The leasing of water might be a part of that policy. Can we protect instream flows with leasing? That question deserves an answer.

Like many of the people in this room, the Governor wants to pursue water storage. In fact, two years from now I hope we are all here to discuss the Governor's water storage. ~~The next~~ The next water plan will examine water storage. *Stephens Plan for*

Finally, one argument against this bill--and I heard this a lot--is that it allows the camel's nose to get under the tent. Except in this case the camel's nose isn't a group, or a cause, or a concept. In this case maybe the camel's nose represents the future. ~~Make no mistake, those ghosts are with us in the room today.~~

~~Will find how much how soon.~~

Thank you.

HB 707
March 15, 1989

Testimony presented by Ron Marcoux, Department of Fish, Wildlife and Parks

Montana's streams provide numerous benefits to the people of this state. Many of these benefits result when water is put to use off the stream, but many others also occur from instream flows. These include clean drinking water, hydroelectric power, dilution for industrial discharges, recreation, and benefits for fish and wildlife.

The past several drought years have clearly demonstrated how water shortages can affect all the users.

Because Montana is a diverse state, the tools needed to manage and allocate our waters must also be diverse. Montana's modern water laws, as they have evolved since 1973, provide flexibility while protecting existing users.

Water management tools must also be diverse because no single mechanism will solve water shortages. Some claim that storage is the only answer. Storage does have its role, but is not appropriate or cost effective in all cases.

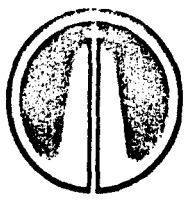
HB 707 can provide a mechanism to keep streamflows from reaching critically low levels in some streams. Like storage, water transfers are not the answer for all streams. However, HB 707 provides an opportunity for willing water right holders to lease water if other existing water users are not adversely affected.

At the present time water can be transferred from any consumptive use to another consumptive use through a change-of-use hearing. There have been comments that would lead one to believe such changes of use cannot occur without adverse impacts. However, they occur today. The main difference with water leasing is that this water will be left instream for a predetermined distance. Our experience in the Bitterroot Valley indicates this can be done. Although the instream water in the Bitterroot comes from storage, we have demonstrated our ability to work with local irrigators, the Conservation District, conservationists and the district court to deliver the water downstream. In fact, the increased flow has also benefited irrigators along this reach of stream.

The process set forth in this bill is similar to other change-of-use proceedings. The opportunity to identify potential conflicts can and should occur up front. If a particular lease appears too complex, the department would pursue other leases or other options. Because leases can only occur during low flow periods, the water not consumed at the lease site will very likely be put to use by agricultural users downstream from the leased area. Thus not only is the lessor directly compensated, but downstream agricultural

users will benefit during a period when they are likely to otherwise experience water shortages.

The bill provides a limited scope of leasing while the program is being evaluated. There are many safeguards built into this bill. While these safeguards will make the process more complex and cumbersome, we believe the process is workable. The department feels the ability to lease water for instream purposes is an important mechanism to alleviate some of the problems on our dewatered streams, and offers its support to HB 707.



College
of
Great Falls

Sisters of Providence

1301 - 20th Street South / Great Falls, Montana 59405 / (406) 761-8210

EXHIBIT NO. 5
DATE 3/15/89
BILL NO. HB 707
Grosfield

RECEIVED

FEB 17 1989

MONTANA, DEPT. OF NATURAL
RESOURCES & CONSERVATION

February 15, 1989

Rep. Bob Raney, Chairman
House Natural Resources Committee
Capitol Station
Helena, MT 59620

Dear Rep. Raney:

On February 9, 1989, the Board of Natural Resources and Conservation approved four sections of the Montana State Water Plan. One of these sections is titled "Instream Flow Protection," and one of its recommendations is for the Legislature to change the law to allow leasing of off-stream water rights to maintain or enhance instream flows.

By the time this letter reaches you, a bill to accomplish this will have been introduced and referred to the House Natural Resources Committee (LC634/1663). An unproofed draft of this bill was reviewed by the Board on February 10, and a motion expressing the Board's support for this bill was unanimously approved.

The water leasing portion of the state water plan engendered much public discussion and controversy. The Board of Natural Resources and Conservation did not approve it lightly. Public comment has included nine public meetings, three public hearings, and receipt of over two hundred letters. Additionally, the Board conducted its own hearing. After carefully considering the alternatives, water leasing emerged as the preferred choice. The draft water leasing bill reviewed by the Board provides an additional method to protect Montana's natural resources that are dependent on instream flow without harming the economic interests dependent on existing water rights.

In sum, the Board supports the water leasing bill before your committee. It is a fair and balanced approach, and it includes clear protection for current water rights holders and safeguards against the uncertainties surrounding implementation of a new water management technique.

Ex. 5

3/15/89

Rep. Bob Raney February 15, 1989 Page 2.

I am sure that as Chairman of the House Natural Resources Committee you will see that this bill receives the fair and timely hearing it deserves.

Sincerely,

William A. Shields

William A. Shields, Chairman
Board of Natural Resources and Conservation

cc: Governor Stan Stevens
Karen Barclay
BNRC Members

TESTIMONY OF THE
DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION
ON HOUSE BILL 707

Barklay

March 15, 1989

A BILL FOR AN ACT ENTITLED: " AN ACT PROVIDING FOR LEASING OF EXISTING WATER RIGHTS FOR THE PURPOSE OF ENHANCING STREAMFLOWS FOR FISH, WILDLIFE, OR RECREATION, ETC.

The Department of Natural Resources and Conservation supports House Bill 707 as amended by the House of Representatives. The legislation would implement a recommendation of the state water plan that addresses streams having significant instream values and yet subject to regular or periodic low flow conditions. Other water plan recommendations to deal with this circumstance include pursuing local cooperative solutions, such as the sharing of water shortages and irrigation scheduling; providing for water storage releases, as is already being done from Painted Rocks Reservoir for the Bitterroot River; and evaluating the potential for developing additional water storage facilities to meet both instream and offstream water use needs.

None of these options is a panacea for solving stream dewatering problems. Rather, each should be considered as a tool for addressing the problem. Each of these tools has its own particular applicability and limitations. Water leasing may be the best tool for the job of solving dewatering problems in some areas.

The state water plan recommendation on water leasing was the result of considerable public input and debate. Participants in the discussion included a broad-based Instream Flow Technical Advisory Committee, the State Water Plan Advisory Council, the Board of Natural Resources and Conservation, the legislature's Water Policy Committee, several special interest groups, and about 2,500 people attending 12 public meetings on the plan.

This bill embodies a "walk-before-you-run" approach. It is purposely a constrained bill in that it doesn't allow private entities to lease water for instream flow purposes nor does it allow for the purchase (or permanent transfer) of a water right for instream uses. It further limits leasing to ten streams in Montana. Yet, the bill can make a difference and can accomplish the principle objective of protecting valuable instream resources at times when they are most threatened.

Ex. #6
3/15/89
HB 707

The bill amends existing Montana water law by allowing instream uses to be considered along other water uses. That is, existing water rights may currently be changed or transferred, but only from one offstream use to another. This bill would treat all water users more fairly by allowing instream flow purposes to be fulfilled when and where willing parties would enter into instream flow lease agreements.

Instream flow leases would be subject to the same change of use requirements that other transfers must satisfy, and additional requirements that are justified by the different nature of an instream water right. These will not be easy requirements to meet but they are necessary to protect all existing water users. I can assure you that such matters as quantifying the consumptive part of a water right or return flows are very complex and difficult, but they are matters with which the department has experience and ones that have to be carefully considered in any other change of use proceeding. If it were found that a proposed lease arrangement would harm an existing water right, the lease would not be authorized.

In conclusion:

1. Water leasing would operate within the framework of Montana's prior appropriation water rights doctrine.
2. All existing water rights would be recognized and protected.
3. Only willing parties would ever be involved in the leasing of water for instream flow purposes.
4. Like reservoir storage, leasing would represent a water management tool that may help sustain important natural resources during low flow conditions.
5. Also, like storage, leasing would not be a panacea and would not be applicable in all circumstances.
6. Finally, water leasing would be very limited in scope and allow the state to approach this matter in a positive, yet cautious manner.

HB707IVERSONMAR. 15, 1989MONTANA WATER RESOURCES ASSOCIATION, JO BRUNNER, EX. SEC.SENATE AG. SUPPORT X AMEND OPPOSE

Mr. Chairman, The Montana Water Resources Association has wrestled long and hard with this bill. Our members have had, and will continue to have very strong feelings, both pro and con on the leasing of water.

The MWRA legislative committee has voted to support HB707, with reservations, but some of our members will be here today in opposition, and we want you to understand that we have encouraged them to present their thoughts and concerns to this committee. We believe that only through earnest participation and thorough discussion do good bills and laws come about.

While the Association does support HB707, at this time, it is with reservations. We continue to have very deep rooted concerns with such a drastic change in Montana water law, but realize the potential for water right holders in circumstances that will prove beneficial not only for themselves, but in maintaining our natural habitat.

MWRA certainly approves the amendments, as we received them, prior to this meeting. It is our conviction that the parties benefiting by the lease provisions should be responsible for adverse affects to others and these amendments hopefully will alleviate our concerns.

We have a problem with the lack of adequate measuring systems, and with inadequate definitions of the reach of use for leased water, and will continue to work toward and support wording we feel will take care of those problems.

MWRA has been deeply involved with all aspects of the State Water Plan, our immediate past president serves on the Council and several of our members served on the Technical Advisory committees, as I did, with the meetings held around the state, on the informal lease plan committee and in the formulation of this bill, and amendments.

We continue to believe that many of the problems addressed by advocates of instream preservation can, and will be solved by the construction of storage facilities. This is not just an assumption, we only have to look to existing facilities and their uses to see the need for further facilities on our streams.

It is the intent of the Montana Water Resources Association to continue to work with those who will be involved in this process, should the bill pass or not, and to closely monitor any developments, good or bad as the case may be. We recognize that this is not a one shot issue, that all areas of the Montana Water Plan will continue over the years, and we intend to be involved to the fullest in the many facets of the programs.

Thank You.

PROPOSED AMENDMENTS TO HB 707
(Third reading copy -- blue)
Prepared for the Senate Committee on Agriculture
March 14, 1989 Draft

1. Title, lines 8 and 9.
Following: "PURPOSE OF"
Strike: "ENHANCING OR MAINTAINING"
Insert: "PROVIDING"
2. Title, line 9.
Following: "FOR"
Strike: remainder of line 9
Insert: "THE BENEFIT OF FISHERIES"
3. Page 2, line 2.
Following: "of"
Strike: "maintaining or enhancing"
Insert: "providing"
4. Page 2, line 3.
Following: line 2
Strike: "fish, wildlife, or recreation"
Insert: "the benefit of fisheries"
5. Page 2, lines 6 and 7.
Strike: "enhance" on line 6 through "recreation" on line 7
Insert: "provide for fisheries"
6. Page 2, line 9.
Following: "parks"
Insert: "that have the approval of the fish and game commission"
7. Page 3, line 4.
Following: "conservation"
Strike: "will"
Insert: "with the consent of the board shall"
8. Page 3, lines 23 and 24.
Following: "authorization" on line 23
Strike: remainder of line 23 through "contract" on line 24
9. Page 4, line 2.
Following: "conservation"
Strike: "should"
Insert: "with the consent of the board shall"

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10. Page 4, line 5.
Following: "are not"
Strike: "or probably will not be"

11. Page 5, line 17.
Following: line 16
Insert: "(6) "Commission" means the fish and game commission
provided for in 2-15-3402."
Renumber: subsequent subsections

12. Page 14, line 13.
Following: "to"
Strike: "enhance or maintain"
Insert: "provide"

13. Page 14, line 14.
Following: "for"
Strike: "fish, wildlife, or recreation"
Insert: "the benefit of fisheries"

14. Page 14, line 16.
Following: "parks"
Insert: ", with the consent of the commission, "

15. Page 14, lines 17 and 18.
Following: "of" on line 17
Strike: "maintaining or enhancing"
Insert: "providing"
Following: "for" on line 17
Strike: "fish, wildlife, or recreation"
Insert: "the benefit of fisheries"

16. Page 14, line 22.
Following: "department"
Insert: "with the consent of the board"

17. Page 14, line 23.
Following: "of"
Strike: "maintaining or enhancing"
Insert: "providing"

18. Page 14, line 24.
Following: "for"
Strike: "fish, wildlife, or recreation"
Insert: "the benefit of fisheries"

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19. Page 15, lines 5 and 6.

Following: "streamflow" on line 5

Strike: "will" through "enhanced" on line 6

Insert: "shall be provided"

Following: "must" on line 6

Strike: "provide"

Insert: "include"

20. Page 15, line 8.

Strike: "will"

Insert: "shall"

21. Page 15, line 14.

Following: line 13

Strike: "enhance or maintain"

Insert: "provide"

22. Page 15, line 21.

Following: line 20

Insert: "(5) The department of fish, wildlife, and parks shall have the responsibility to prove to the board by substantial credible evidence that a proposed lease authorization does not adversely affect existing water rights. The department of fish, wildlife, and parks shall pay the cost, including reasonable attorney fees, for any appropriator who successfully objects to a proposed department of fish, wildlife, and parks lease."

Renumber: subsequent subsections

23. Page 16, line 4.

Strike: "(9)"

Insert: "(10)"

24. Page 16, line 6.

Following: "."

Insert: "If an appropriator proves adverse effects to his water rights, the department of fish, wildlife, and parks shall pay to the appropriator an amount equal to the damages that resulted from exercise of their lease, and the costs of proving the adverse effects including reasonable attorney fees and court costs. This provision applies only to water leases entered into under this section."

25. Page 16, line 8.

Following: "department"

Insert: "with the consent of the board"

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26. Page 16, line 10.

Strike: "(9)"

Insert: "(10)"

Following: "by"

Strike: "substantial credible"

Insert: "a preponderance of the"

27. Page 16, line 11.

Following: "."

Insert: "If an appropriator proves adverse effects to his water rights, the department of fish, wildlife, and parks shall pay to the appropriator an amount equal to the damages that resulted from exercise of their lease, and the costs of proving the adverse effects including reasonable attorney fees and court costs. This provision applies only to water leases entered into under this section."

28. Page 17, line 5.

Following: "parks,"

Strike: "in consultation with the department"

Insert: "with the consent of the commission"

29. Page 17, line 7.

Following: "to"

Strike: "maintain or enhance"

Insert: "provide"

30. Page 17, line 12.

Following: line 11

Strike: "maintain" through "recreation"

Insert: "provide for fisheries"

31. Page 17, line 14.

Insert: "(3) Upon declaring a stream reach eligible for leasing, the board shall request the department to prepare an analysis concerning whether longer term solutions to the critical low flows in the stream reach are feasible. Longer term solutions to be considered include storage enhancement or development and recharge from ground water sources. The preparation of or recommendations resulting from the analysis may not preclude, inhibit, or delay the negotiation or implementation of leases on the stream reach as provided in [section 4]."

Renumber: subsequent subsection

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32. Page 17, lines 21 through 23.

Following: "to" on line 21

Strike: "maintain" on line 21 through "enhance" on line 22

Insert: "provide"

Following: "for" on line 22

Strike: remainder of line 22 through "purposes" on line 23

Insert: "the benefit of fisheries"

33. Page 17; line 24 through page 18, line 1.

Following: "TO" on line 24

Strike: remainder of line 24 through "ENHANCE" on line 25

Insert: "provide"

Following: "STREAMFLOWS" on line 25

Strike: remainder of line 25 through "PURPOSES" page 18, line 1

34. Page 18, line 8.

Following: "of"

Strike: "maintaining or enhancing"

Insert: "providing"

35. Page 18, line 9.

Following: "flows"

Strike: "for" through "recreation"

36. Page 18, lines 14 and 15.

Following: "TO" on line 14

Strike: "MAINTAIN OR ENHANCE"

Insert: "provide"

Following: "STREAMFLOWS" on line 14

Strike: remainder of line 14 through "PURPOSES" on line 15

37. Page 18, line 19.

Following: second "DEPARTMENT"

Insert: "with the consent of the board"

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1 A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR LEASING OF
2 EXISTING WATER RIGHTS FOR THE PURPOSE OF ENHANCING OR
3 MAINTAINING PROVIDING STREAMFLOWS FOR FISH, WILDLIFE, OR
4 RECREATION THE BENEFIT OF FISHERIES DURING CRITICAL LOW FLOW
5 PERIODS IN STREAM REACHES DESIGNATED BY THE BOARD OF NATURAL
6 RESOURCES AND CONSERVATION; SPECIFYING THAT THE DEPARTMENT OF
7 FISH, WILDLIFE, AND PARKS IS THE LESSEE AND ALLOWING THE
8 DEPARTMENT TO ACCEPT CONTRIBUTIONS FROM PUBLIC OR PRIVATE
9 ENTITIES FOR THE PURPOSE OF ACQUIRING LEASES OR FOR DEVELOPING
10 STORAGE FACILITIES; SPECIFYING THAT THE DEPARTMENT BOARD OF
11 NATURAL RESOURCES AND CONSERVATION SHALL MAKE A REPORT TO
12 EACH REGULAR SESSION OF THE LEGISLATURE; AMENDING SECTIONS 85-
13 2-102, 85-2-402, AND 85-2-404, MCA; AND PROVIDING A TERMINATION DATE."
14
15

16 STATEMENT OF INTENT

17 A statement of intent is provided for this bill in order to give additional
18 guidance to the board of natural resources and conservation and the involved
19 state agencies concerning the review and processing of lease applications for
20 the purpose of ~~maintaining or enhancing~~ PROVIDING stream flows for fish,
21 ~~wildlife, or recreation~~ THE BENEFIT OF FISHERIES.

22 The legislature intends that the board designate stream reaches eligible for
23 water leasing in areas where leasing is necessary ~~or likely to be necessary~~ to
24 ~~enhance or maintain fish, wildlife, or recreation~~ PROVIDE FOR FISHERIES.
25 Upon receipt of a list of stream reaches from the department of fish, wildlife,
26 and parks THAT HAVE THE APPROVAL OF THE FISH AND GAME
27 COMMISSION, the board shall act expeditiously to designate eligible stream
28 reaches. However, the legislature also encourages the board to select stream
29 reaches where leasing has a good chance of success and where all interests
30 may be satisfied.

31 The legislature also intends that the review process for lease applications be
32 thorough and provide ample opportunity for consideration and input by concerned
33 persons. As required in [section 4], the process should involve notice and
34 opportunity for objections and hearing in the same manner provided for proposed

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1 changes in appropriation rights. The legislature contemplates that the department
2 of fish, wildlife, and parks will meet with appropriators along each designated
3 stream reach to assess and consider any concerns before filing applications for
4 lease authorizations. The legislature also encourages the department of fish,
5 wildlife, and parks to assemble lease applications for filing at the same time to
6 minimize costs to potential objectors. Moreover, the legislature anticipates that
7 the department of natural resources and conservation will WITH THE
8 CONSENT OF THE BOARD, SHALL review the proposed leases for a single
9 stream reach in one proceeding, though the potential for another set of lease
10 applications at a future date is recognized.

11 The accurate identification of the stream reach in both the application and
12 lease authorization is critical to a successful leasing program. Upon issuance of
13 a lease authorization with an identified stream reach, the legislature intends that
14 the entire leased appropriation may be protected to the extent provided under
15 Title 85, chapter 2, in any part of the stream reach that is above the lessor's
16 point of diversion. However, only the historical consumptive use of the right, or a
17 smaller amount if specified in the lease authorization by the department of
18 natural resources and conservation, may be protected in any part of the stream
19 reach that is below the lessor's point of diversion. Finally, the legislature intends
20 for the lessor to be responsible for taking action, if necessary, to protect the
21 instream flow amount specified in the lease authorization, ~~though the lessor and~~
22 ~~lessee may specify otherwise by contract.~~

23 From a broad policy perspective, the legislature desires to emphasize that
24 the department of natural resources and conservation ~~should~~ WITH THE
25 CONSENT OF THE BOARD, SHALL consider and, if potentially feasible,
26 recommend supplemental or alternative strategies that provide long-term solutions
27 to problems that are not ~~or probably will not be~~ addressed adequately by water
28 leasing in the board-designated stream reaches. These strategies may include
29 storage enhancement or development and recharge from ground water sources.

30

31 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

32 Section 1. Section 85-2-102, MCA, is amended to read:

33 "85-2-102. Definitions. Unless the context requires otherwise, in this chapter
34 the following definitions apply:

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1 (1) "Appropriate" means to:

2 (a) divert, impound, or withdraw (including by stock for stock water) a
3 quantity of water; or;

4 (b) in the case of a public agency, to reserve water in accordance with 85-
5 2-316; or

6 (c) in the case of the department of fish, wildlife, and parks, to lease water
7 in accordance with [section 4].

8 (2) "Beneficial use", unless otherwise provided, means:

9 (a) a use of water for the benefit of the appropriator, other persons, or the
10 public, including but not limited to agricultural (including stock water), domestic,
11 fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational
12 uses; and

13 (b) a use of water appropriated by the department for the state water
14 leasing program under 85-2-141 and of water leased under a valid lease issued
15 by the department under 85-2-141; AND

16 (C) A USE OF WATER BY THE DEPARTMENT OF FISH, WILDLIFE, AND
17 PARKS PURSUANT TO A LEASE AUTHORIZED UNDER [SECTION 4].

18 (3) "Board" means the board of natural resources and conservation
19 provided for in 2-15-3302.

20 (4) "Certificate" means a certificate of water right issued by the department.

21 (5) "Change in appropriation right" means a change in the place of
22 diversion, the place of use, the purpose of use, or the place of storage.

23 (6) "COMMISSION" MEANS THE FISH AND GAME COMMISSION PROVIDED
24 FOR IN 2-15-3402.

25 (6)(7) "Declaration" means the declaration of an existing right filed with the
26 department under section 8, Chapter 452, Laws of 1973.

27 (7)(8) "Department" means the department of natural resources and
28 conservation provided for in Title 2, chapter 15, part 33.

29 (8)(9) "Existing right" means a right to the use of water which would be
30 protected under the law as it existed prior to July 1, 1973.

31 (9)(10) "Groundwater" means any water beneath the land surface or beneath
32 the bed of a stream, lake, reservoir, or other body of surface water, and which
33 is not a part of that surface water.

34 (10)(11) "Permit" means the permit to appropriate issued by the department

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1 under 85-2-301 through 85-2-303 and 85-2-306 through 85-2-314.

2 ~~(11)~~(12) "Person" means an individual, association, partnership, corporation,
3 state agency, political subdivision, the United States or any agency thereof, or
4 any other entity.

5 ~~(12)~~(13) "Political subdivision" means any county, incorporated city or town,
6 public corporation, or district created pursuant to state law or other public body
7 of the state empowered to appropriate water but not a private corporation,
8 association, or group.

9 ~~(13)~~(14) "Waste" means the unreasonable loss of water through the design or
10 negligent operation of an appropriation or water distribution facility or the
11 application of water to anything but a beneficial use.

12 ~~(14)~~(15) "Water" means all water of the state, surface and subsurface,
13 regardless of its character or manner of occurrence, including but not limited to
14 geothermal water, diffuse surface water, and sewage effluent.

15 ~~(15)~~(16) "Water division" means a drainage basin as defined in 3-7-102.

16 ~~(16)~~(17) "Water judge" means a judge as provided for in Title 3, chapter 7.

17 ~~(17)~~(18) "Water master" means a master as provided for in Title 3, chapter
18 7.

19 ~~(18)~~(19) "Well" means any artificial opening or excavation in the ground,
20 however made, by which groundwater is sought or can be obtained or through
21 which it flows under natural pressures or is artificially withdrawn."

22 **Section 2.** Section 85-2-402, MCA, is amended to read:

23 **"85-2-402. Changes in appropriation rights.** (1) An appropriator may not
24 make a change in an appropriation right except as permitted under this section
25 and with the approval of the department or, if applicable, of the legislature.

26 (2) Except as provided in subsections (3) through (5), the department shall
27 approve a change in appropriation right if the appropriator proves by substantial
28 credible evidence that the following criteria are met:

29 (a) The proposed use will not adversely affect the water rights of other
30 persons or other planned uses or developments for which a permit has been
31 issued or for which water has been reserved.

32 (b) The Except for a lease authorization pursuant to [section 4] that does
33 not require appropriation works, the proposed means of diversion, construction,
34 and operation of the appropriation works are adequate.

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1 (c) The proposed use of water is a beneficial use.

2 (3) The department may not approve a change in purpose of use or place
3 of use of an appropriation of 4,000 or more acre-feet of water a year and 5.5
4 or more cubic feet per second of water unless the appropriator proves by
5 substantial credible evidence that:

6 (a) the criteria in subsection (2) are met;

7 (b) the proposed change is a reasonable use. A finding of reasonable use
8 must be based on a consideration of:

9 (i) the existing demands on the state water supply, as well as projected
10 demands of water for future beneficial purposes, including municipal water
11 supplies, irrigation systems, and minimum streamflows for the protection of
12 existing water rights and aquatic life;

13 (ii) the benefits to the applicant and the state;

14 (iii) the effects on the quantity and quality of water for existing uses in the
15 source of supply;

16 (iv) the availability and feasibility of using low-quality water for the purpose for
17 which application has been made;

18 (v) the effects on private property rights by any creation of or contribution to
19 saline seep; and

20 (vi) the probable significant adverse environmental impacts of the proposed
21 use of water as determined by the department pursuant to Title 75, chapter 1,
22 or Title 75, chapter 20.

23 (4) The department may not approve a change in purpose of use or place
24 of use for a diversion that results in 4,000 or more acre-feet of water a year
25 and 5.5 or more cubic feet per second of water being consumed unless:

26 (a) the applicant proves by clear and convincing evidence and the
27 department finds that the criteria in subsections (2) and (3) are met; and

28 (b) the department then petitions the legislature and the legislature affirms
29 the decision of the department after one or more public hearings.

30 (5) (a) The state of Montana has long recognized the importance of
31 conserving its public waters and the necessity to maintain adequate water
32 supplies for the state's water requirements, including requirements for reserved
33 water rights held by the United States for federal reserved lands and in trust for
34 the various Indian tribes within the state's boundaries. Although the state of

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1 Montana also recognizes that, under appropriate conditions, the out-of-state
2 transportation and use of its public waters are not in conflict with the public
3 welfare of its citizens or the conservation of its waters, the following criteria must
4 be met before out-of-state use may occur:

5 (b) The department and, if applicable, the legislature may not approve a
6 change in appropriation right for the withdrawal and transportation of appropriated
7 water for use outside the state unless the appropriator proves by clear and
8 convincing evidence and, if applicable, the legislature approves after one or
9 more public hearings that:

10 (i) depending on the volume of water diverted or consumed, the applicable
11 criteria and procedures of subsection (2) or (3) are met;

12 (ii) the proposed out-of-state use of water is not contrary to water
13 conservation in Montana; and

14 (iii) the proposed out-of-state use of water is not otherwise detrimental to the
15 public welfare of the citizens of Montana.

16 (c) In determining whether the appropriator has proved by clear and
17 convincing evidence that the requirements of subsections (5)(b)(ii) and (5)(b)(iii)
18 will be met, the department and, if applicable, the legislature shall consider the
19 following factors:

20 (i) whether there are present or projected water shortages within the state of
21 Montana;

22 (ii) whether the water that is the subject of the proposed change in
23 appropriation might feasibly be transported to alleviate water shortages within the
24 state of Montana;

25 (iii) the supply and sources of water available to the applicant in the state
26 where the applicant intends to use the water; and

27 (iv) the demands placed on the applicant's supply in the state where the
28 applicant intends to use the water.

29 (d) When applying for a change in appropriation right to withdraw and
30 transport water for use outside the state, the applicant shall submit to and
31 comply with the laws of the state of Montana governing the appropriation and
32 use of water.

33 (6) For any application for a change in appropriation right involving 4,000 or
34 more acre-feet of water a year and 5.5 or more cubic feet per second of water,

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1 the department shall give notice of the proposed change in accordance with 85-
2 2-307 and shall hold one or more hearings in accordance with 85-2-309 prior to
3 its approval or denial of the proposed change. The department shall provide
4 notice and may hold one or more hearings upon any other proposed change if
5 it determines that ~~such~~ a change might adversely affect the rights of other
6 persons.

7 (7) The department or the legislature, if applicable, may approve a change
8 subject to ~~such~~ terms, conditions, restrictions, and limitations as it considers
9 necessary to satisfy the criteria of this section, including limitations on the time
10 for completion of the change. The department may extend time limits specified
11 in the change approval under the applicable criteria and procedures of 85-2-
12 312(3).

13 (8) If a change is not completed as approved by the department or
14 legislature or if the terms, conditions, restrictions, and limitations of the change
15 approval are not complied with, the department may, after notice and opportunity
16 for hearing, require the appropriator to show cause why the change approval
17 should not be modified or revoked. If the appropriator fails to show sufficient
18 cause, the department may modify or revoke the change approval.

19 (9) The original of a change approval issued by the department must be
20 sent to the applicant, and a duplicate must be kept in the office of the
21 department in Helena.

22 (10) A person holding an issued permit or change approval that has not
23 been perfected may change the place of diversion, place of use, purpose of
24 use, or place of storage by filing an application for change pursuant to this
25 section.

26 (11) A change in appropriation right contrary to the provisions of this section
27 is invalid. ~~No~~ An officer, agent, agency, or employee of the state may not
28 knowingly permit, aid, or assist in any manner ~~such~~ an unauthorized change in
29 appropriation right. ~~No~~ A person or corporation may not, directly or indirectly,
30 personally or through an agent, officer, or employee, attempt to change an
31 appropriation right except in accordance with this section."

32 Section 3. Section 85-2-404, MCA, is amended to read:

33 "85-2-404. Abandonment of appropriation right. (1) If an appropriator ceases
34 to use all or a part of his appropriation right with the intention of wholly or

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1 partially abandoning the right or if he ceases using his appropriation right
2 according to its terms and conditions with the intention of not complying with
3 those terms and conditions, the appropriation right shall, to that extent, be
4 ~~deemed~~ considered abandoned and shall immediately expire.

5 (2) If an appropriator ceases to use all or part of his appropriation right or
6 ceases using his appropriation right according to its terms and conditions for a
7 period of 10 successive years and there was water available for his use, there
8 ~~shall be~~ is a prima facie presumption that the appropriator has abandoned his
9 right in whole or for the part not used.

10 (3) If an appropriator ceases to use all or part of his appropriation right
11 because the land to which the water is applied to a beneficial use is contracted
12 under a state or federal conservation set-aside program:

13 (a) the set-aside and resulting reduction in use of the appropriation right
14 does not represent an intent by the appropriator to wholly or partially abandon
15 the appropriation right or to not comply with the terms and conditions attached
16 to the right; and

17 (b) the period of nonuse that occurs for part or all of the appropriation right
18 as a result of the contract may not create or may not be added to any
19 previous period of nonuse to create a prima facie presumption of abandonment.

20 (4) The lease of an existing right pursuant to [section 4] does not constitute
21 an abandonment by the lessor or serve as evidence that could be used to
22 establish an abandonment by the lessor of any part of the right.

23 ~~(4)~~(5) Subsections (1) and (2) do not apply to existing rights until they have
24 been determined in accordance with part 2 of this chapter."

25 NEW SECTION. Section 4. Leases to ~~enhance or maintain~~ PROVIDE
26 streamflows for fish, wildlife, or recreation THE BENEFIT OF FISHERIES --
27 department authorization. (1) The AFTER JULY 1, 1991, THE department of fish,
28 wildlife, and parks , WITH THE CONSENT OF THE COMMISSION, may lease
29 existing rights for the purpose of ~~maintaining or enhancing~~ PROVIDING
30 streamflows for fish, wildlife, or recreation THE BENEFIT OF FISHERIES DURING
31 CRITICAL LOW FLOW PERIODS in stream reaches determined eligible by the
32 board pursuant to [section 5]. This section is the exclusive means by which
33 appropriations may be changed to an instream flow purpose.

34 (2) The department , WITH THE CONSENT OF THE BOARD, shall authorize

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1 a lease of an existing right for the purpose of ~~maintaining or enhancing~~
2 PROVIDING streamflows for fish, wildlife, or recreation THE BENEFIT OF
3 FISHERIES DURING CRITICAL LOW FLOW PERIODS in an eligible stream
4 reach if the applicant submits a completed application and meets the
5 requirements of 85-2-402.

6 (3) The application for a lease authorization must include specific information
7 on the length and location of the stream reach in which the streamflow ~~will be~~
8 ~~maintained or enhanced~~ MUST BE PROVIDED and must provide INCLUDE a
9 detailed streamflow measuring plan that describes the points where and the
10 manner in which the streamflow ~~will~~ MUST be measured.

11 (4) The maximum quantity of water that may be leased is the amount
12 historically diverted by the lessor. However, OF THE AMOUNT LEASED, only the
13 amount historically consumed by the lessor LESSOR'S CROP, IF APPLICABLE,
14 AND EXCLUDING WATER USED AS RECHARGE OR RETURN FLOW, or a
15 smaller amount if specified by the department in the lease authorization, may be
16 used to ~~enhance or maintain~~ PROVIDE streamflows below the lessor's point of
17 diversion. THE LEASE MUST TAKE INTO ACCOUNT THE HISTORICAL USE OF
18 THE WATER RIGHT, INCLUDING BUT NOT LIMITED TO THE USUAL SHUTOFF
19 OF ALL OR A PORTION OF THE WATER SUBJECT TO THE WATER RIGHT
20 DUE TO NORMAL IRRIGATION PRACTICES, HARVESTING, NORMAL CLIMATE
21 CONDITIONS, AND COOPERATIVE PRACTICES WITH OTHER IRRIGATORS.

22 (5) THE DEPARTMENT OF FISH, WILDLIFE, AND PARKS HAS THE
23 RESPONSIBILITY TO PROVE TO THE BOARD UNDER 85-2-402 THAT A
24 PROPOSED LEASE AUTHORIZATION DOES NOT ADVERSELY AFFECT
25 EXISTING WATER RIGHTS. THE DEPARTMENT OF FISH, WILDLIFE, AND
26 PARKS SHALL PAY THE COST, INCLUDING REASONABLE ATTORNEY FEES,
27 FOR ANY APPROPRIATOR WHO SUCCESSFULLY OBJECTS TO A PROPOSED
28 DEPARTMENT OF FISH, WILDLIFE, AND PARKS LEASE.

29 (5)(6) The lease may not be issued for a term of more than 10 years but
30 may be renewed for up to 10 years per renewal upon notification to the
31 department. Upon receiving notice of a lease renewal, the department shall notify
32 other appropriators potentially affected by the lease and shall allow 30 days for
33 submission of new evidence of adverse effects to other water rights. A lease
34 authorization is not required for a renewal unless an appropriator, other than an

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1 appropriator described in subsection ~~(9)~~(10), submits evidence of adverse effects
2 to his rights that has not been considered previously. IF AN APPROPRIATOR
3 PROVES ADVERSE EFFECTS TO HIS WATER RIGHTS, THE DEPARTMENT OF
4 FISH, WILDLIFE, AND PARKS SHALL PAY TO THE APPROPRIATOR AN
5 AMOUNT EQUAL TO THE DAMAGES THAT RESULTED FROM EXERCISE OF
6 ITS LEASE AND THE COSTS OF PROVING THE ADVERSE EFFECTS,
7 INCLUDING REASONABLE ATTORNEY FEES AND COURT COSTS. THIS
8 PROVISION APPLIES ONLY TO WATER LEASES ENTERED INTO UNDER THIS
9 SECTION.

10 ~~(6)~~(7) During the term of the original lease, the department, WITH THE
11 CONSENT OF THE BOARD, may modify or revoke the lease authorization if an
12 appropriator, other than an appropriator described in subsection ~~(9)~~(10), proves
13 by ~~substantial-credible~~ A PREPONDERANCE OF THE evidence that his water
14 right is adversely affected. IF AN APPROPRIATOR PROVES ADVERSE EFFECTS
15 TO HIS WATER RIGHTS, THE DEPARTMENT OF FISH, WILDLIFE, AND PARKS
16 SHALL PAY TO THE APPROPRIATOR AN AMOUNT EQUAL TO THE DAMAGES
17 THAT RESULTED FROM EXERCISE OF ITS LEASE AND THE COSTS OF
18 PROVING THE ADVERSE EFFECTS, INCLUDING REASONABLE ATTORNEY
19 FEES AND COURT COSTS. THIS PROVISION APPLIES ONLY TO WATER
20 LEASES ENTERED INTO UNDER THIS SECTION.

21 ~~(7)~~(8) The priority of appropriation for a lease under this section is the
22 same as the priority of appropriation of the right that is leased.

23 ~~(8)~~(9) Neither a change in appropriation right nor any other authorization is
24 required for the reversion of the appropriation right to the lessor's previous use.

25 ~~(9)~~(10) A person issued a water use permit with a priority of appropriation
26 after the date of filing of an application for a lease authorization under this
27 section may not object to the exercise of the lease according to its terms, the
28 renewal of the lease, or the reversion of the appropriation right to the lessor
29 according to the lessor's previous use.

30 ~~(10)~~(11) THE DEPARTMENT OF FISH, WILDLIFE, AND PARKS SHALL PAY
31 ALL COSTS ASSOCIATED WITH INSTALLING MEASURING DEVICES OR
32 PROVIDING PERSONNEL TO MEASURE STREAMFLOWS ACCORDING TO THE
33 MEASURING PLAN SUBMITTED UNDER THIS SECTION.

34 NEW SECTION. Section 5. Board designation of eligible stream reaches.

Gray House Bill No. 707 -- Unofficial
March 17, 1989

1 (1) The department of fish, wildlife, and parks, ~~in consultation with the department~~
2 WITH THE CONSENT OF THE COMMISSION, may apply to the board for
3 designation of stream reaches for which water leasing to ~~maintain or enhance~~
4 PROVIDE streamflows pursuant to [section 4] may occur.

5 (2) The board may declare a stream reach eligible for leasing pursuant to
6 [section 4] only if it finds that water leasing is necessary ~~or is likely to be~~
7 ~~necessary to maintain or enhance fish, wildlife, or recreation~~ PROVIDE FOR
8 FISHERIES DURING CRITICAL LOW FLOW PERIODS.

9 (3) UPON DECLARING A STREAM REACH ELIGIBLE FOR LEASING, THE
10 BOARD SHALL REQUEST THE DEPARTMENT TO PREPARE AN ANALYSIS
11 CONCERNING WHETHER LONGER TERM SOLUTIONS TO THE CRITICAL LOW
12 FLOWS IN THE STREAM REACH ARE FEASIBLE. LONGER TERM SOLUTIONS
13 TO BE CONSIDERED INCLUDE STORAGE ENHANCEMENT OR DEVELOPMENT
14 AND RECHARGE FROM GROUND WATER SOURCES. THE PREPARATION OF
15 OR RECOMMENDATIONS RESULTING FROM THE ANALYSIS MAY NOT
16 PRECLUDE, INHIBIT, OR DELAY THE NEGOTIATION OR IMPLEMENTATION OF
17 LEASES ON THE STREAM REACH AS PROVIDED IN [SECTION 4].

18 ~~(3)(4)~~ (4) The board may designate no more than 10 stream reaches in the
19 state where water leasing pursuant to [section 4] may occur.

20 NEW SECTION. Section 6. Contributions for leasing appropriation rights
21 OR DEVELOPING STORAGE FACILITIES. (1) The department may accept
22 contributions from public or private entities for the purpose of:

23 (A) leasing appropriation rights to ~~maintain or enhance~~ PROVIDE instream
24 flows for fish, wildlife, or recreation purposes THE BENEFIT OF FISHERIES; OR

25 (B) DEVELOPING STORAGE FACILITIES TO MAINTAIN OR ENHANCE
26 PROVIDE STREAMFLOWS FOR FISH, WILDLIFE, RECREATION, AND OTHER
27 PURPOSES. *The benefit of fisheries*

28 (2) Any contributions accepted by the department under this section must be
29 deposited in the fish and wildlife mitigation trust fund established in 87-1-611.

30 (3) The department shall expend money obtained under ~~this section~~
31 SUBSECTION (1)(A) and deposited in the fish and wildlife mitigation trust fund
32 EXCLUSIVELY to lease existing rights for the purpose of ~~maintaining or~~
33 ~~enhancing~~ PROVIDING instream flows for fish, wildlife, or recreation UNLESS
34 EXPENDITURE FOR A DIFFERENT PURPOSE IS AUTHORIZED PURSUANT TO

Gray House Bill No. 707 -- Unofficial
March 17, 1989

1 87-1-614.

2 (4) THE DEPARTMENT SHALL EXPEND MONEY OBTAINED UNDER
3 SUBSECTION (1)(B) AND DEPOSITED IN THE FISH AND WILDLIFE
4 MITIGATION TRUST FUND EXCLUSIVELY TO DEVELOP STORAGE FACILITIES
5 TO MAINTAIN OR ENHANCE PROVIDE STREAMFLOWS FOR FISH, WILDLIFE,
6 RECREATION, AND OTHER PURPOSES UNLESS AN EXPENDITURE FOR
7 OTHER PURPOSES IS AUTHORIZED PURSUANT TO 87-1-614.

8 NEW SECTION. Section 7. REPORT TO THE LEGISLATURE -- BY THE
9 DEPARTMENT BOARD. THE DEPARTMENT BOARD SHALL REPORT TO EACH
10 REGULAR SESSION OF THE LEGISLATURE AS TO THE OPERATION OF [THIS
11 ACT].

12 NEW SECTION. Section 8. Extension of authority. Any existing authority to
13 make rules on the subject of the provisions of [this act] is extended to the
14 provisions of [this act].

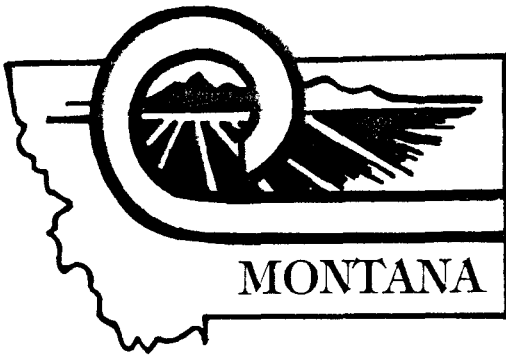
15 NEW SECTION. Section 9. Codification instruction. (1) [Sections 4, and 5,
16 AND 7] are intended to be codified as an integral part of Title 85, chapter 2,
17 part 4, and the provisions of Title 85, chapter 2, part 4, apply to [sections 4,
18 and 5, AND 7].

19 (2) [Section 6] is intended to be codified as an integral part of Title 87,
20 chapter 1, part 6, and the provisions of Title 87, chapter 1, part 6, apply to
21 [section 6].

22 NEW SECTION. Section 10. Termination. [This act] terminates October 1,
23 1999.

24 -END-

25



SENATE AGRICULTURE
EXHIBIT NO. 10
DATE 3/15/89
BILL NO. HB 707

MONTANA Association of Conservation Districts

1 South Montana 443-5711
Helena, MT 59601
March 15, 1989

Testimony to the Senate Agriculture Committee on HB 707.

For the Record, my name is Peggy Haaglund and I am executive vice president of the Montana Association of Conservation Districts.

MACD does support HB 707.

MACD has a resolution that supports voluntary leasing to the Montana Department of Fish, Wildlife and Parks of offstream water rights for instream flows as long as current water rights are not adversely affected and the volume of water leased is not greater than the original depletion.

MACD will only consider supporting the sale of offstream water rights for instream flow after more careful study has been done that shows that there are no significant adverse effects on adjacent users or local economies.

Ex #10
3/15/89
HB 707

1988 Resolution No. 37

WHEREAS, in some cases streams are dewatered in low flow years to the detriment of instream values; and

WHEREAS, MACD prefers storage built by investment of both instream and offstream users as a long term answer to Montana's water supply; but

WHEREAS, in the meantime contractual leasing arrangements may be possible that serve the interests of both instream and offstream users;

THEREFORE BE IT RESOLVED, that MACD supports voluntary leasing to the Montana Department of Fish, Wildlife and Parks of offstream water rights for instream flows as long as current water rights are not adversely affected and the volume of the water leased is not greater than the original depletion.

BE IT FURTHER RESOLVED, that MACD will only consider supporting the sale of offstream water rights for instream flow after more careful study has been done that shows that there are no significant adverse effects on adjacent users or local economies.

Submitted By: Water Resources Committee

COMMITTEE ASSIGNMENT: Water Resources

Lorents Grosfield made a motion for adoption of the resolution. The motion carried.



SENATE AGRICULTURE

EXHIBIT NO. 11

DATE 3/15/89

BILL NO. HB 707

WEST SLOPE CHAPTER

P.O. Box 7316

Missoula, Montana 59807

March 15, 1989

To: Senate Agricultural Committee
From: Robert J. Whalen, Jr.
West Slope Chapter
Trout Unlimited
Subject: House Bill 707

The two hundred and fifty members of the West Slope Chapter of Trout Unlimited urge you to support H.B. 707 without additional amendments. This bill is designed to protect fisheries in times of drought and provide direct benefits to those lessors willing to lease water to the Department of Fish Wildlife and Parks.

Montana has the nationwide reputation of providing the best trout fishing in the nation, and probably in the world. That status is threatened by the over appropriations of water in the states streams and rivers. The water law in it's present form discriminates against in-stream water users. These are the only users not provided the opportunity to lease water rights from agreeable rights holders.

This law is vital to our state so that we can maximize the productivity of our streams for the enjoyment of Montana's citizens and to attract out of state fishermen.

SURFACE AND GROUNDWATER REQUIREMENTS: - Bitterroot Valley

The perennial need for more surface (diversionary) water for crop irrigation and aquifer recharge is now coupled with increasing demands for instream flow to satisfy increasing recreational demands in all of Region I. The scarcity of any water at all in late July, August, and often in September, in most tributaries of the Bitterroot drainage costs Ravalli County and the State ^{many m} billions of dollars. The Montana tourist and recreational guide urges tourists to come to western Montana to revel in the water-oriented pursuits at the very time, when the entire watershed is drying up (Appendices 4, 5, 7, 8, 9 & 11)

Clearly needs for late summer water transcends the taxpayer subsidized roading and clearcutting proposed by the BNF. Tourism and recreation infuse the economy with many millions of dollars. The BNF 50-year plan is a program to systematically abort all activities relating to tourism, recreation, ^{farming} and related amenities.

Our water needs may be clarified by a brief analysis of the water budget of the Bitterroot and other parts of Region I. Note Figure 10A that our annual precipitation in Ravalli County average is about 5,600,000 acre feet of water, over 90 percent of which

Also eliminate charge for water

Helman's comment

(Table 2)
falls within the mountainous areas of the BNF. Of this total, about 3 to 3.5 million acre feet are evapotranspired into the air. This evaporated water seeds clouds that produce additional rain and snow in the Bitterroot and downwind to the east in central and eastern Montana. The evapotranspiration from plants and the evaporation of water from lakes and streams serve to reduce extremes in temperature during both summer and winter. The climatic effect of this water is highly beneficial.

The remaining 2 to 2.5 million acre feet of water constitutes runoff into the Bitterroot Valley. Some 50 to 65 percent of this runoff occurs during peak flow during May, June, and early July. It is important to examine what happens to this water.

(1) Over 100,000 acres of land under cultivation in the valley require irrigation (Figures 8, 11)

(2) Approximately 6,000 wells draw an average of 2 to 3 acre feet each per year.

(3) There are about ~~750,000 to~~ ^{750,000 to} 1,000,000 recreations users seeking Bitterroot streams for aquatic sports and amenities.

Yet in 1985 and 1987, all of the tributaries to the Bitterroot River except the East and West Forks were dewatered by primary users, usually first and second decreed water rights by August 15 (Figures 8, 11).

Between August 15 and October 15, 1987, the only water available

in the valley was derived from the Bitterroot River which draws
→ on Painted Rocks reservoir. All other decreed water rights could
not be met. This means that ~~almost~~^{over} three-fourths of
Bitterroot inhabitants with decreed water rights had no water.
A secondary effect of this diversionary water shortage was lack of
aquifer recharge from leaky irrigation ditches that were dry.
Aquifers were mined and approximately 375 wells went dry (Appendix 9)

These two years were not unique. Acute water shortages in
late summer occur in 3 out of every 5 years. The costs of these
annual water shortages are difficult to evaluate in dollars, but
are clearly in the tens of millions of dollars. The economy of
the region, due to water shortages, involves abandoned farms, lost
farm income, lost income from tourism and recreation, dry domestic
and business wells, and lost income to service industries at the
height of the tourist and recreational season (Appendices 4, 5, 7 & 8)

The water needs may be best understood by separation of
diversionary water from instream flow to support the aquatic biota
especially trout.

DIVERSIONARY WATER:-

The 100,000 acres of farm land requiring irrigation from crops
and pasture, plus aquifer recharge from leaky ditches require
approximately 600,000 acre feet of water per average year. Of
this 2 to 2.5 acre feet of water per acre are required for crop

growth and aquifer recharge in the period July 15 to Sept 15. Approximately 80 percent of this water is diverted by a complex system of irrigation ditches which total over 450 miles in length. Our research over the last decade indicates these ditches lose an average of 25 percent of their water per mile by sinkage into the ground (which recharges aquifers) and by evaporation and evapotranspiration. More than half the fields irrigated are from one-half mile to one and one-half miles from the source of ditch intake. (See Appendix 9, Figures 8 & 11.)

Although some marginal farms are being subdivided, demand for diversionary water continues to increase. This is true for two reasons (1) land not previously farmed especially in the foothills is being subdivided into ranchettes of two to forty acres. These ranchettes are variously grazed by horses, planted in lawns, orchards, gardens and dotted with ponds, (2) needs for groundwater derived from ditch and field loss of diversionary water continue to increase and both domestic and irrigation wells are drilled into the unconfined aquifers. Amounts of groundwater needed to supply the growing number of wells, ^{cannot} depend largely on rainfall which is rarely over 1.5 inches in July and August (Appendix 9, Table 2)

No matter how the shortage of diversionary water for surficial crops and other uses is calculated, it exceeds 150,000 acre feet in late July, August, and September. There are now, approximately, 6,600 wells pumping groundwater from aquifers in the Bitterroot Valley and foothills. The dynamics of a typical aquifer in the

Big Creek area are discussed in Appendix 9, attached.

INSTREAM FLOW:-

The current condition of dewatered streams in late summer and early fall must be mitigated if the Bitterroot Valley is to achieve economic vitality. In the face of currently dry streams there are exploding demands for additional fisheries and aquatic recreation with the peak of recreational demands correlating with the dewatering of streams (see Appendices 5, 7, 8)

To keep each of the major tributaries as viable recreational sites and fisheries requires a minimum instream flow of at least 500 acre feet per stream, per week, in mid- to late-summer and early fall. This is in excess of the water needed for diversion.

The solution of Bitterroot water needs in late summer includes: (1) minimum further logging and roading of the watersheds, (2) extensive soil and slope rehabilitation including terracing by hand, not machine, (3) aggressive replanting with drought resistant species of trees, (4) reservoirs on at least twelve of the major tributaries of the Bitterroot River with holding capacities of at least 8,000 acre feet of water.

In addition, one or two reservoirs of the size of Lake Como.

The economics of this program involve a transfer of the five

Water Budget
Bitterroot River Drainage
based upon 'Average' precipitation data.
Amounts decrease greatly in dry years.

EXHIBIT # 12
3/15/89 HB 707

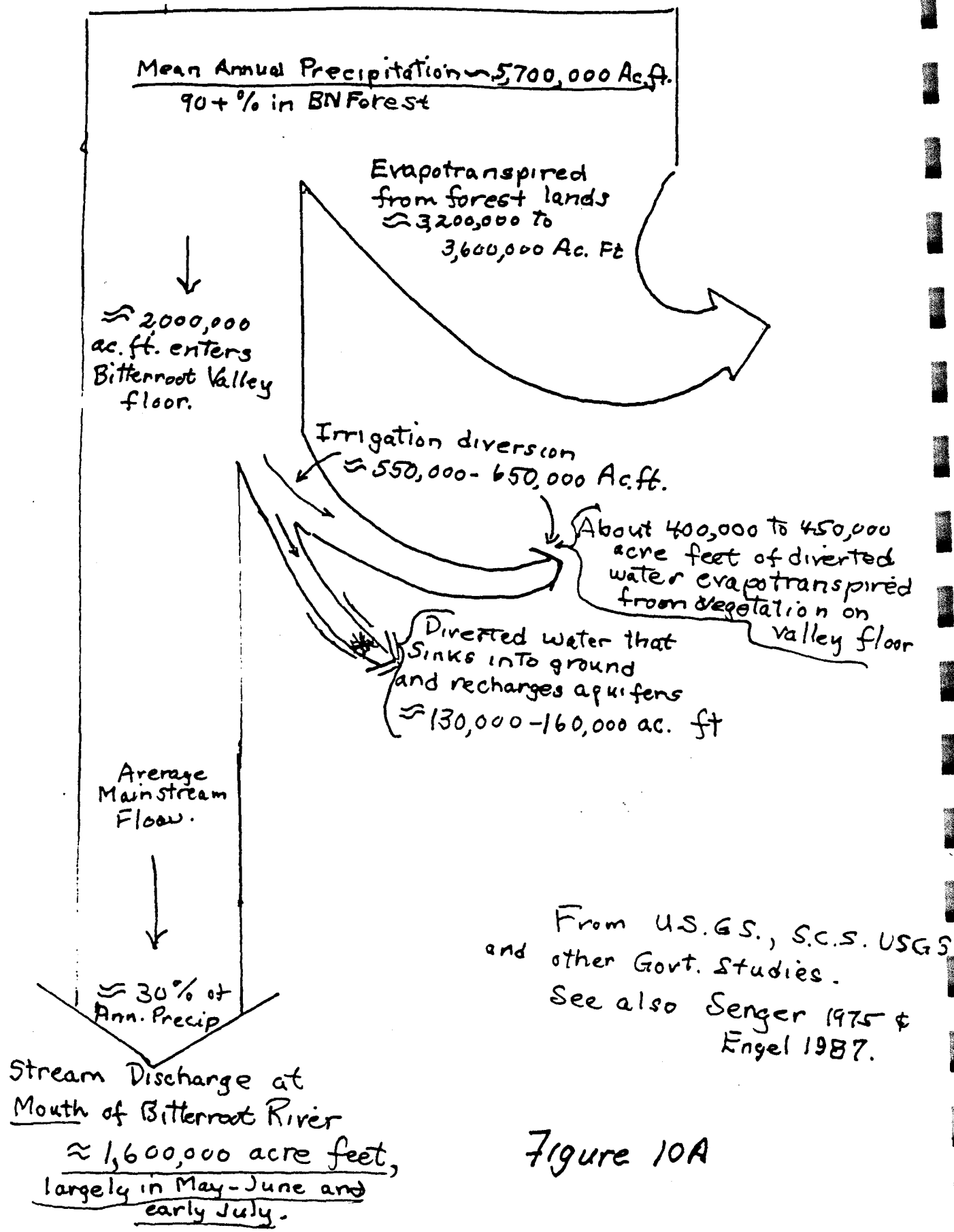


Figure 10A

Generalized curves of stream flow from National Forests of Ravalli County during "normal" and "dry" years. Skewed patterns of flow, and abortion of late summer flow and aquifer recharge are shown below.

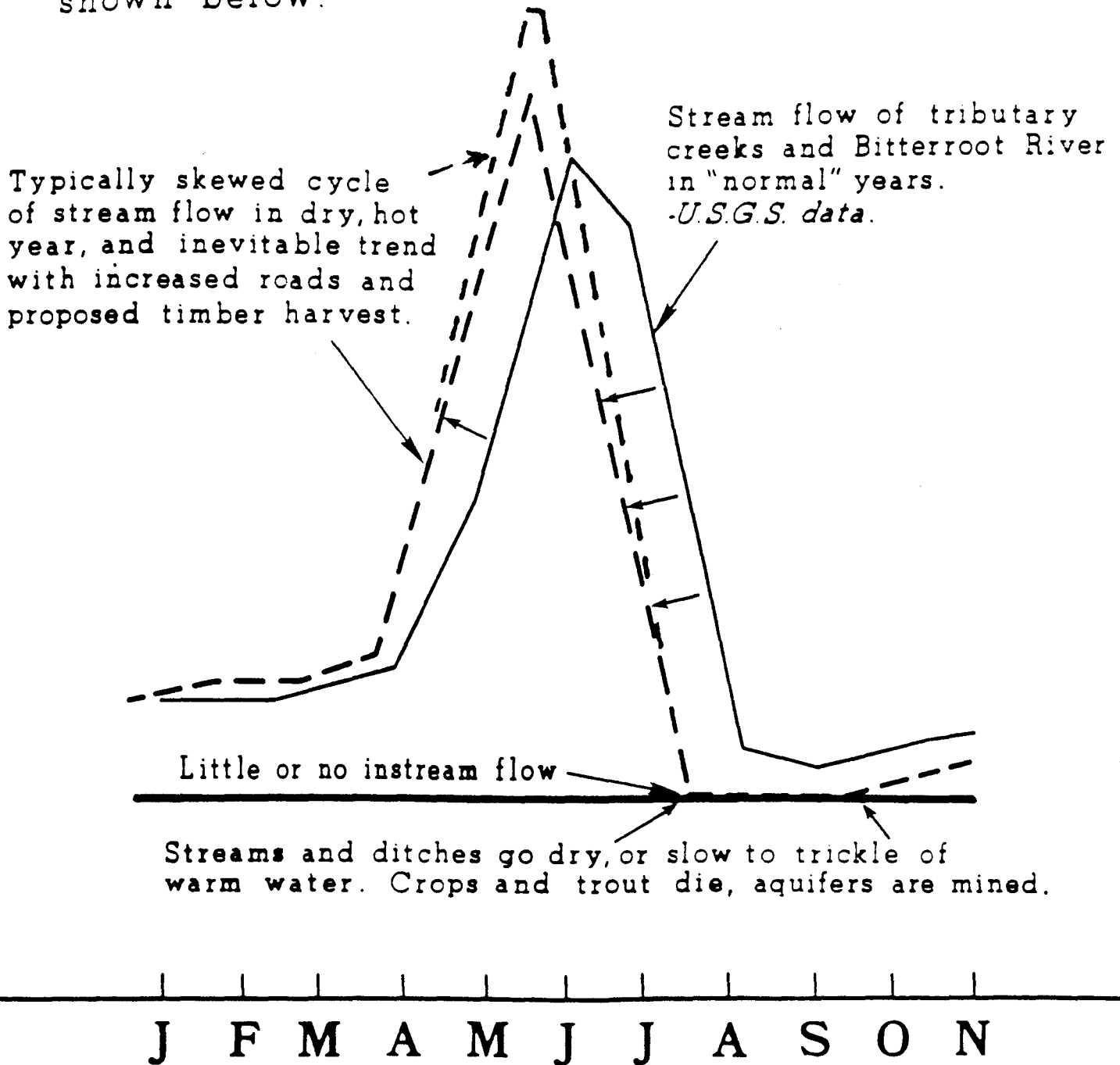
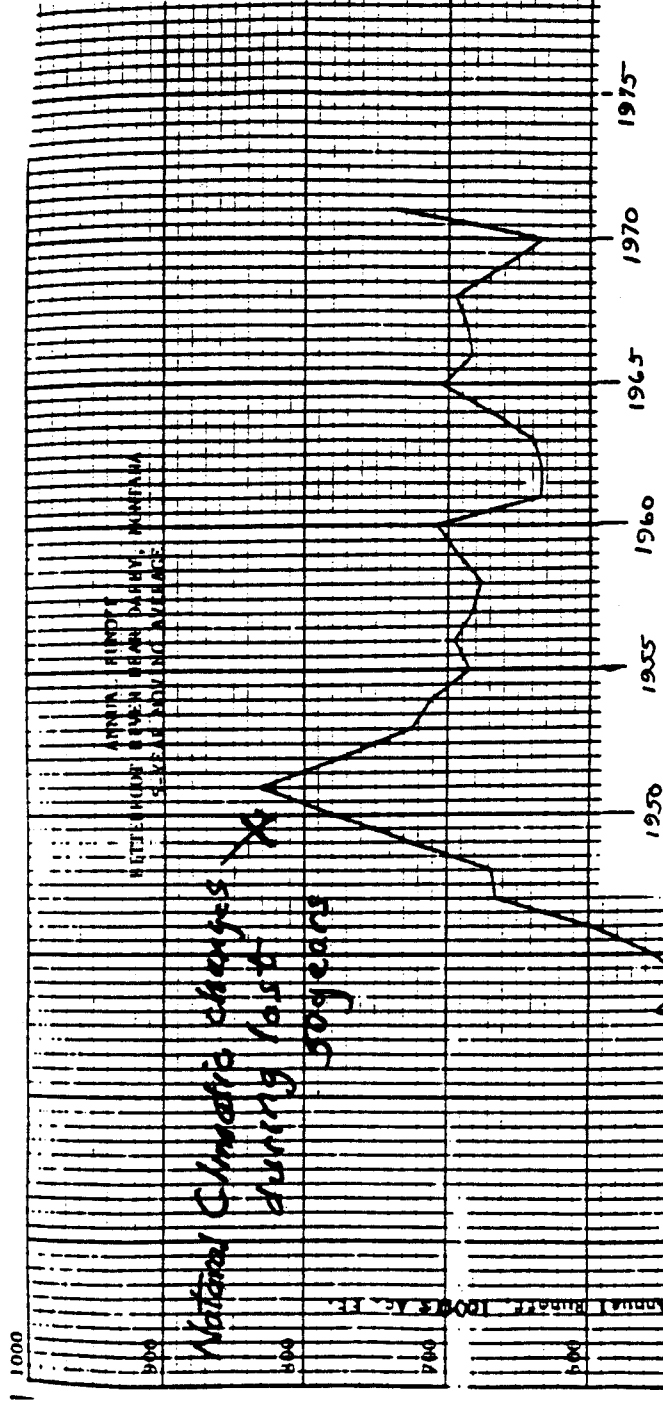


Figure 1

Figure 14A



Years From U.S.G.S. data.

Figure 14A

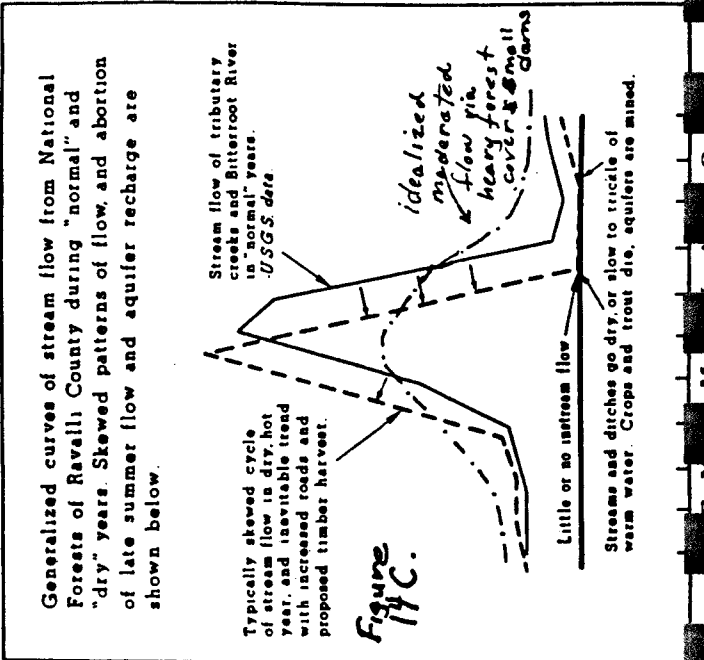
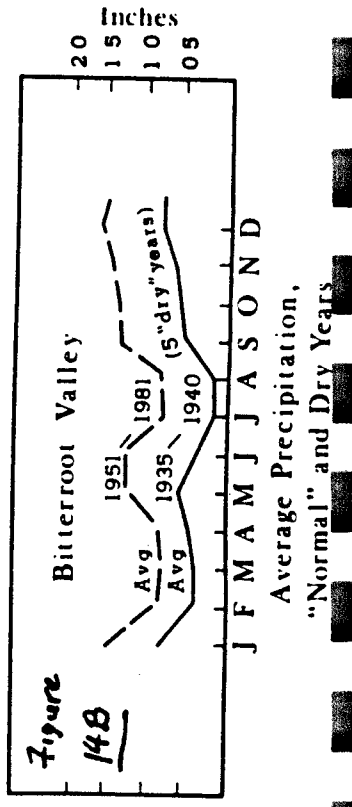
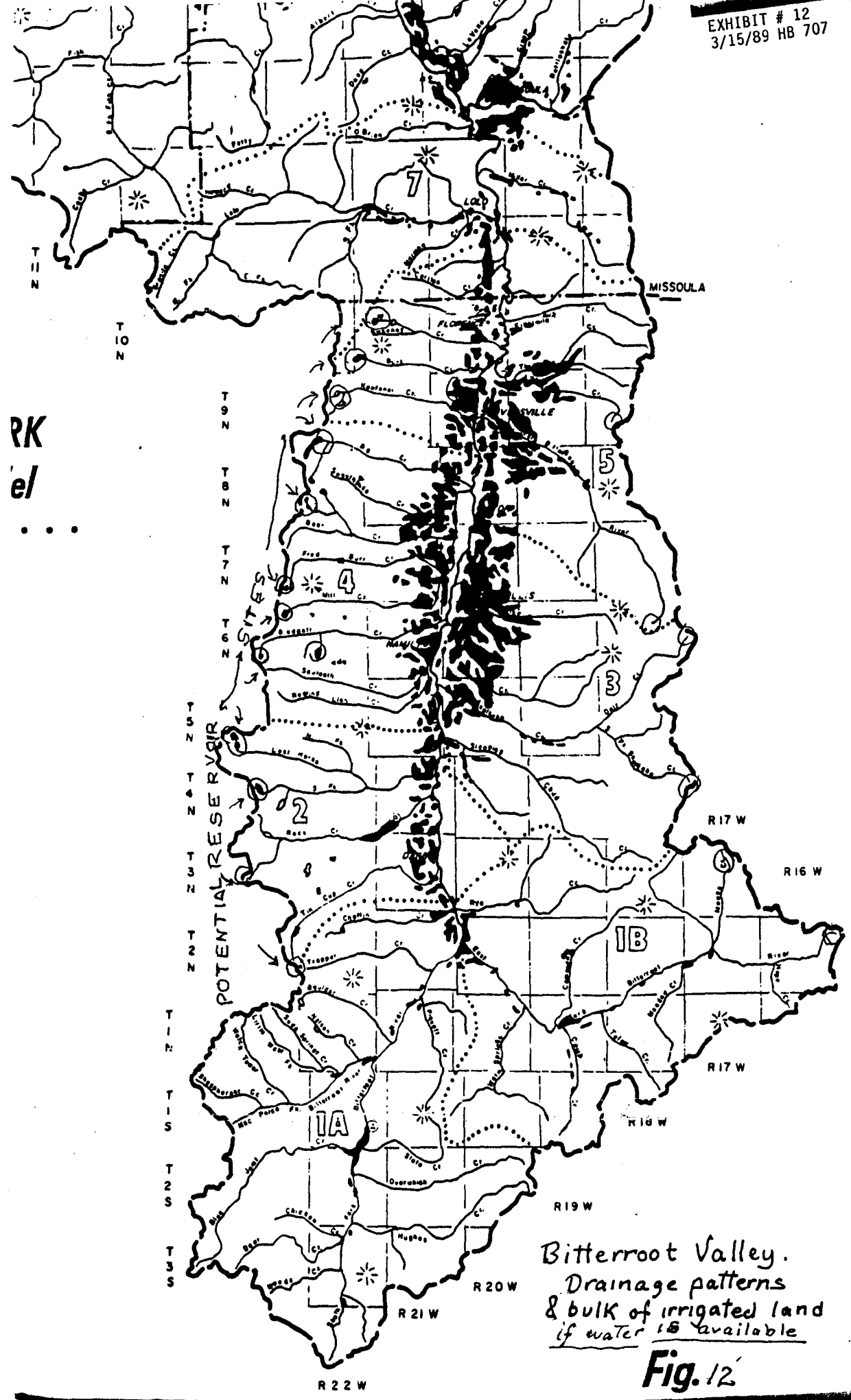


Figure 14C

Figure 14B

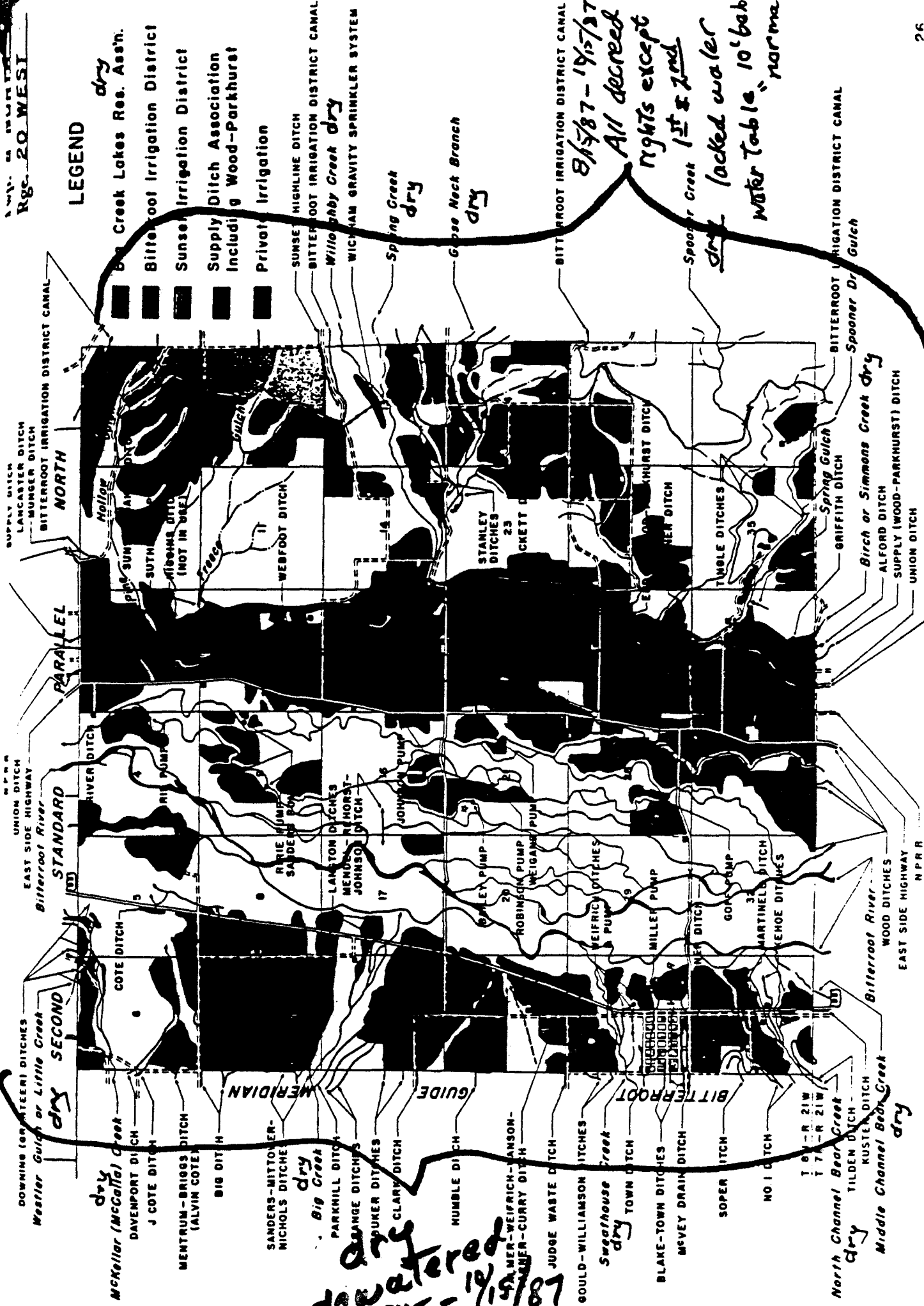


RK
el
...

Bitterroot Valley.
Drainage patterns
& bulk of irrigated land
if water is available

Fig. 12

Figure 11



LEGEND

- █ Bitterroot Irrigation District
- █ Sunseri Irrigation District
- █ Supply Ditch Association Including Wood-Parkhurst
- █ Private Irrigation
- █ HIGHLINE DITCH
- █ BITTERROOT IRRIGATION DISTRICT CANAL
- █ Willowby Creek dry
- █ WICHAM GRAVITY SPRINKLER SYSTEM
- █ Spooner Creek dry
- █ Goose Neck Branch dry

8/5/87 - 10/5/87
 All decreed
 rights except
 1st & 2nd
 lacked water
 water table 10' below
 normal

dewatered
 8/5 - 10/5/87

Ph.D., D.Sc.
Hydrology & Geology

THE HYDRODYNAMICS OF A SIMPLE BITTERROOT AQUIFER

Big Creek Aquifer

The attached figures and maps are interrelated and fundamental to an understanding of groundwater behavior in many Bitterroot aquifers. The Big Creek aquifer is typical of aquifers which occur throughout the alluvial blanket in the Bitterroot Valley.

Figure 7 shows the location of the Big Creek aquifer, and Figure 8 is a map of the aquifer which is bordered on the west by the Heartbreak Hills (Figure 7). The line A-B is the location of a vertical section through the aquifer as indicated by the detailed studies of well logs and field mapping (Figure 9). Because the Big Creek floodplain is relatively narrow in this area, it is not differentiated from the blanket of sands, gravels, and clay lenses that define the broad areas between this and adjacent creeks.

Seventy eight wells have been drilled in the aquifer, and more are in progress. All of the seventy eight wells are being actively pumped at rates ranging from 0.3 to 18 acre feet per year. This high withdrawal is because most of these wells are multipurpose, for house, garden, yard, and meadow. Six of the seventy eight wells are used solely for irrigation of horse pasture, gardens and trees. These wells yield from 10 to 40 acre feet weekly from late May through September. This means that from May through September about 200 to 300 acre feet of water is pumped from the Big Creek Aquifer (BCA). One acre foot of water contains 325,900 gallons.

During winter months, groundwater consumption in the BCA averages about 45 acre feet per year. Presently, several farms are partly subdivided, but wells have not been drilled on the lots. In the future decade, or two, at least 50, perhaps 100 wells, will be drilled into the aquifer withdrawing another 50 to 200 acre feet of water. Thus, we may project the yearly withdrawal rates of about 400 acre feet of groundwater from the BCA by the year 2000.

Most wells are drilled to depths of 30 to 60 feet, and yields range from 10 to 50 gallons per minute, with the average yield about 25 gallons per minute when the wells are not pumped dry.

The history of groundwater use from the BCA in the last thirty years is critical in understanding problems currently encountered in water use, and indicates serious water problems in the future.

In 1960, there were only twenty one active wells in the BCA. Eleven of these wells were hand dug to depths of 12 to 18 feet. Water use from these wells was largely for the farm house, and totaled no more than 0.3 acre feet per year. Some wells went dry and water was carried from the nearest ditch or stream until spring. Half of the farms had no bathrooms, or other modern water-consuming appliances. Gardens and fields were supplied by

open irrigation ditches and sheet flooding.

In 1960, about eighty five percent of the land in the BCA, from highway 93 on the east, to the westerly limits of the aquifer, was farmed using sheet flooding. An average of about 4.5 to 6.5 acre feet of water per summer was spread over the surface of the unconfined aquifer for irrigation of crops. From fifty to seventy percent of the irrigation water was evaporated, or evapo-transpired, by plants. About twenty to thirty percent of the water from the ditches and fields sank into the aquifer, recharging it each year. The groundwater table from June through August, in an average year, was never deeper than twenty feet. Throughout the stippled east half of the aquifer, the groundwater table is never lower than four to five feet below the surface, and in several areas, less than two feet from the surface, a condition true in most recent years. (See Figures 9,10, and 11).

Between 1960 and 1986 groundwater consumption from wells and sumps in the BCA increased from four or five acre feet per year to over 250 acre feet per average year. By the year 2000, groundwater withdrawal will increase to about 450 to 500 acre feet per year. This represents an increase of almost one hundred times as much groundwater demand from the BCA, then in 1960.

In addition to recharge of the BCA from sheet flooding at the rate 1 to 2 acre feet per acre, the leaky irrigation ditches lose some 20 to 50 percent of the water carried per mile, and add at least another 75 to 100 acre feet of water recharge into the BCA with the amount depending on land use and weather (See Figure 9).

Consequently, recharge in 1960 amounted to 1.5 acre foot per acre via irrigation from mid-May through September, if instream flow in Big Creek was available to the ditches. During the same period, rainfall contributed no more than 0.3 acre feet per acre. Big Creek instream flow in late summer is augmented by 2,600 acre feet of water impounded in Big Creek Lakes during spring melt. This water is released in two to three intervals beginning in August. In recent years all impounded water is released by August 15, and Big Creek runs dry on most of the private lands.

The data above, and accompanying figures, indicate the fact that irrigation via leaky ditches and sheet flooding, is by far the major means of recharging the BCA, contributing about 75 percent of yearly aquifer recharge. Similar relations pertain in most of the aquifers in the alluvial blanket that forms the Bitterroot Valley floor.

In wet summers instream flow continues throughout late August and early September, but in hot dry years Big Creek runs only a trickle during late July, August, and September. There is no available water for irrigation of crops or for aquifer recharge.

Other Bitterroot creeks lacking a major source of impounded

water, commonly run dry by the end of July and water users must resort to either pumping of groundwater or allow the meadows and crops to dry up.

The amount of groundwater recharged into the BCA each year (1.5 to 2.5 acre feet per acre) from irrigation water approaches current needs. But many of the farms are being subdivided, fewer ditches are maintained, and areas of sheet flooding decrease. Because of the permeability of the BCA, groundwater flows downslope toward the river at rates ranging from 200 feet in twenty four hours in its westerly parts, to several feet, or less, near the river. This is because the aquifer slopes from 80 to 100 feet per mile and the water pumped downslope from increasing numbers of wells, dewateres the western edge of the aquifer.

As a result, by mid-winter (1984 to 1988), the most westerly part of the BCA is drained dry, and so are the eight to ten wells in the westerly area. These wells can't be deepened because there are no deeper aquifers, and no groundwater between them and China.

These fluctuations in the groundwater table in the sloping aquifers of the Bitterroot Valley floor are indicated in Figures 9 and 10.

Note in Figure 10 that in the west one-fourth of the BCA, the water table is some two to four feet below the surface one month after sheet flooding of the fields begins to recharge the western part of the aquifer (late May). But by December and January, the western margins of the aquifer, may be dry or nearly dry, whereas the eastern parts of the water table, along and just west of Highway 93 (the downslope side of the aquifer) rarely fluctuates more than six feet below the surface even in the winter, and early spring.

These data on water table recharge and fluctuations in the BCA, coupled with plots of precipitation and annual sheet flooding are summarized in Figure 11, derived from measurements within the BCA over the last 15 years.

Note in Figure 11, the extreme annual fluctuations in water table in the BCA along its western parts (see also Figure 9). Note that the rate of easterly flow of the groundwater, which we measure 6 to 8 times per year, and the decrease in groundwater flow in the eastern, downslope parts of the aquifer, where very small fluctuations exist in the groundwater table. Note also the upper two graphs, Figure 11, showing amounts of annual rainfall, and the period and amounts of sheet flooding.

It is clear that the maximum rise of the groundwater table coincides with the driest months of the year, and correlates exactly with periods of maximum sheet flooding (upper diagram, Figure 11). Clearly, the annual precipitation in the valley, over the BCA, and other aquifers has minimal influence on aquifer

recharge. Without the major contribution to the groundwater table from leaky ditches and sheet-flooded fields, most or all of the westerly half of the BCA would be mined of its water within two years. We see very clearly, the inception of mining of water from aquifers in the Bitterroot Valley during the period 1980 to 1988.

The demise of the family farm, the increasing subdivisions, more wells, and the eventual decline in leaky ditch repair and use, poses a groundwater threat of major proportions in the Bitterroot Valley. The problem will be highlighted in the future because it is the western, and eastern portions of the aquifers that are especially enticing to new home owners because of their view, seclusion, and charm.

The quantification of these problems and the specter of dry wells and disheartened, disillusioned homebuilders, farmers, and recreationists, is the main thrust of our research.

The data illustrated by Figures 7 through 11, indicate we must (1) impound large volumes of water from spring snowmelt in new reservoirs, and increase thereby instream flow and aquifer recharge throughout the summer, fall, and winter, or (2) pay the billions of dollars necessary for valley-wide irrigation systems. Proliferation of wells in the valley floor can't be continued without developing sources of recharge.

A. Engel
2/5/89

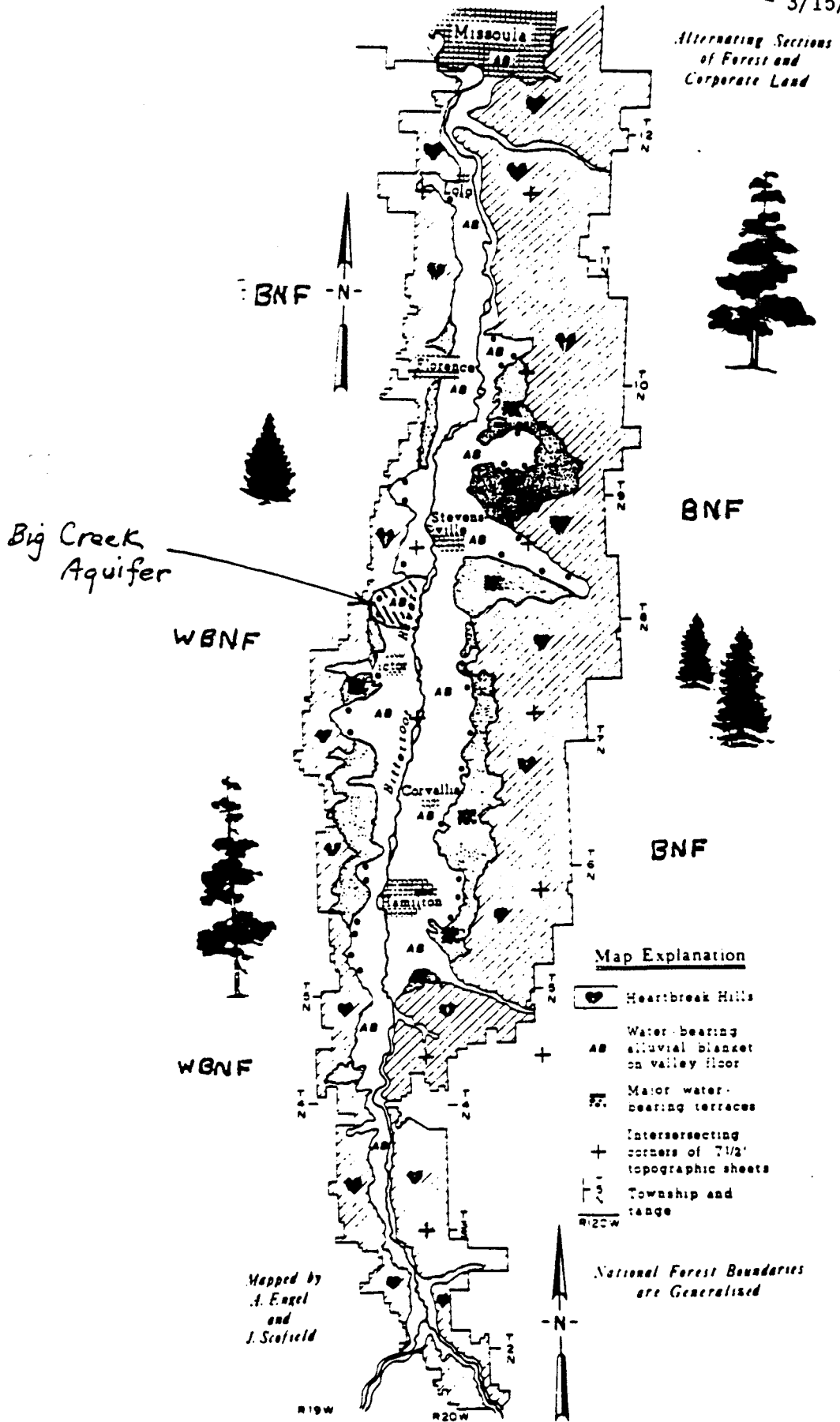




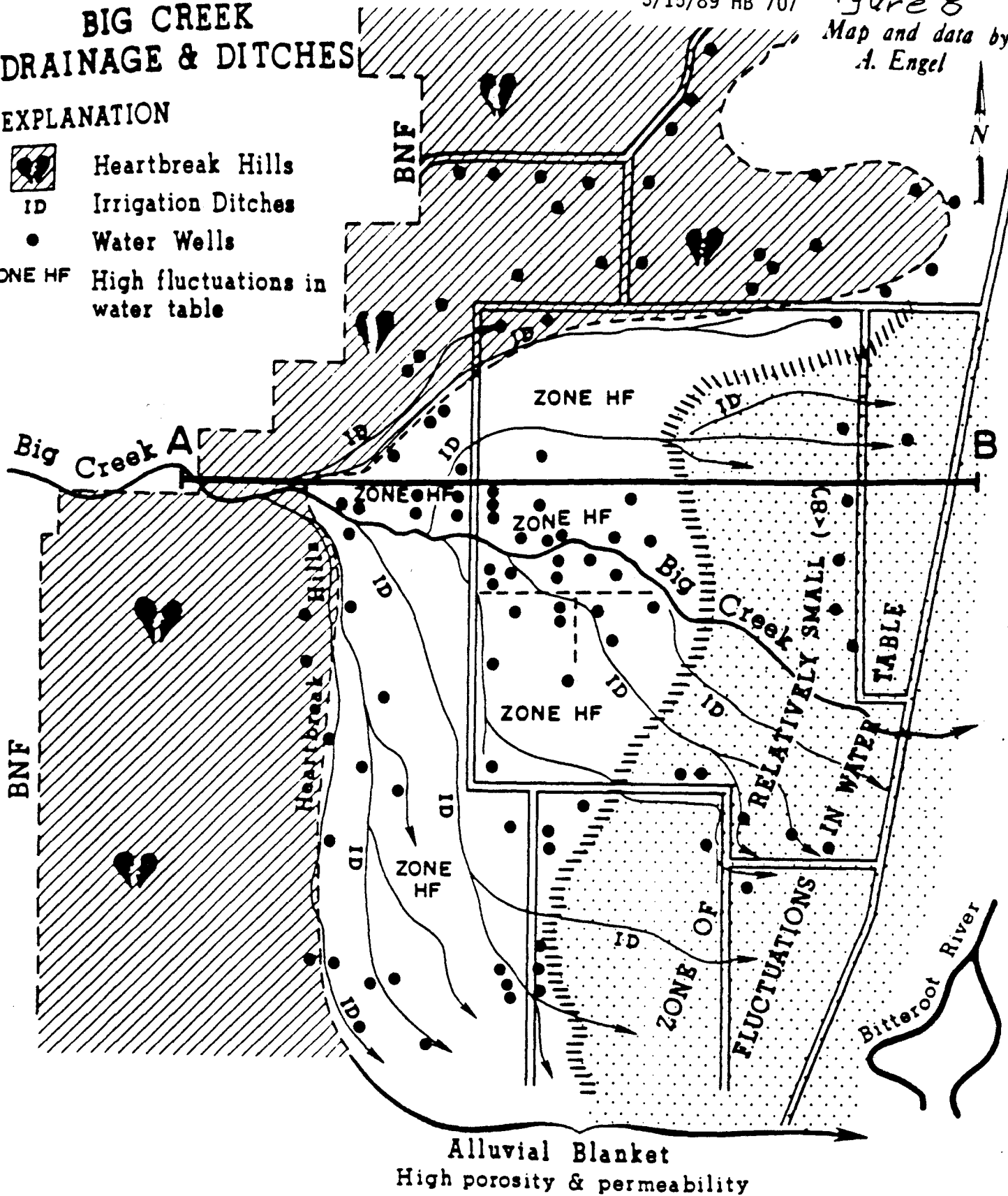


Figure 7.

BIG CREEK DRAINAGE & DITCHES

EXPLANATION

-  Heartbreak Hills
-  ID Irrigation Ditches
-  Water Wells
-  ZONE HF High fluctuations in water table



Map of Big Creek Aquifer
typical of alluvial aquifers on 'west side'

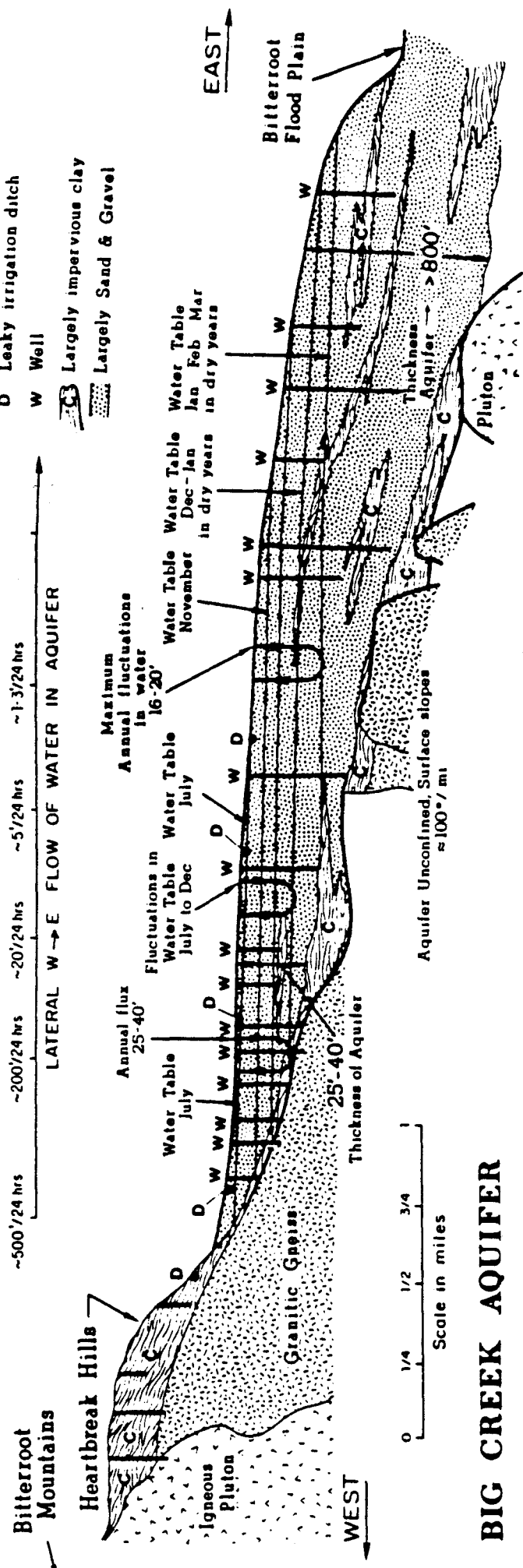
Figure 8

Figure 9.

EXHIBIT # 12
3/15/89 HB 707

EXPLANATION

- D Leaky irrigation ditch
- W Well
- C Largely impervious clay
- ▨ Largely Sand & Gravel



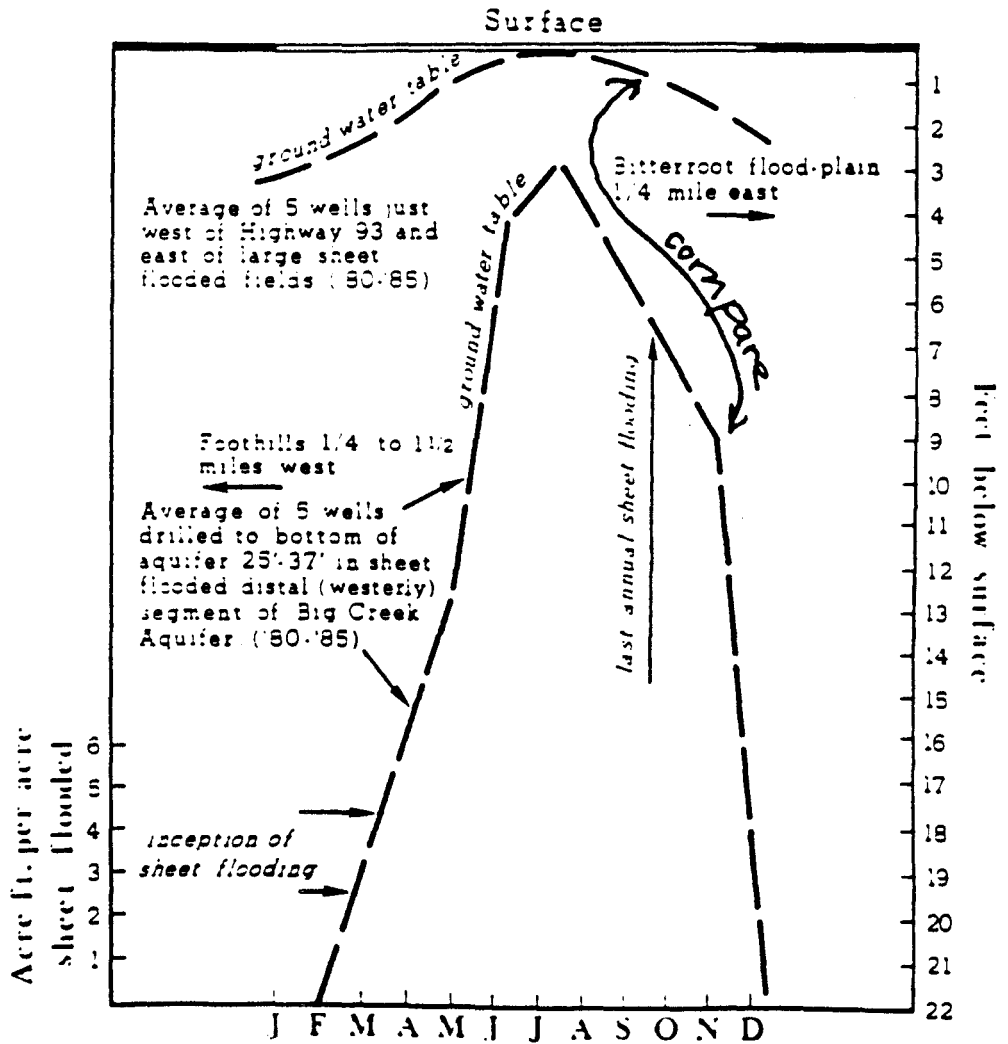
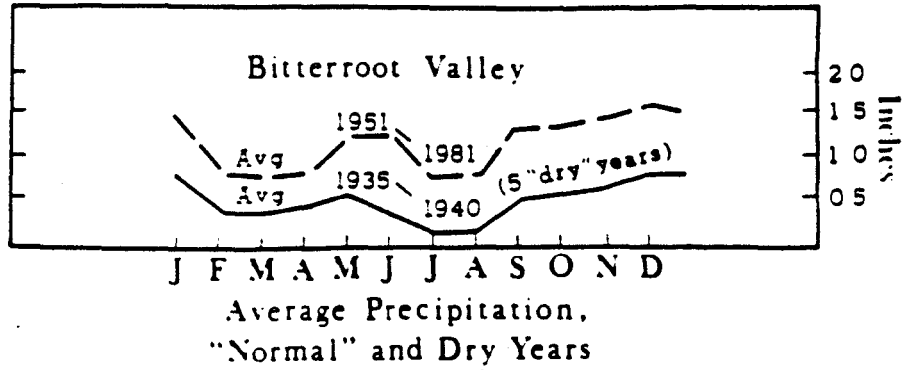
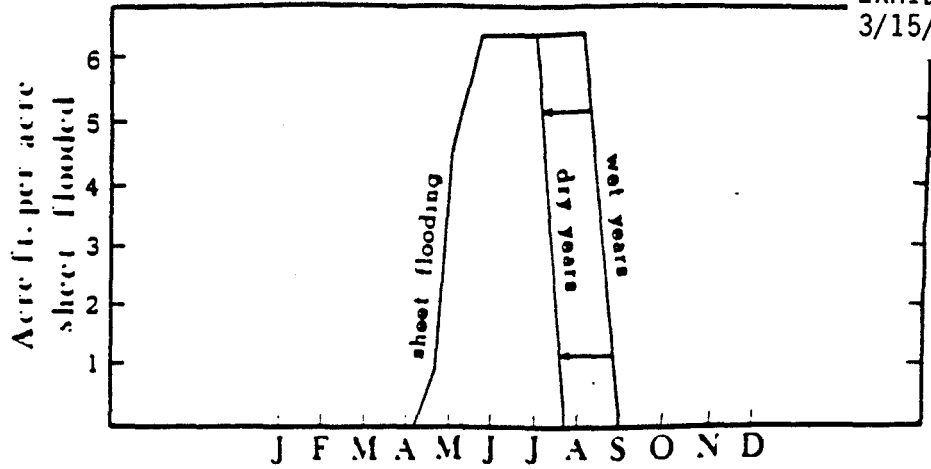
BIG CREEK AQUIFER

Figure 9.

Note: that pumping in new wells in the eastern (down slope) → part of the aquifer dries up the aquifer in its western part. This trend will increase greatly as new wells compete for a constant or decreasing annual recharge.

True throughout Bitterroot Valley.

Figure 9.



Fluctuations in ground water table below surface.

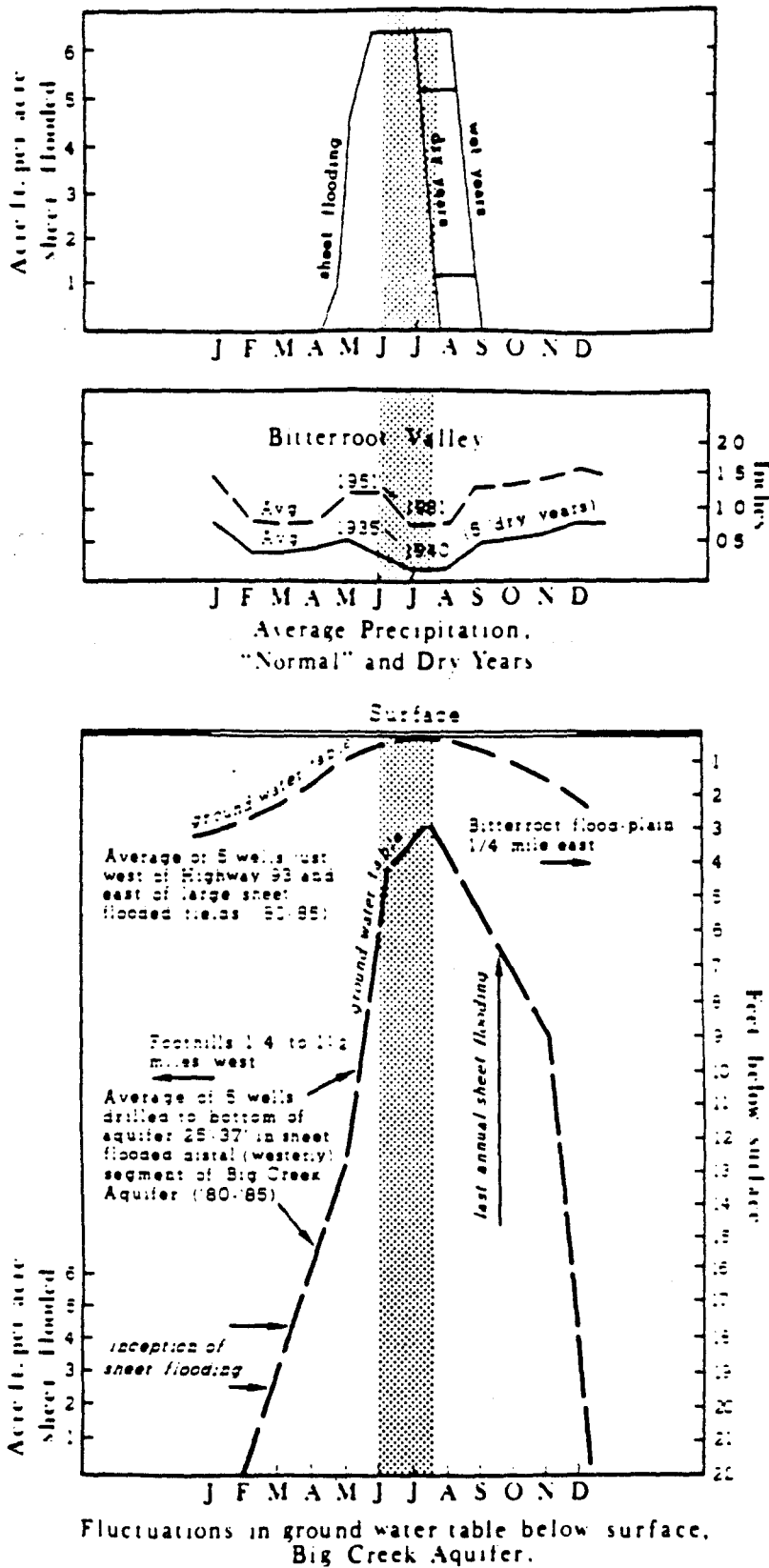


Figure 11 Interrelations between recharge of the BCR, sheet flooding & valley rainfall. Note the aquifer is recharged in the driest (often little or no rain) months of the year by

*Carl Davis*SENATE HEARING - HOUSE BILL 707
March 15, 1989 - Old Court Chambers

Carl M. Davis Testimony

MR. CHAIRMAN - MEMBERS OF THE COMMITTEE

My name is Carl M. Davis - I am an attorney practicing law in Dillon, Montana, for the past 40 years, and my only recreation is fishing, hunting and river boating.

I am testifying today in behalf of the Ruby River Water Users Association whose 78 water users irrigate approximately 35,000 acres in Madison County, Montana, from waters of the Ruby River and its tributaries and from storage in the Ruby Dam. I am also testifying on behalf of the Water Users Irrigation Company with 30 water users irrigating approximately 18,000 acres from the Red Rock and Beaverhead Rivers and storage from the Lima Dam which they own and operate, and on behalf of the Clark Canyon Water Supply Company and East Bench Irrigation District with approximately 200 water users irrigating over 50,000 acres in Beaverhead and Madison Counties from the Beaverhead River and storage in the Clark Canyon Dam.

All of the above adamantly oppose HB-707 on the following grounds:

1. Water leasing by the Department of Fish, Wildlife & Parks is not the answer to solve minimum instream flows.

2. The bill as written is really to conduct a very costly experiment and will not accomplish its intended purpose. It will create another administrative nightmare for the State and the water users.

3. The bill would violate our existing water law which has always provided that water rights only give a person the right to use water in such amount as is needed and can be beneficially used on the lands for which the water is appropriated. Our courts have consistently held:

"When the one holding the prior right does not need the water, such prior right is temporarily suspended and the next right or rights in the order of priority may use the water until such time as the prior appropriator's needs justify his demanding that the junior appropriator or appropriators give way to his superior claim." Cook et al. v. Hudson, 110 Mont. 263.

If the water right is not needed or beneficially used the next right is entitled to the water and that right is protected by Montana's constitution which ratified and confirmed existing rights. Article IX, Sec. 3. I served with Senator John Anderson in the Constitutional Convention and know his knowledge and experience on water matters merit consideration by your Committee.

4. We believe HB-707 gets the cart ahead of the horse and that the time and money it will entail could be spent more wisely by the Department identifying the problem areas and attempting to resolve the minimum stream flow problems by working with the water users, sportsmen and other parties concerned and knowledgeable in this area.

This would also allow time for the Water Courts to complete the adjudication process that will determine the water rights in Montana.

This can be done.

The founders of the Ruby River Water Users experienced the devastating effect of the drought of the 1930's and as a result of their efforts and the foresight of the State of Montana, the Ruby Dam was constructed in 1937. With the storage the Association has been able to provide a minimum instream flow during critical low flow periods since 1937, except for a couple of days during 1985 and 1987 when there was a short section of the River that was briefly dry. This provoked an outcry from fishermen and was highly publicized. The downstream water users of course were also suffering from the shortage and the Association and water users made every effort to and did resolve the problem. The Association now makes daily readings of the river at 5 critical points during low water and maintained

adequate water in the river during last summer, the driest year on record, for fish and wildlife. I don't know whether it was or when it is adequate for recreation or who will eventually define that term in the Bill.

The Ruby River water users, in cooperation with the Fish & Wildlife Dept., believe they have resolved the instream flow problems in the Ruby River area where all interests are satisfied.

The Clark Canyon Dam was constructed on the Beaverhead River through the efforts of the old timers who had survived many low water years, despite opposition from the then Fish & Game Department and many sportsmen - who historically oppose dams and storage projects. By agreement and in cooperation with the Fish & Wildlife Department we maintain a minimum instream flow in critical low flow periods sufficient to protect the fish and wildlife, and since the Dam was completed in 1965 the Beaverhead River and Clark Canyon Dam have been a mecca for fishermen and a bonanza in license sales for the Department.

The Lima Dam has historically provided water to maintain the Red Rock River until the drought of 1988 when the upper reaches of the River ceased to flow without any diversions for irrigation. This Bill wouldn't have solved that problem as there was no water to lease.

We have many objections to the language of the bill but are equally concerned with what is not included in the bill. The language in the Statement of Intent in the bill provides "that the Legislature encourages the Board to select stream reaches where leasing has a good chance of succeeding and where all interests may be satisfied."

"The legislature also intends that the review process for lease applications be thorough and provide ample opportunity for consideration and input by concerned persons. As required in (section 4), the process should involve notice and opportunity for objections and hearing in the same manner provided for proposed changes in appropriation rights. The legislature

contemplates that the department of fish, wildlife, and parks will meet with appropriators along each designated stream reach to assess and consider any concerns before filing applications for lease authorizations."

If this is what the legislature intended, it certainly isn't what the bill says.

Section 4, part 4, of the bill is an example of the complexities of our water use that needs clarification. The Act reads:

"The maximum quantity of water that may be leased is the amount historically diverted by the lessor. However, of THE AMOUNT LEASED, only the amount historically consumed by the lessor, or a smaller amount if specified by the department in the lease authorization, may be used to enhance or maintain streamflows below the lessor's point of diversion. THE LEASE MUST TAKE INTO ACCOUNT THE HISTORICAL USE OF THE WATER RIGHT, INCLUDING BUT NOT LIMITED TO THE USUAL SHUTOFF OF ALL OR A PORTION OF THE WATER SUBJECT TO THE WATER RIGHT DUE TO NORMAL IRRIGATION PRACTICES, HARVESTING, NORMAL CLIMATE CONDITIONS, AND COOPERATIVE PRACTICES WITH OTHER IRRIGATORS."

The normal irrigation practice is to divert and use a good deal more water than the appropriated right when water is available, and only after the water flows recede is the water user limited to his water right. The leased amount should be limited to the amount of the water right or the amount historically diverted by the Lessor, whichever is the smaller, and of the amount leased only the amount historically consumed.

The Act provides - Sec. 4(10) - "The Department shall pay all costs of providing personnel to measure streamflows." This Act should provide that "only water commissioners appointed by the District Court shall have authority on the streams"

The costs to the Department of installing measuring devices in many areas could well exceed the budget.

New section 4(2) requires the completed application to meet the requirements of Sec. 85-2-402.

Sec. 85-2-402 permits a change in use only if the proposed use will not adversely effect the water rights of other persons.

But it is up to any appropriators adversely affected by a lease to prove by substantial credible evidence that his right is adversely affected.

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This is the same as no redress at all for a water user during critical low flows with the very livelihood of the water user at risk because by the time you can get the issue resolved through the administrative procedures involved and the court, the drought would be over and the farmer broke.

The 10 year lease period is too long to experiment with a law that acknowledgably only has a chance of succeeding.

We submit that leasing will adversely affect other appropriators by diminishing return flows or depriving other appropriators of their legal rights.

House Bill-707 would fly in the face of and seek to undermine what has been established water law in the State of Montana since the first reported water case was heard by our territorial Supreme Court in Virginia City in 1869.

That law, simply stated, is this:

Once the senior appropriator of water from a stream has used the amount of water to which he is entitled by Court decree, for the acreage to which it was decreed, he must return the surplus to the stream - so that the surplus in turn - may be enjoyed by the next appropriator or appropriators.

House Bill-707 would permit this senior appropriator, if the price is right, to lease his water to the Department of Fish, Wildlife and Parks, for obviously recreational purposes, and take the water far beyond the reach of the junior appropriator whose very livelihood may depend on such water.

Mr. Chairman, and Members of the Committee, this is not the year to initiate a new and costly program to enhance recreation with funding so difficult for education and other essential existing programs. Our rivers and streams are being prudently managed, fishing is great, and the system is working despite the drought. Wouldn't it make sense to devote our time and money toward the completion of the water rights adjudication process we are involved in now before starting another water program.

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Rather than holding the costs of government, HB-707 will
take us in the opposite direction and should not pass.

Thank you for your time and consideration.



SENATE AGRICULTURE

EXHIBIT NO. 14

DATE 3/15

BILL NO. HB 707

The Big Sky Country

MONTANA HOUSE OF REPRESENTATIVES

March 15, 1989

Testimony H.B. 707

Senate Agriculture Committee:

Senator Tom Beck, Chairman:

Senator Gerry Devlin, Vice Chairman:

I am Vernon Westlake, Representative H.D. #76, in Gallatin County. I am appearing in opposition to H.B. 707, together with many opponents from the Gallatin Valley. At this time, I want to present to the Committee, if I may, several lists of water rights holders who want to be on record in opposition to the bill, and their reasons.

The proponents have said that this bill does not change anything affecting existing water rights under Montana statutes. Mr. Chairman, I disagree, I believe there are at least five (5) major changes.

Number (1): Section 1, Page 4, Lines 19 & 20, giving the Dept. of Fish, Wildlife and Parks the authority to lease water for instream flow to enhance fish, wildlife and recreation in accordance with a new Section, Number (4).

Number (2): Section 1, Page 5, Lines 7,8 & 9, Subsection (C), giving the Dept. of Fish, Wildlife and Parks the authority to lease water in free flowing streams, again in accordance with new Section (4). Under existing statutes, the Dept. can only lease water from Federally controlled impoundments.

Number (3): Section 2, Page 7, Lines 23 & 24, again in accordance with new Section 4, would authorize water rights to be leased for use not requiring a diversion, as is required in the Prior Appropriation Doctrine.

Number (4): Section 3, Page 14, Lines 6,7,8 & 9, again in accordance with new Section 4, a leasor would not be subject to the "use it or lose it" abandonment requirement in existing statute.

Number (5): New Section 4, Page 16, Lines 12,13 & 14, again in accordance with new Section 4, allows a pre-1973 priority date to be used for instream flow.

H.B. 707 is much more than a pilot project to keep fish alive during a critical low flow period. The bill includes recreation, which definitely requires a larger stream flow. It changes the Prior Appropriation Doctrine. It allows for up to 10-year leasing, and could jeopardize water rights under a "use it or lose it"

Ex. 14
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HB 707

The Big Sky Country



MONTANA HOUSE OF REPRESENTATIVES

March 15, 1989

Testimony H.B. 707

Page 2

requirement. It allows for leasing in free flowing streams.

Leasing will create an adverse effect, junior appropriators will object and litigation will result.

The bill should require reponsibility by the Dept of Fish, Wildlife and Parks for costs of a prevailing objector for adverse impacts or effects.

The bill does not recognize the need for water commissioners, or who will be responsible for the costs. The Dept. must be responsible for waiving its right to object to other water use on the stream during the period of lease.

H.B. 707, for a bill that doesn't change anything and is purely voluntary, I see many changes and I have great concern for our 100-year old Montana water law.

Thank you.

SENATE AGRICULTURE

EXHIBIT NO.

15

DATE

3/15/89

TESTIMONY RE HOUSE BILL 707

NO.

HB 707

I am Ronald F. Waterman, Attorney at Law, practicing in Helena, Montana. I appear on behalf of the Montana Stock-growers Association, Montana Cattlewomens' Association and Montana Association of State Grazing Districts in opposition to House Bill 707.

These agricultural organizations testified earlier in opposition to House Bill 707 before the House Natural Resources Committee. Some changes have been made to House Bill 707, but there remain a number of reasons why these organizations continue to oppose this bill. One reason deals with fundamental philosophies. The other reasons flow from specific areas of the bill.

In opposing this legislation, these agricultural organizations do not ignore the problems the past drought has had upon Montana's streams. Livestock producers have been affected by drought. They know and understand the consequences the drought-like conditions caused, not only to their own operations, but also to the State's stream, its fisheries and its wildlife. Nevertheless a recognition of the drought does not justify approval of House Bill 707. The bill contains numerous problems.

The first fundamental problem these agricultural organizations have with House Bill 707 is the underlying concept of allowing an individual who is not using a water right to lease

the same to another party. Water rights are unique property rights. They rely exclusively on use to warrant their continued existence. A water user may assert a claim through court filings for a certain quantity of water for a period of water use. However, if the actual use is less, the actual use controls and determines the amount of the water right. A water right is exclusively a use right. Without actual use, a water right does not exist. Likewise, when a water right is not used the water becomes available to satisfy junior appropriator rights in the source of supply. This prevents waste and assures the water in a source of supply is continually put to a beneficial use.

Leasing contains the assumption that an individual owns a right which can be leased to another. A water user who does not put water to a beneficial use does not have a water right capable of being leased to a third party. When a water user declines to put water to a beneficial use, that water is then subject immediately to junior appropriators rights. A water user who does not place water to a beneficial use simply has no water right available to lease to a third party.

House Bill 707, even in its amended form, contradicts this fundamental concept of water law. The bill suggests that a water user who does not place water to a beneficial use nonetheless can lease the water to a third party. The water user who does not put water to a beneficial use simply has no water

to lease. For this reason alone, the concept behind House Bill 707 is contrary to applicable water law and for this reason the agricultural organizations appear in resistance to this bill.

When this bill was pending before the House, the organizations opposed the bill because its announced purpose was to address drought conditions while the bill itself never identified the fact the legislation would be used only when a severe drought occurred. The organizations felt and continue to feel the bill places inappropriate emphasis upon the enhancement of stream flows for fish, wildlife and recreation without adequate recognition that the bill should be a mechanism used only "during critical, low flow periods caused by drought."

The House made a partial concession to this issue by inserting in the bill following the phrase "fish, wildlife and recreation," the concept that stream enhancement is appropriate only "during critical low flow periods." However the problem which the agricultural organizations addressed has not been completely resolved by this amendment. There remains a flaw in the bill with the continued use of the word "recreation" and that word should be deleted from the bill. This deletion is warranted for one of two reasons. The word "recreation" duplicates the concepts of protection of fish and wildlife values and therefore is redundant and should be deleted. If the word "recreation" is not redundant, then the word would allow stream enhancement during drought conditions of sufficient quantities

to satisfy a recreational flow requirement separate and above flows sufficient to protect fish and wildlife and adequate to permit boating, floating and other water recreational activities.

The question posed is, during a drought, with the ability to protect fish and wildlife in place, whether the State of Montana should be leasing water for other recreational activities. The word "recreation" alone underscores that the bill creates a conflict between agricultural and sportmen groups within the State. Acquisition of water for floating and other recreational needs will only assure that agricultural interests and concerns will be forced to bear the brunt of any future drought.

As water users spread waters upon the land, the result is not only the growth of a crop and the watering of livestock; the water also charges aquifers and springs which benefit not only the water user but also adjacent land owners. Especially during a drought, action which will result in the drying of springs and aquifers will have far-reaching, consequential effects upon land owners adjacent to the water user who leases water to the State. In stream flow enhancement will have off stream flow affects.

The agricultural organizations continue their objection to the amendment contained in Section 1, amending Section 85-2-102(1)(c), MCA. A lease as described in the bill is a

lease of an existing right. Such a lease should not be defined as a new appropriation by the Department, as is suggested by this provision. This section suggests that a lease becomes a separate appropriation and a separate right of the Department, Wildlife and Parks. This language on page 4, lines 19 and 20 of the bill, should be deleted.

There is no question that a lease, if authorized by statute, must be recognized as a beneficial use to avoid the argument that by leasing the lessor has abandoned the water right. This protection has been added by the amendment in Section 1, amending Section 85-2-102(2)(c), MCA, found on page 5, lines 7 through 9. The language identifying a lease as an appropriation should be stricken however.

Before the House, the agricultural organizations identified a conflict between subparagraph 5 of Section 4 and Section 10 of the bill. The act terminates on October 1, 1999. A lease entered into for 10 years cannot be renewed for an additional 10 years, as permitted by Section 4, because the underlying authority for the leasing concept, this legislation itself, will have expired in 1999. Regardless of when entered into all leases will terminate by application of Section 10 of this bill. It is unrealistic to insert renewal language in the bill, especially renewal language allowing renewals beyond 10 years from the passage of the legislation. The agricultural organizations requested this conflict be addressed by the House

Natural Resources Committee and there was some agreement advanced that a lease would be said to terminate either upon its expiration or the termination of the act, whichever event was later. This type of an amendment would otherwise clarify an ambiguity in the present legislation which only promises future litigation.

Subparagraph 10 of Section 4 places on the Department the costs of measuring devices and the cost of personnel to measure stream flows. It is likely that whenever a lease occurs, a water commissioner will have to be appointed to regulate the flows of the water throughout all measuring devices on the stream. Subparagraph 10 should be broadened to assure the Department is included as a stream user responsible for bearing a portion of the costs of any water commissioner appointed on a stream where there is a lease.

This legislation is proposed as an "experiment". To retain its truly experimental nature of this legislation, the number of stream reaches affected and the length of each lease should be at least cut in half and the concept should be phased into application, leasing first on only two stream reaches, with authority to broaden the leasing of further reaches if no adverse impacts have been identified in the first leases. Moreover, there is a practical reason to shorten the period of the lease. Until a lease has run its term, the Department of Fish, Wildlife and Parks may well argue it cannot assess all

adverse impacts of a leasing program. With authority for a 10 year lease, this may mean the full impact of a leasing program is not fully identified until the entire authorization for this legislation has expired. This legislature should not permit the Department to avoid an analysis of adverse impacts because the lease has not yet expired. The lease terms authorized by this legislation should be shortened to five years each lease period.

Again in the House, the agricultural organizations criticized this legislation upon the ground it failed to limit the Department to the role it would play on a stream once it became a lessee. The Department, if it intends to exercise a lease, should be required to waive the right to object to any other water use applications on the stream during the period of the lease. The Department of Fish, Wildlife and Parks with its resources, should it become a lessee of water, could potentially fund broad objections which would prevent future development of a stream unless the Department's ability to file those objections is waived through passage of this legislation.

It is necessary to return to the beginning however, to underscore the fundamental problems with this legislation. Water leasing is a concept which makes material alterations in the existing water law and fundamental alterations of private property rights. In noting this fact, the issue raised is whether these changes are appropriate and necessary under the

circumstances. More specifically, the question arises as to why this legislation has been pursued.

One explanation is that the legislation will avoid future litigation. There is no guarantee of that result. Indeed the supporters of this legislation today may well be the plaintiffs in tomorrow's litigation. After all, these groups can easily claim the legislation as passed was not the legislation as proposed and the trade off of passage to avoid litigation was extended only regarding the initial legislation. Moreover, we have learned that even if the current supporters of the legislation may not be transformed into tomorrow's litigants, members of the same groups can reorganize into another group and carry the issue into the courts. Passage of this legislation does not avoid the potential of litigation.

In fact, the opposite is likely true. Once the legislature recognizes a water right is something more than a use right, the burden upon those who seek to acquire instream flows will be lessened considerably. As the legislature proceeds to alter and change water law, it is engaged in an action which has fundamental and far-reaching adverse effects upon all water users in this State.

Likewise, it has been suggested that this legislation is an alternative to passing of a more far-reaching initiative on the same subject. Again, there have been no promises offered or guarantees advanced that passage of this legislation will

end the desire of some groups to acquire minimum instream flows unavailable for any water development. The issue remains, moreover, of whether any initiative could successfully divest appropriators junior to the lessor of their vested property rights. Clearly, an extreme initiative would result in a court challenge and those opposing unregulated instream flows and the concept of leasing of water rights will have a better challenge to such extreme legislation, regardless of its form. The people of this state cannot divest water users of vested property rights. There is no authorization to any attempt to exercise eminent domain over those rights. Any restriction on existing water rights would be an unconstitutional taking of a vested property right and unlawful.

The concept of water leasing clearly is new and a unique way of addressing drought-related stream flow problems. As set forth above, House Bill 707 advances this concept in an inappropriate manner. The agricultural groups I represent recognize however there may be some need to experiment with this concept on a few limited stream reaches. My clients would consider and evaluate legislation which was site specific and limited to only one or two stream reaches with identified quantities of water to be leased and with the disclosure of the parties who would be affected by the lease. This information is likely to already be in the possession of the Department of Fish, Wildlife and Parks. Any leasing bill should require

specific sun-setting to assure that the experiment retained its character of an experiment and that the bill did not provide an opportunity to expand the concept of leasing beyond its experimental stage until the full ramifications of a water leasing program have been evaluated both scientifically and by future legislators.

With all due respect to the sponsors of this bill, for the reasons set forth above, I do not believe that House Bill 707 is justified. House Bill 707 will not resolve the instream flow controversy. House Bill 707, instead, will only impose upon some water users an unwarranted experiment which should not be pursued by the State of Montana at this time.

For all of these reasons, Montana Stockgrowers Association, Montana Cattlemens' Association and Montana Association of State Grazing Districts oppose House Bill 707 and ask this committee to vote "do not pass" regarding this legislation.

7868R

March 15, 1989

Senate Agriculture Committee:

Senator Tom Beck, Chairman:

Senator Gerry Devlin, Vice Chairman:

SENATE AGRICULTURE

EXHIBIT NO. 16

DATE 3/15/89

BILL NO. HB707

Hearing on House Bill 707:

We, the undersigned, are very opposed to leasing of water rights during critical low-flow periods for instream flow, particularly for recreational purposes.

Our major concerns with the legislation are:

- (1) The changing of the Prior Appropriation Doctrine by eliminating diversion for beneficial use and allowing a pre-1973 priority date for instream flow.
- (2) A definite possibility that a 10-year lease for instream flow might constitute abandonment by reason of the "use it or lose it" principle.
- (3) The creation of adverse effect on junior appropriators with litigation as the only resort.
- (4) Ten-stream reaches and 10-year leases are way beyond the original intent of a pilot project.
- (5) The bill does not recognize that a water commissioner will be needed, nor who will be responsible for costs.
- (6) The Department of Fish, Wildlife and Parks must be required to waive its right to object to other water use on the stream during period of lease.
- (7) The Department of Fish, Wildlife and Parks must be responsible for the costs of prevailing adverse impacts on the existing appropriators.

<u>Name</u>	<u>Address</u>	<u>Organization</u>
Milo J Todd	24427 Norris Rd Bozeman	APR, High Line Canal, Water Users
Norman Vander Voo	24228 " " "	
Joel Borz	13890 Churchill Rd. MANHATTAN	Highline Canal Water Users
Ken Van Dyke	2062 Bitterroot Ave. Bozeman	
Alex B. Venn	3855 Anderson Rd Manhattan	
Jake Kuttinga	15333 Churchill Rd. Manhattan mt.	
Jack Scarborough	15520 Churchill Rd Manhattan mt.	
	1775 Churchill Rd Manhattan mt.	High Line Canal

March 15, 1989

Senate Agriculture Committee:

Senator Tom Beck, Chairman:

Senator Gerry Devlin, Vice Chairman:

Hearing on House Bill 707:

SENATE AGRICULTURE
EXHIBIT NO. 17
DATE 3/15/89
BILL NO. HB 707

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<u>Name</u>	<u>Address</u>	<u>Organization</u>
<i>Richard J. Boylan</i>	<i>1812 Wilson Way</i>	<i>Wildlife Creek</i>
<i>F. J. Boyd</i>	<i>5773 Bigelow Rd</i>	<i>Hoy Ditch Co.</i>
<i>Henry Dusenberry</i>	<i>5170 Johnson Rd.</i>	<i>Middle Creek Ditch Hoy Ditch Co.</i>
<i>Bert Dusenberry</i>		
<i>Floyd Rafferty</i>	<i>5530 Stucky Rd</i>	<i>The Middle Creek Ditch Co.</i>
<i>Glen O. Kraft</i>	<i>7035 S. 19th</i>	<i>Hoy Ditch</i>
<i>Ken Trueman</i>	<i>5555 LOVE LN</i>	<i>WEST GALATAMA</i>
<i>Ken Trueman</i>	<i>4776 Love Ln</i>	

March 15, 1989

Senate Agriculture Committee:

Senator Tom Beck, Chairman:

Senator Gerry Devlin, Vice Chairman:

SENATE AGRICULTURE
EXHIBIT NO. 18
DATE 3/15
BILL NO. HB 707

Hearing on House Bill 707:

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<u>Name</u>	<u>Address</u>	<u>Organization</u>
John Maryanne Beck H. Morrow	1103 So. Wilson Bogerman	Kuylen Ditch Co
John R. Van Dyke	6353 Delta Dr	" "
John A. Brown	4605 Cameron B. W	" "
Lid Klump	3270 Lee Rd Manhattan	" "
Acher D. Bos	8670 Churchill Rd.	Kuylen " "
Vince D. D...	7198 River Road	Kuylen Ditch
Harold J. Kin...	2735 Churchill Rd	" "
Gary Bos	2840 Lee Rd Manhattan	Kuylen Ditch
Gary & Van Dyke	4285 Dyke Rd	Kuylen Ditch
M. Eugene Bryson	20410 Bryan Rd.	Kuylen Ditch
Robert G. ...	77071 - Callahan Rd	Bogerman Ditch
Dwight Winchester	991 Pasche Rd. Belgrade, MT 8104- HOFFMEYER Lane	FORMER COUNCIL

W H Williams 10511 River Road Hixline -

March 15, 1989

Senate Agriculture Committee:

Senator Tom Beck, Chairman:

Senator Gerry Devlin, Vice Chairman:

Hearing on House Bill 707:

Ex. 18
3/15/89
HB 707

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<u>Name</u>	<u>Address</u>	<u>Organization</u>
Jake Schutte	80650 Hal Rd	West Sallatin
Gerald Jacobson	268 Jackrabbit Lane	Becker & Border ditch co
Gerald Leys	531 Cobb Hill Rd	Highline Canal
Bill Albrecht	11655 Prairie Rd	Highline Canal
Jon Albrecht	8500 Birch Bush Bozeman	Keighon Ditch
Henry J. Visser	10700 Visser RD Manhattan mt.	High line Canal co
Phil Sinnema	10040 Compauk Rd Manhattan, mt	High Line Canal co
Alvin J. Bolhuis	17177 Norris Rd Manhattan, mt.	MAMOTH Ditch
Ray Bolhuis	Manhattan MT	Low Line Canal
Cornie VanderMolen	Manhattan, mt.	High Line Canal
Ronald Pruitt	28289 Norris rd Bozeman mt	Lowline Canal
James L. Hays	130, many mt	Beck & Border ditch
# Bill	113 Arrowhead Rd Bozeman mt	Middle C. Supply
	24 Beck & Border Rd	11.

March 15, 1989

Ex. 18
3/15/89
HB 707

Senate Agriculture Committee:

Senator Tom Beck, Chairman:

Senator Gerry Devlin, Vice Chairman:

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Our major concerns with the legislation are:

- (1) The changing of the Prior Appropriation Doctrine by eliminating diversion for beneficial use and allowing a pre-1973 priority date for instream flow.
- (2) A definite possibility that a 10-year lease for instream flow might constitute abandonment by reason of the "use it or lose it" principle.
- (3) The creation of adverse effect on junior appropriators with litigation as the only resort.
- (4) Ten-stream reaches and 10-year leases are way beyond the original intent of a pilot project.
- (5) The bill does not recognize that a water commissioner will be needed, nor who will be responsible for costs.
- (6) The Department of Fish, Wildlife and Parks must be required to waive its right to object to other water use on the stream during period of lease.
- (7) The Department of Fish, Wildlife and Parks must be responsible for the costs of prevailing adverse impacts on the existing appropriators.

<u>Name</u>	<u>Address</u>	<u>Organization</u>
<i>George Cook</i>	<i>7272 River Road Bozeman Mt.</i>	<i>Keeghen Ditch</i>
<i>Ray Schultz</i>	<i>81393 Sullatan Rd. Bozeman, Mont.</i>	
<i>Bruce H. Visser</i>	<i>10633 Visser Rd. Manhattan, MT.</i>	
<i>Albert Bellus</i>	<i>Bozeman Mont</i>	<i>Keeghen Ditch</i>

March 15, 1989

Senate Agriculture Committee:

Senator Tom Beck, Chairman:

Senator Gerry Devlin, Vice Chairman:

Hearing on House Bill 707:

SENATE AGRICULTURE
EXHIBIT NO. 19
DATE 3/15
BILL NO. HB 707

We, the undersigned, are very opposed to leasing of water rights during critical low-flow periods for instream flow, particularly for recreational purposes.

Our major concerns with the legislation are:

- (1) The changing of the Prior Appropriation doctrine by eliminating diversion for beneficial use and allowing a pre-1973 priority date for instream flow.
- (2) A definite possibility that a 10-year lease for instream flow might constitute abandonment by reason of the "use it or lose it" principle.
- (3) The creation of adverse effect on junior appropriators with litigation as the only resort.
- (4) Ten-stream reaches and 10-year leases are way beyond the original intent of a pilot project.
- (5) The bill does not recognize that a water commissioner will be needed, nor who will be responsible for costs.
- (6) The Department of Fish, Wildlife and Parks must be required to waive its right to object to other water use on the stream during period of lease.
- (7) The Department of Fish, Wildlife and Parks must be responsible for the costs of prevailing adverse impacts on the existing appropriators.

<u>Name</u>	<u>Address</u>	<u>Organization</u>
Tim Fuls	517 1000 Ace Orchard Rd CORVALLIS MT.	President-Mtn View Water Dist. Co.
Gerry Roseley	14518 Foothill Rd St. Ignace Mt	Member Flathead Irrigation Dist.
Stanley J. G.	6870 Amsterdam Rd Manhattan Mt.	Member Lowline Canal Co.
Jerry E. Leg	8280 Highline Rd. Manhattan, mt.	
Robert W. Ba	1767 YADON RD MANHATTAN, mt.	MEMBER HILINE CANAL CO.
Rich Visser	Manhattan Mt	
Maynard O. Jellison	Manhattan, Mont	
Joe W. Albroda	Manhattan Mt	Highline Canal Highline Canal
Jacob R. Cook	" "	Lowline Canal Co.
James A. Young	Manhattan mt	" "
Willard K. Kinn	" "	Highline Canal Co. Lowline Canal



SENATE AGRICULTURE

EXHIBIT NO. 20MONTANA FARM BUREAU FEDERATION 3/15/89502 South 19th • Bozeman, Montana 59715
Phone: (406) 587-3153HB 707BILL# HB 707 ; TESTIMONY BY: Dave McClureDATE Mar. 15, 1989 ; SUPPORT _____ ; OPPOSE Yes

Mr. Chairman, members of the committee, I am Dave McClure, a farmer-rancher from the Lewistown area and currently president of the Montana Farm Bureau, an organization of over 3600 member families. We oppose HB 707 because of policy statements established by our voting members who are active farmers and ranchers. We do want to cooperate and participate in solving problems regarding the use of our water resources in Montana. We recognize and share the concerns of many other groups and the legislature. Our policy states:

"We support the theory of additional water storage to increase availability of water for agriculture and recreational use as well as to increase instream flow."

"We oppose any instream flow legislation unless it is based strictly on additional storage."

As you can see, we support the idea of maintaining stream flows and feel that this is best done by storing, spreading and using water for Montana. This type of plan can benefit all Montanans with economic activity, development and future growth of our water resources for late-season stream flow.

We have genuine concerns about several issues contained in HB 707 and the concept of leasing water rights for instream flow. The possibility of litigation and costs to protect down stream of junior water rights is real because this is a major change in the definition beneficial use. Also, since federal law does not recognize instream flow as a beneficial use, will this change cripple Montana when down stream states lay claim to unused flows? We are concerned about putting a leasing plan into effect before the adjudication process is complete.

During severe drought such as in 1988, we cannot solve all problems by moving a limited quantity of water around. We feel that current water projects, which provide much recreation as well as irrigation, held water back for more late season flows than in past droughts, as in the 30's. By many accounts the 1988 drought was more severe than any other. Farmers and ranchers were severely harmed by the lack of water in 1988. They had to haul feed to cattle or haul the cattle to feed and water and in some cases haul water to the cattle that were not sold off. All this in addition to lost crop production. We, more than any other group do not want to experience another year as dry as 1988. We sincerely hope that HB 707, which is to some extent a knee-jerk reaction to the 88 drought, does not cause more harm.

Lastly Farm Bureau pledges cooperation and support in funding projects as in support of HJR 22 for Pick-Sloan funding. The support of water use efficiency as in HB 461. We do not feel that confrontation with other groups here in Montana is the best way to solve problems. However Montana Farm Bureau must represent the best interests of agriculture and we sincerely believe that water leasing for instream flow is not the best solution.

SIGNED: Dave McClure

EXHIBIT NO. 21

DATE 3/15/89

BILL NO. HB 707

WITNESS STATEMENT

NAME Louise Monroe BUDGET HB 707

ADDRESS Box 287 Dorky Mt. 57829

WHOM DO YOU REPRESENT? Monroe Ranches

SUPPORT _____ OPPOSE _____ AMEND _____

COMMENTS: see Exhibit 21A

Lined area for additional comments or notes.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Mr. Chairman and Members of the Committee:

I am Louise Conner Monroe from the upper Bitterroot Valley. My husband, John Monroe, owns land and water rights on the Tin Cup drainage, my son Michael Conner and I own land and water rights on the Chaffin Creek drainage, and my husband and I own land in the Sula Basin. Our water rights in Sula are on the East Fork River and Camp Creek. None of us have any intention of leasing our water rights but we are all concerned over the Fish and Wildlife's "foot in the door" approach to solving the low water problems in our creeks and rivers.

Granted we have had several "critical low flow periods" the last several years, but it has been even more critical for agriculture than for the fish and recreationists. My home is on the banks of the Bitterroot River and I love to see the river full of water and see the fishermen floating by on their rafts but not at the expense of agriculture!

I have several questions that have come to mind after reading House Bill 707 and I hope you committee members will research these questions and consider the testimony of others carefully before voting on this bill.

It has always been my understanding that there is a law that the water stays with the land and can not be sold or traded away from the land it was appropriated for. It has also been my understanding that when you shut your water off temporarily for haying or harvest that you can't let your best friend use your water, you have to turn it back into the creek and let those with the next water rights use the water. If no one else needs the water it will then flow into the river. If the Fish and Wildlife is allowed to lease water rights, will their only claim on the water be during "critical low flow periods" or will they be able to take their leased water during high water as well? Who decides when it's a "critical low flow period"? Is the purpose of this bill to make an exception to existing laws for the benefit of the Fish and Wildlife? It seems to me, if you're going to allow a landowner to lease his water to the Fish and Wildlife, he should be allowed to lease his water to the highest bidder—be it agriculture, industry or the Fish and Wildlife!

Won't any leased water eventually find its way out of state and can the Fish and Wildlife sell their leases as the water passes out of state?

Suppose a man was about to lose his ranch to a lender and he decides to lease his water for ten years. What recourse does the lender have if he gets the land back without water rights?

Nearly all of our mountain canyons in the Bitterroot Valley have potential dam sites for water storage but because of wilderness restrictions we are prohibited from building new dams. Why doesn't the Fish and Wildlife try to get a few wilderness laws changed and build dams for water storage instead of jeopardizing existing Montana water rights?

I urge you to vote against House Bill 707. Thank you.

SENATE AGRICULTURE

EXHIBIT NO. 22

DATE 3/15/79

BILL NO. HB 707

Ueland

WITNESS STATEMENT

Name Ole Ueland Bill No. HB 707Address RR3, West Browns Gulch Road, Silver Bow, Mt. 59750Whom do you represent? Headwaters Agriculture Water Resources CommitteeSupport _____ Oppose X Amend _____ X

Comments:

- #1) Leasing of water rights (or selling) by irrigators to Fish Wildlife and Parks runs the risk of jeopardizing or losing ones right. It is an admission that water is not needed for his use. This could go against one in a court case. By relinquishing ones need for the water means that the next junior users on the stream are next in line for the use of the water by the PRIOR USE DOCTRINE. Claiming of water for a new use by leasing or purchase is a lot more complicated than meets the eye. It would be very expensive. Agriculture water users would like assurance that any burden of proof be born by the entity proposing a change.
- #2) Perhaps the most likely argument against leasing of water from agriculture to fishery and/or recreation is not recognizing that the water is more valuable for agriculture. A fishery or recreation interest would likely need to pay an amount equivalent to its value for agriculture. What is worth more? The agriculture product or the fishery product, and/or the preservation of prime (irrigated) farmland?
- #3) No action should be permitted that would take away from an established beneficial economic use such as agriculture and the impact it has on the community. Instead it would be wiser to look for alternatives, the main one being STORAGE of high water runoff to be used later when low flows for a number of beneficial uses are critical. Thru storage all beneficial uses could be maximized instead of taking from one to satisfy another (lesser) use.

It is the recommendation of the HEADWATERS AGRICULTURE WATER RESOURCES COMMITTEE (a seven county organization within Granite, Powell, Deer Lodge, Silver Bow, Jefferson, Madison and Beaverhead) to oppose leasing of water rights. If it is the wisdom of the legislature to permit leasing, then please consider amending HB 707 so that research be done on the environmental, economic, and social impacts of leasing; and that before leasing is permitted that the alternative benefits of storage be fully investigated.

The Headwaters Agriculture Water Resource Committee is willing to cooperate and work with legislature, state agencies, and the many water interest groups in solving water shortages. Water is a valuable resource. We feel that by all beneficial uses (users) contributing financially to various methods of storage, we can solve much of the fishery and recreation needs as well as irrigators and many other water use needs. Thank you for your kind attention.

(over)

The series of meeting the DNRC held recently across Montana re suggestions for the State Water Plan emphasized additional storage as the high priority need to help out for providing water for all beneficial uses:

- storage mainly of the dam and reservoir type preferably offstream, upstream, tributary
- storage thru better water conservation practices such as improved irrigation water management and water spreading, and range management practices to store water in the soil profile and contribute to groundwater and springs which feed the streams
- help the beavers with their dams
- act on new inovative ideas such as storing water for late use thru formation of icebergs in the winter time
- storage to provide water for instream uses for fishery, for water quality, for hydropower, for recreation, for riparian, for use many times over
- storage for drouth relief
- storage for supplemental water for most of the irrigation water rights which are not fulfilled thruout the irrigation season
- storage to provide water for developing the potentially new irrigable lands
- storage to provide water for industry
- storage to provide water for economic development
- storage for flood prevention, watershed protection
- storage for domestic and municipal use
- storage for groundwater recharge
- storage for downstream state benefits of flood control, navigation, irrigation, etc.
- storage for which all the above are beneficial

SMITH 6 BAR S LIVESTOCK

P. O. BOX 107

GLEN, MONTANA 59732

406-835-3441

March 15, 1989

SENATE AGRICULTURE

EXHIBIT NO. 23

DATE 3/15/89

BILL NO. HB 707

Randall Smith

To the Members of the Senate Agriculture Committee:

We are ranchers in the Big Hole Valley near Glen. We use water for irrigation from the Big Hole River and two of its tributaries, Divide Creek in Silver Bow County, and Willow Creek in Beaverhead County.

We are strongly opposed to HB 707 for the following reasons:

1. No action, or even discussion, should take place on a proposal to lease water rights before all streams in Montana have been adjudicated. Most streams that are not adjudicated yet have had water rights filed on them that are greater in amount than the flow the streams produce. Those rights, through beneficial use of the water, are dated prior to July 1, 1973. These are historic water rights that go with the land.
2. Streams that are already adjudicated, such as one creek we use for irrigating, often leave junior water rights holders without their specified water rights in late summer if streamflow is below normal. Any water not used by the senior water right holders (our water rights, for example, date from 1877 into the 1880s) belongs to the junior water rights holders so that their water rights are filled. No one should have the right to take that away from them. There is always a certain amount of water in our creek anyway, even in dry years like last summer, and that water flows into the Big Hole River. The creek is never completely dry.
3. Leasing water rights takes water that historically goes with the land. It has had to be diverted from a stream for beneficial use in order to have the right to use it. Irrigating actually stores the water in the land gradually releasing it back into the stream from which it was diverted. If water formerly used for irrigating is allowed to flow down the rivers or creeks through leasing, that storage benefit is lost. Irrigating is what has historically saved stream flows in the late summer months.
4. We do not believe recreation should be considered a beneficial use of water.
5. We believe small upstream storage of water would be far more beneficial in maintaining water flows than leasing of water rights.
6. When water is not used on the land it flows down the streams and out of Montana. That old phrase "use it or lose it" is still valid.

We believe our reasons for opposing HB 707 are valid and urge you to kill this bill.

E. Maynard Smith
E. Maynard Smith

Randall P. Smith
Randall P. Smith

SENATE AGRICULTURE

EXHIBIT NO. 24

DATE 3/15/89

BILL NO. HB 707

Bill Garrison

I would like to protest House Bill No. 707. I think that it is very poor management for the government of the State of Montana to even think of leasing or selling the water rights away from the land that it is recorded to, until the water is properly adjudicated and taken care of. A few years back the State decided the water in Montana had to be rerecorded and properly adjudicated, so that we could legally keep our water here in the State. Now you want to pass a bill to lease the water to someone so they can let it run out of the State, before we get it all adjudicated, that doesn't make much sense to me.

I think we should take a hard look at how a bill like this could effect our tax base in the State if it were used on a larger scale. Thirty per cent of the total revenue of Madison County is generated through ranching and agriculture. I am sure that a good per cent of that is generated through irrigation being that twenty per cent of the irrigated land in Montana is in Madison and Beaverhead Counties.

I can not see, in my own mind, how water could be leased for instream flow during a critical low water time without affecting the other water users on the stream.

I am a rancher and irrigator on the lower Big Hole River, and a tax payer in Madison, Silver Bow and Beaverhead Counties. I am very concerned as to how this bill could affect the state of Montana.

Bill Garrison
Glen, Montana

Bill Garrison

STATE AGRICULTURE
25
DATE 3/15/89
BILL NO. HB 707

March 15, 1989

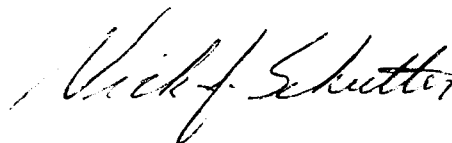
To the Chair-person and Members of the committee hearing HB 707.

For the record, my name is Nick Schutter, and I am a farmer in Gallatin County.

Currently every user on any particular ditch or canal shares in the loss of water in that respective canal due to seepage and evaporation. Now if you take for instance a long canal, say of 40 or 50 miles. If a significant number of the users on the upper end of the canal lease their water out, it would be highly unlikely that the users on the lower end of the canal could receive even close to their full water right because of reduced flow, and the people that lease their water right out are not sharing in the loss due to seepage and evaporation. I don't find any protection for these people against this happening in this bill.

This bill also states that the Department of Fish, Wildlife, and Parks shall pay all of the costs associated with installing measuring devices or providing personnel to measure streamflows. I assume then that this is taxpayers money being used here. Quite frankly, I do not care to see the money I pay in State Income Taxes spent in this way.

For these reasons, I urge you to oppose House Bill 707.



Nick J. Schutter

SENATE AGRICULTURE

EXHIBIT NO. 26

DATE 3/15/89

BILL NO. HB 707

Mark E. Fehardt

Amendments to House Bill No. 707
Third Reading Copy

Requested by Senator Hammond
For the Committee on Senate Agriculture

Prepared by Deborah Schmidt
March 15, 1989

1. Page 3, line 10.

Following: "program."

Insert: "Because the Milk River Basin is chronically water short, and because it is the subject of considerable negotiation of federal and Indian reserved rights, leasing should not be undertaken in this basin until these issues are successfully resolved."

2. Page 14, line 15.

Following: "~~The~~"

Insert: "Except for the Milk River basin,

3. Page 15, line 12.

Following: "by the"

Strike: "lessor"

Insert: "lessor's crop, if applicable, and excluding water used as recharge or return flow"

SENATE AGRICULTURE

EXHIBIT NO. 27

DATE 3/5/89

BILL NO. HB 707

Dear Senator Hammond

I understand that HB 707 is to be heard by the Senate Agriculture Committee on Wednesday, March 15th at 1:00 O'clock.

Etchardt

This is the bill that deals with instream flows for fish and recreation and comes from the study for a new State Water plan. This looks to irrigators like the Sportemens way of taking over some of the water which is put to beneficial use by agriculture now.

The bill is potentially dangerous because if the water rights purchased are at the head end of the stream they become in effect a consumptive use. The bill does concede that only the "consumptive use" portion of the water rights leased could be used but if this were not calculated accurately the downstream ag users might be denied the benefits of the return flows and there could be a change in the recharge of underground aquifers which would affect livestock and domestic wells and springs as well as actually hurting instream flows which would be diminished at a later time from not getting the benefit of underground and surface recharge and return flow to the original stream.

In the Milk River the water is diverted several times on its way down the river and used over and over again (Incidentally this produces considerable instream flows in the proces). For example 10% of a 1200 cfs release from Fresno Dam if purchased in the Chinook division would be 120 cfs. If this same 120 cfs were passed down the river to the last diversion on the milk, which is the diversion for the Glasgow Irrigation District at Vancalia Dam, it would be 60 % of the water available if there were only 200 cfs to divert at Vandalia (which often happens in periods of water shortages).

My view is that the bill should be killed and further study should be made in the various drainages to see what the actual effect would be, and if this could not be accomplished by the addition of more storage. This storage could increase the total water supply by impounding floodwaters which flow out of state in the spring and are gone when we need them later on.

Amendments should be prepared for the bill which would:

1. Define "consumptive use when figured for purposes of instream flows as the amount of water that is actually used by the crop itself.
2. The Milk River Basin should be amended out of the bill since we have too many water problems at this time to allow this type of appropriation which might further disrupt our water supply (at least until we get our supplemental water supply in place). If instream flows are needed in the Milk River Basin then the Fish and Game Department should join in the project and increase the supplemental water supply by the amount of additional water they deem necessary (and of course also pay for it).
3. There is presently a moritorium on new appropriations of water from the Milk which might apply to a change of use such as contemplated in BH 707 so to be on the safe side the Milk River should be amended out.

March 14, 1989

EXHIBIT NO. 28

DATE 3/15/89

BILL NO. HB 707

Mr. Chairman and Members of the Committee:

1. Regarding leasing water for the purpose of enhancing stream flow for Fish, Wildlife and Recreation during low-flow periods; From reading this proposed bill, it is obvious that the drafters of this bill have done a lot of work and have done their best to address all of the problems. However, there are several things that bother me about this proposed legislature.

1. Approximately 10 years ago we farmers and ranchers were required to refile on existing water rights for the purpose of readjudication. We faced a deadline, with failure to comply being the loss of our water rights. My understanding is that the State has not completed one single county thru the re-adjudication process, and now we are talking about leasing existing water rights that have not been re-adjudicated.

2. Secondly, the continued use of the word, Recreation. I don't think that any Farmer or Rancher has a problem with doing his best to protect fish and wildlife. If we are in a critical low flow, recreation should be the last on our list of priorities.

3. If a water rights holder leases his water to the Department of Fish, Wildlife and Parks for a 10-year period, and then during a critical low flow period his right becomes invalid because of the date of appropriation, what then is the department's role? Do they continue to pay for the water that they don't get, or do they just take the water, regardless of right?

4. My real fear is that this is a small step in the ever increasing erosion of personal property rights. It is simply a foot-in-the-door approach to total control of water by a Department of Fish, Wildlife and Parks or as it continually states, Fish, Wildlife and Recreation.

5. At the best, this really is a band-aid approach to our problem. In the Bitterroot at least there are many creeks that could be equipped with small dams or reservoirs where the water could be released during low flow periods and they would in fact increase the recreational opportunities in the Valley.

It would also behoove us to pay more attention to watershed management and doing those things that would stop the flooding we see every spring.

Lastly, no matter what we do as conservationists, agriculturalists, environmentalists, or sociologists; everything in the end hangs on the understanding and application of our ideas by politicians. I hope that you will look at this problem as it relates to our whole economy, rather than a stop-gap measure to save the fish.

Thank you.

3/15/89

EXHIBITS WERE MISNUMBERED. THERE IS NO EXHIBIT # 29 FOR THIS DAY.

March 15, 1989

Mr. Chairman and Members of the Senate Committee:

I am George Vogt from Ravalli County, where four generations of my family have irrigated with water from the Bitter Root River. We have used and shared this water, I believe efficiently and effectively.

Last year was the driest of my 82 years, but we still had crops and still have fish in our streams. People shared water with their neighbors and the fish. Additional water was released for them and the fish from private dams.

If I should lease my water right, and the lessee uses all the water granted by my right, ^{all} those with newer rights below me ^{for in stream flow} may suffer particularly ^{as well as economy} in dry years.

Another concern is that Montana is a long way from completing the adjudication process. According to some judgments, many water rights will be decreased significantly in volume . How can an owner of water rights lease water for ten years when he is uncertain to the amount he may be allowed?

Too, let's take off the wraps of this bill and see it as it really is. To me the main thrust of the bill (p. 9a - p.11,- 47 lines) is permitting leasing of our water to out-of-state entities for ten years with right of renewals if certain conditions are met. Montana needs that differ from year to year must be kept in mind.

I strongly question why this purpose was omitted from the statement of intent of this bill. Montana's water has long been coveted by other states. This law obviously allows another foot in the door for out of state uses of our water with certain so called requirements, if met.

I assume that the committee is familiar with results of water leasing and purchasing in other states. I have been told that in South Park, Colorado, and other counties in that state there were leased or purchased water rights for considerable sums of money. Some owners still live on the lands, which now are unproductive semi deserts affecting the economy, the tax structure and the beauty of the areas.

May the Governor and this Legislature not be remembered for leasing Montana needed water to out of state users, and may we in the Bitter Root never have to say, "How Green Was My Valley."

I beg you, DO NOT PASS THISS BILL!

Thank you,
George Vogt.

HB 707

SENATE AGRICULTURE
EXHIBIT NO. 31
DATE 3/15/89
BILL NO. HB 707
Sen Severson

SENATOR ELMER SEVERSON
SENATE DISTRICT 32
MARCH 15, 1989

WATER RIGHTS

WHAT IS A WATER RIGHT?

It is a right to a beneficial use of a given amount of water on a described tract of land with a priority date. The given amount in Montana is usually approximately one miners inch per acre, or one cubic foot per section for forty acres.

WHAT IS A PRIORITY DATE?

First in date of priority is first in right to use that water. Water is decreed to land and not to people. You cannot sell, lease or give away water, it is part of the land it was decreed to.

HOW DO WATER RIGHTS WORK?

First in date of right has first use. If first water is not in use, second water, in effect, becomes the first water and so on down the line.

Most streams in Montana are over adjudicated. Burnt Fork Creek, the first decreed stream in Montana is an example of that. It has had the first right in line in Montana, since 1852. If any right

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3/15/89
HB707

WATER RIGHTS
MARCH 15, 1989
PAGE 2

on this creek were to be filled on a given day, the creek at its highest point could not fill those rights, but it works. Use and re-use of this water, make the water shed a good one. Someone's used water is just as wet as fresh unused water from the creek.

WHAT HAPPENS IF YOU WERE TO LEASE AND SELL WATER?

If some of that water was not there for use and re-use, I will guarantee you that you will hurt people and take a valuable right and dollars in product away from them. This is the greatest departure from water law in the history of our state. It is throwing away 100 years of water law. We, in irrigated agriculture have learned to live with our present system. Please don't upset the system that is in place.

WHAT IS THE ANSWER TO IN-STREAM FLOW IN A DRY YEAR?

The answer is small off-stream storage. The day of large dams is probably over, but we have hundreds of sites for small dams. Stored water can be sold or leased. We have an abundance of water in the late spring that runs into the ocean helping no one and hurting many. This is the water that we should be talking about. Painted Rocks Lake, in the Bitterroot Valley, is a prime example of this. It is a lake that is used by boaters, fishermen, and irrigators and they have learned to work together. Water in-stream for irrigators -- makes water for fish. Painted Rock Lake is an

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WATER RIGHTS
MARCH 15, 1989
PAGE 3

excellent example of what can be done if people have the desire to work together.

THIS BILL IS AN OVER-REACTION TO A THREE YEAR DROUGHT THAT EQUALED THE DROUGHT IN THE 1930'S.

That drought is over! Let's not destroy the delicate balance of water use in Montana. I urge this Committee to put this monster to death with a majority vote from this Committee.

SSP/sd

Dan Bailey's FLY SHOP

209 West Park Street
P.O. Box 1019
Livingston, MT 59047
(406) 222-1673

GENERAL INFORMATION
EXHIBIT NO. 32
DATE 3/15/89
BILL NO. HB 707

March 15, 1989

Chairman Tom Beck
Senate Agriculture Committee

Chairman Beck and Committee Members,


A great opportunity is at hand to let those who want to enhance stream flows for the protection of fish, wildlife or recreation to compensate those who control the water rights.

When one considers the agriculture growing season and the high and low flows of our rivers, one realizes the conflict between the two is short. By the time the first cutting of hay is done most streams still have plenty of water in them. Problems in the streams generally occur in the late summer. Since a lease will cost money, there is incentive to lease the smallest amount of water over the shortest time period.

Low flows during winter, when there is no irrigation, determines the carrying capacity of the stream for fish. We only need to lease enough water during the late summer season to maintain this capacity.

I am encouraged by the concept of this bill. I urge you to pass it giving us an opportunity to minimize low flow problems.

Thank you,


John Bailey

Honorable Committee Members,
Ladies and Gentlemen

March 15, 1989

My name is L. M. Powell

I am a Director on the Bitterroot Conservation District, a native Bitterrooter, a retired Forest Service Employee, a Professional Land Surveyor, the owner of two small, irrigated farms, and an avid fisherman.

Surely, with these credentials, there must be some conflict of interest.

First of all, I would like to congratulate our Legislators on the their diligent efforts in the careful preparation of House Bill No. 707. I am sure that they have attempted to cover every eventuality, and perhaps they have, but in my state of confusion I still have questions.

My companions, Richard Ormsbee, and Marshall Bloom have, or will discuss in detail the marvelous cooperation we have had in the Bitterroot in recent years between the Irrigators, Fishermen, Land Owners, The Fish and Game Dept. and others. We have found the expertise and willingness of Don Peters and others in various departments to be invaluable.

The subject of water leasing, in the land of the bloody shovels is bound to cause consternation among all of us who value our water so highly. That is why I'm sure others have unanswered questions as well as myself.

In recent years the increase in tourism and recreation use in our area has expanded tremendously, and obviously such use has resulted in increased income to many businesses and citizens. This occurs at a time when agricultural lands are diminishing and residential use increasing. Does this mean that irrigation use of water is any less important? In my opinion no.

Lewis and Clark classified the Bitterroot Valley in their journals as a barren wasteland, a condition that would exist today, were it not for irrigation. Would such a condition enhance the area for tourist enjoyment?

The fact is that many valid uses exist for our water, and all deserve our attention.

The following are some of the questions that I have:

1. What are stream reaches? Are they the main rivers? Do they include creeks?

Ex. #33
3/15/89
HB 707

2. What is the purpose of out of State leasing, except to raise the hackles on our necks. Could someone want to irrigate the desert or fill swimming pools?

3. The bill states that leasing will apply to the valid rights as of 1973, does this mean that all of the effort and expense put into the new adjudication process was for not?

In view of our drought conditions over the past eight or ten years, one has to wonder where the slack exists for water leasing. I am more prone to consider means of increasing the supply of water by instream storage and other measures.

One example is Painted Rocks Reservoir. When the roads were reconstructed around the lake they were raised to a level that would accommodate an additional fifteen foot of water. Since House Bill 707 authorizes expenditure of funds for such projects, perhaps this could be considered.

If "stream reaches" include creeks, there are some forty or so small dams in Ravalli County that could be reconstructed to store some of the flood waters that are not only wasted but cause considerable down stream property damage.

It has long been recognized that wasteful irrigation practices exist, but it is also a fact that economic conditions often preclude gearing up to a more efficient system. Perhaps some emphasis should be placed on the construction of gravity flow sprinkler systems from some of our west side canyons, whereby the water consumption could be greatly reduced and a greater amount made available for instream flow.

I appreciate the time you have given me and your consideration.

Thank You.

L. M. Powell
S. E. 405 Grantsdale Road
Hamilton, Montana 59840
Ph. 363-2116



HEARING
HOUSE BILL 707
MARCH 15, 1989
HELENA, MONTANA

SENATE AGRICULTURE

EXHIBIT NO. 34

DATE 3/15/89

BILL NO. HB 707

Wilbur Anderson

Mr. Chairman, and members of this Committee, for the record my name is Wilbur Anderson. I am General Manager of Vigilante Electric Cooperative, with headquarters in Dillon, Montana.

Vigilante Electric provides service in portions of nine (9) counties in southwestern Montana and into the northern part of Clark County, Idaho. We also provide electric service to about 760 irrigation pumps in this service area totaling 44,000 H.P. These 760 irrigation pumps provide water for irrigation on about 80,000 acres of cropland.

Our irrigation consumers are very concerned about legislation which would authorize the transfer of water from offstream irrigation to instream use for fish, wildlife and recreation. We do not see how water transfers of this type can be made without some adverse affects on other users on these same streams. In short, we feel this would be a very dangerous precedent for all irrigated agricultural areas.

In the case of protests under the current system, the hearings are conducted by the Department of Natural Resources. This same Department has sold water out of projects such as Painted Rocks Dam in the Bitterroot Valley, and has promoted the concept of water transfer and use. We feel this is a very clear conflict of interest on the part of the DNRC.

One of the finest means of water storage is by use of water for irrigation. The second best storage means is by offstream and onstream storage dams. They both provide greater instream flows, and for longer periods each season. The instream flow problem should be addressed in a logical and common sense manner-- not by penalizing irrigated agricultural consumers.

We certainly concur with the testimony provided by the Water Users Irrigation Company of Lima Dam, and the testimony provided by Mr. Carl Davis from Dillon. The transfer of water is a poor concept for Montana and we urge you to vote against this legislation. Thank you.

Wilbur Anderson

Montana State

SENATE AGRICULTURE 9

EXHIBIT NO. 35

HB 707

DATE 3/5/87

W.I.F.F.

We believe more study ~~is needed~~

I

We object to the provision that the rights holders must bear the burden of proof.

#2 We object to the IDWR maintaining jurisdiction of the water & leasing

#3 Does the F.W.P pay their share of the distribution and cost of maintaining leased water?

Thank you
Shirley Bugli
Stevensville, Mt

WATER USERS IRRIGATION COMPANY
RICHARD WIEBER, SECRETARY
OWNERS OF LIMA DAM AND RESERVOIR
P. O. BOX 1046
DILLON, MONTANA

February 20, 1989

SENATE AGRICULTURE
EXHIBIT NO. 36
DATE 3/15/89
BILL NO. HB 707

To the Senate Committee on Agriculture:
R.E. House Bill 707

Sirs:

The Water Users Irrigation Company presents the following specific objections to the wording and intent of House Bill 707.

We object to the wording of the title in that we believe that providing water for enhancing stream flows for fish and wildlife is sufficient. Recreation should not place a priority claim on water during times of critical shortage. We should not have to provide water for floaters and water skiers. The Title and purpose of the act should be rephrased to the "Purpose of enhancing or maintaining stream flow for fish and wildlife during critical low flow periods."

We object to a 10 year term for the leases since this concept is still untested and is largely experimental. A lease of 5 year duration with a termination date for the act on October 1, 1995 would be adequate to see how this is going to work.

The act provides that the maximum amount of water that may be leased is the amount historically diverted by the lessor. This wording must be changed to state, "the amount of the lessors appropriation." That is all that can be legally leased. In many instances irrigators have consistently diverted much more water than their appropriation, but have no legal claim to that water especially during periods of critical water shortage.

The act must provide for adequate notice to all parties on a stream reach by certified mail when leasing is proposed.

The act must provide specific details as to how the leased water is to be measured. Who is to do the measuring, and how far the leased water must be maintained in the stream.

It is our belief that a water right is only recognized to the point of diversion from the stream. Maintaining that right instream beyond its point of diversion adversely effects the other users on the stream and is against the intent of current water law. Once the water flows past the point of diversion the water right holder forfeits his rights to the water. The water is then available for use by the next right in time on the stream.

Water cannot be created during a drought. It can only be stored in times of surplus to supplement the low flows of the dry periods. One means of storage we have already mentioned is the underground storage resulting from irrigation and natural precipitation. Another method is by building storage dams to supplement periods of low stream flow with water stored in times of excess flows. These are proven methods of maintaining stream flows. Leasing of water rights will not make any water and is unproven in its effectiveness in maintaining instream flow.

For the duration of this act leasing of water rights must be limited to five or less sight specific stream reaches in the State of Montana. The stream reaches to be selected by the Department of Fish, Wildlife, and Parks and approved by the Board of Natural Resources and Conservation.

Allen Martinell
ALLEN MARTINELL, President

Richard Gosman
RICHARD GOSMAN, Vice-President

WITNESS STATEMENT

NAME Allen Martinek BUDGET _____ADDRESS Box 77 Dell, Montana 59724WHOM DO YOU REPRESENT? Water Users Irrigation CoSUPPORT _____ OPPOSE X AMEND _____

COMMENTS: There are many reasons why we are opposed to this bill. Mostly we oppose it because it attempts to lease something that is not owned, just a right to use the water. Until Montana water rights have finished the adjudication process ^{and} completed, these rights have not been confirmed. We feel that further studies are needed to determine the effects of in-stream flows on the agricultural users of the state.

The bill merely insures that downstream states have the free ticket to the water of Montana. The bill allows the big money of the interest of outside Montana to have control of our water. The bill gives total control of the water to the DNRC as the administrators of the law the way it interprets the law. The DNRC is the hearings officer and renders a decision on the appeals ~~of~~ affected parties. At the same time the DNRC is in the business of selling Montana water. This is a flawed process. The DNRC has very little credibility with a lot of the people of Montana and do not feel they are adequately & fairly treated by the DNRC. This bill as introduced would be not in the best interest of the irrigators of Montana.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

We cannot support a bill that is so detrimental to water right holders without ~~the~~ amending it to take the burden of proof from the water user.

DONALD R. MARBLE

Attorney at Law

SENATE AGRICULTURE

EXHIBIT NO. 38

DATE 3/15/89

BILL NO. HB 707

MARBLE LAW OFFICE

WESTLAND BUILDING

P. O. BOX 649

CHESTER, MONTANA 59522

(406) 759-5104

1-800-237-4891

March 13, 1989

Senator Tom Beck
Senate Agriculture Committee
Capitol Station
Helena, Montana 59620

Re: House Version of HB 707

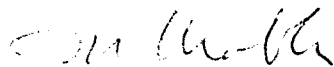
Dear Sen. Beck:

Enclosed are copies of my statement to the Committee regarding HB 707. Would you please included it in the hearing record to be made on Wednesday, March 15, 1989.

I hope to be able to attend the hearing but we are getting a lot of snow and the roads may prevent attendance.

Thanks to you and your committee for consideration and,

Very truly yours,



Donald R. Marble

Enc.

DM/ps

WATERSHED PROTECTION AND HB 707

TO: Montana Senate Agriculture Committee

FROM: Donald R. Marble
P.O. Box 649, Chester, MT 59522
(406) 759-5104 - office
(406) 759-5211 - home

SUBJECT: Passage of House Version HB 707 to Protect Marias

INTRODUCTION

The Marias River complex is under attack by destruction of its watershed, by over-appropriation and drought. The USFS desires to increase damaging development of the fragile watershed of the Marias by burning, roading and excessive logging. The commercial water users have appropriated much of the flow. Drought makes the situation even more critical. Now protection of a minimum flow is needed and HB 707 will provide a vehicle to do this. The House Version of HB 707 deserves your support.

FACTS

The watersheds (sources) of the Marias, Milk and Teton rivers are located on natural federal lands of the north east front. A large part of these source lands are fragile and being subjected to damage from development. (See map on reverse side.)

Drought has ravaged northcentral Montana: the Teton River (lower part) was dry most of the summer of 1988; the Marias river above Tiber Dam almost dried up in 1988; in every day of August 1988, more water evaporated from the surface of Tiber Dam than flowed into Tiber Dam (according to USGS records attached).

Tiber Dam is the main recreational area in northcentral Montana. Outflow is now about 350 CFS (minimum allowable to preserve fishery below the dam), reservoir water level is very low with no promise of improvement.

Snowpack on the north East Front is now low. More and more people believe the "greenhouse effect" may be causing permanent weather changes such as we are now experiencing. (See Time magazine, "Earth Issue").

The waters flowing from these north East Front lands service the people, wildlife, fisheries and lands of northcentral Montana (See map for areas of Northcentral Montana dependant on the Marias River). These include towns, ranches, farms and recreational areas.

Cities dependent on the waters of the Marias and tributaries include Chester, Conrad, Cut Bank and all of the towns from Joplin to Havre. Many ranch-farm systems use the Marias as a water source.

COMMENTS

The Teton now goes dry whether or not there is drought. The drought makes the "dry period" longer. The Marias is next unless protection is given. Protection will have to consist better management of the watershed on federal lands, avoiding over appropriation, and some means of guarantying a minimum flow. It has always been a basic principle that clean and healthful drinking water is highest and best use. Since a vast area depends on the Marias for drinking, a minimum flow is necessary. HB 707 is a start towards providing a mechanism to guarantee a minimum flow.

Please vote for the House Version HB 707. Please vote for legislation that will protect the rivers and their sources for now and future generations.

Thank you for your consideration, and



SENATE AGRICULTURE

EXHIBIT NO. 39

DATE 3/5/82

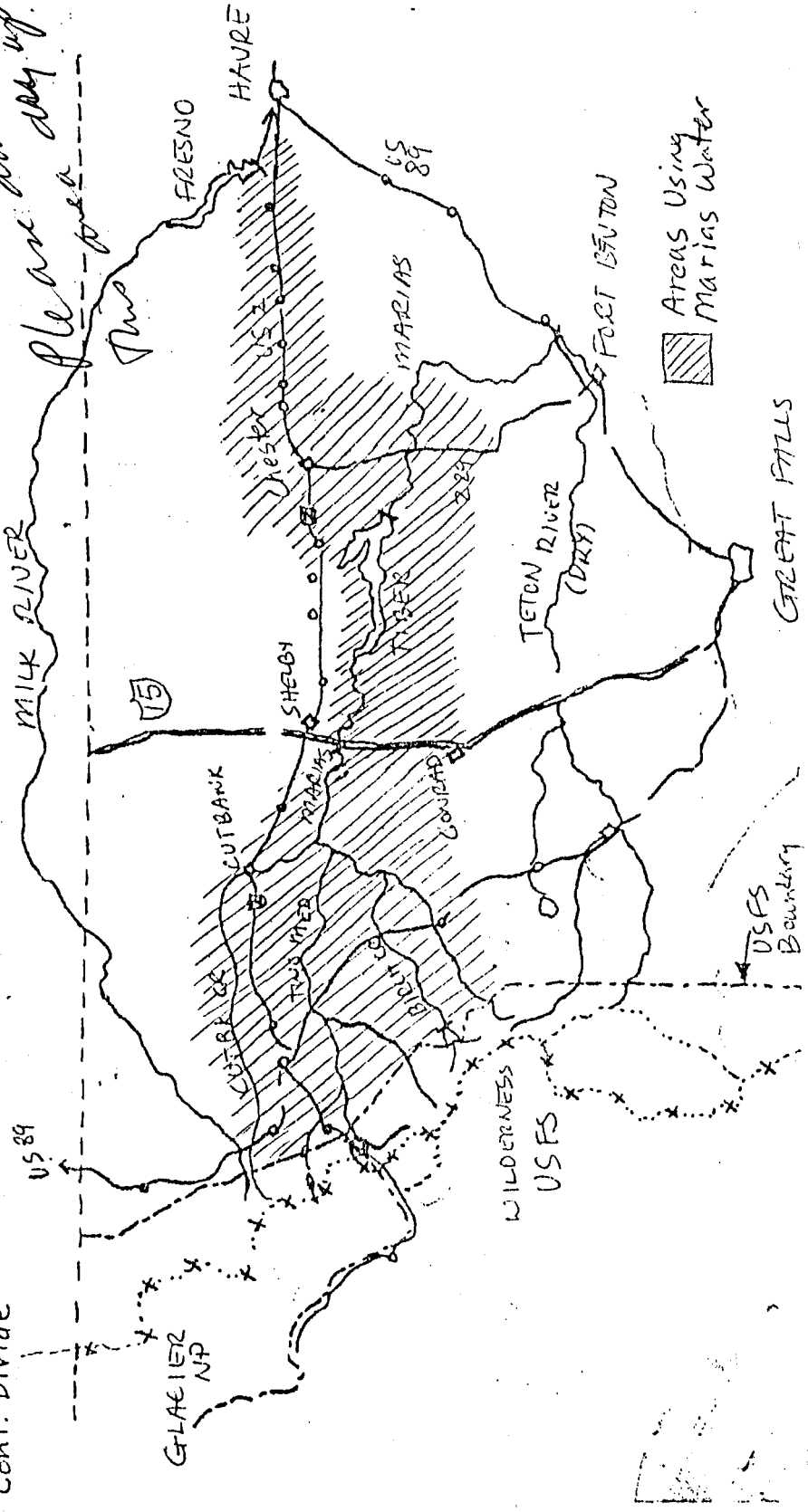
BILL NO. HS 207

Watersheds of North Central Montana Marble

*These please don't let
me see any of up.*

Canada

Cont. Divide



Areas Using
Marias Water

GREAT FALLS

USFS
Boundary

WILDERNESS
USFS

GLACIER
NP

CUTBANK

15

US 89

SHOSHONE

PRICHARD

COUER D'ALENE

TETON

TETON RIVER

GREAT FALLS

US 89

HAURE

FRESNO

US 89

MARIAS

TETON RIVER

FOOT STATION

US 89

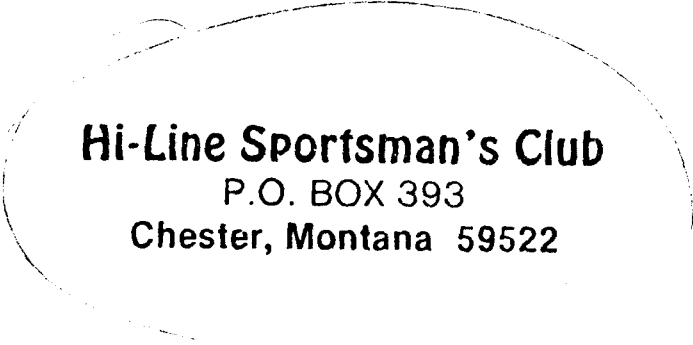
US 89

US 89

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US 89



SENATE AGRICULTURE
 EXHIBIT NO. 40
 DATE 3/15/89
 BILL NO. HB 707
 Frey

Hi-Line Sportsman's Club
 P.O. BOX 393
 Chester, Montana 59522

March 7, 1989

Senator Tom Beck
 Senate Agriculture Committee
 Montana Legislature
 Capitol Station
 Helena, MT 59620

Re: HB 707 - Streamflow Leasing Act

Dear Senator Tom Beck:

The Hi Line Sportsmen Club of Northcentral Montana would very much like your support in obtaining approval of the House version of HB 707 and other instream flow legislation. Hi Line Sportsmen is composed of approximately 160 members from northcentral Montana who live in Liberty, Hill and Cascade counties. We have been actively working for sometime to protect the Marias River-Tiber Dam-Lake Elwell complex. Last year the Upper Marias almost dried up.

We feel this instream flow bill is very important as regards:

1. Fisheries.
2. Wildlife: Dry rivers destroy our habitat.
3. Weed Control: Stable flows are needed.
4. Water Users: Ranch/Farm water systems.
5. Towns using water: Havre to Chester, for example.

This bill (HB 707) is very important to the people of Northcentral Montana. Your support will be appreciated.

We would like the letter to be part of the testimony to be read as support of HB 707.

Charles W. Frey, Jr.
 Hi Line Sportsmen Club

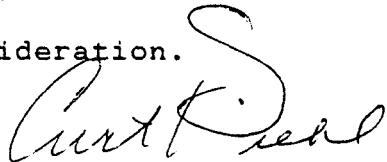
SENATE JOURNAL
EXHIBIT NO. 41
DATE 3/15/89
BILL NO. HB 707

March 15, 1989

My name is Curt Diehl. I farm (irrigated) in Broadwater County.

I want to state first that in-stream concerns me, as it does all Montanans. Recently, I saw thousands of inches of water run down Dry Creek, which runs through my farm. The water is lost to me as a user and to fisherman and outdoorsmen that would like to fish on Dry Creek. A better approach would be to impound the water in Dry Creek in a dam. It could then be stocked with fish, used for livestock water and irrigation.

Thank you for your consideration.



CURT DIEHL
454 Flynn Lane
Townsend, MT 59644

SENATE AGRICULTURE
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3/15/89
HB 707

WITNESS STATEMENT

NAME Eugene Manley BILL NO. HB 707

ADDRESS 15 Willow Tree Lane, Drummond, MT 59837

Granite County Commissioners
WHOM DO YOU REPRESENT? Headwaters Ag Water Committee

SUPPORT _____ OPPOSE unless ammended AMEND _____

COMMENTS: _____

That part of the bill permitting water leasing for recreation
should be removed. Use of water during drought periods for
floating is absolutely unthinkable.

The Department of Fish, Wildlife and Parks as lessee should pay
the cost of establishing that a water lease will not adversely
impact other existing water appropriations.

I would also suggest that the list of stream reaches submitted
to the Board of Natural Resources by the Department of Fish,
Wildlife and Parks should include the minimum amount of water
necessary to be leased for that water to achieve its objective.

The leasing of any less than that amount of water should be con-
sidered to be waste, because it then becomes an unreasonable
loss of water to that stream and its other water appropriations.

Eugene Manley

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

3/15/89

EXHIBITS WERE MISNUMBERED. THERE ARE NO EXHIBITS # 43 OR 44 FOR THIS DAY.

TESTIMONY BEFORE THE
SENATE AGRICULTURE COMMITTEE

MARCH 15, 1989

Mr. Chairman, Members of the Committee, my name is Jack Salmond and I represent the Western Environmental Trade Association.

We are here today to support HB 707 because we feel that this bill is based on a reasonable premise. We share the belief of the Governor of this state that Montana needs a water plan. We must develop a sound water policy if we are going to protect the doctrine of prior appropriation.

Further, this plan should also encompass the issue of instream flows. We view HB 707 as a compromise effort to preserve the natural environmental to a reasonable degree through water leasing. That goal is achieved by establishing a contractual agreement between the Department of Fish, Wildlife and Parks and existing water right~~s~~ users.

However, with regard to HB 707 itself, we do see a need for this committee to consider making several improvements in the language of the bill. The following amendments ~~have~~ or will be proposed by others and WETA would like to add its support to these changes:

Page 2

1. First, the words "recreation and wildlife" should be removed. Our ability to achieve our long term^s goals would be greatly facilitated if we focus our efforts on the biological requirements of fish and aquatic life without worrying about the more broad concept of recreation. In fact, we could conceive of a situation where the two may be in direct conflict, with fish and floaters competing for the same limited resource. ^{this} ~~That~~ would only impede our ability to make any progress in building a sensible water policy.

2. Second, the word "enhance" should be removed. As I'm sure most of you here today would agree, the definition of enhance is elusive at best, and our association believes allowing it to remain in the bill will cause problems down the road.

3. Finally, language should be inserted in the bill whereby the Department of Fish, Wildlife and Parks will compensate an appropriator if he has been adversely affected by this legislation. This compensation should include court costs and damages that result from the exercise of a lease. This amendment could help alleviate the fears of appropriators who might be involved in water leasing litigation.

Ex. # 45
3/15/89
HB 707

Page 3

In summary, WETA believes that HB 707 is a start in the right direction to provide the state with an instream flow plan. Such a program could prove to be a very useful tool in protecting Montana's water users from attacks by the federal government and others who want to infringe on the doctrine of prior appropriation. We recognize, however, that this does represent a big step forward and we share a number of concerns expressed by those in opposition to the bill. For that reason, we urge the committee to vote in support of HB 707 with the amendments outlined above so that we can proceed on this journey in a thoughtful and prudent manner.

Thank you for your time and ~~for your~~ consideration.

3/15/89

EXHIBITS WERE MISNUMBERED. THERE ARE NO EXHIBITS # 46, 47, 48, OR 49 FOR THIS DAY.

(1)

Statement of Richard A. Esmebee, Bitterroot
Conservation District, Hamilton, Montana.

My name is Richard A. Esmebee.

I was brought as a child to the Bitterroot
in 1924. With interruptions for schooling and World
War II, I have lived in ~~the~~ Western Montana ever
since. For the past 12 years I have been a Supervisor
on the Bitterroot Conservation District Board of
Supervisors. Today I am here ^{today} to describe to you
our efforts to form an effective working
relationship of the Department of Fish, Game and
Parks, the Department of Natural Resources and
Conservation, the ditch companies and independent
land owners and water users, ~~and~~ ^{with} the Bitterroot
Conservation District.

Our aim was to foster a relationship that
would effectively enable these groups to work
effectively with sportsmen and conservationists
such as those in Trout Unlimited and the
Ravalli County Fish & Wildlife Association.
Towards a common goal of preserving and
enhancing the many values of the Bitter Root
River ~~to~~ ^{to} the inhabitants of Ravalli County as
well as ~~to~~ ^{to} the many visitors who come to enjoy
the Bitter Root Valley.

By prompt and ~~impartial~~ ^{impartial} attention to 310
complaints we gained the respect and understanding
of the community that we would impartially
protect the river and its tributaries.

3/15/89

HB 707

(2)

from man-caused damage to the banks and bottoms of the streams, at the same time trying to help the landowners, whose living depended on these streams, solve their water problems. We invited local representatives of the U.S. Forest Service, FWFP and DNRC to come to our regular meetings. Many of them did.

Slowly we earned the respect and trust of the few residents to whom available running water was highly important. This included recreationists as well as agriculturalists for whom the water was vital. We came to an important realization — the interests of trout and fishermen were remarkably similar. They both wanted adequate and ~~the~~ reliable supplies of clean, cool water running in a river or creek with stable banks.

A series of low water years turned our attention to the potential value of the Painted Rocks impoundment of 32,000 acre feet of water on the West fork of the Bitter Root River. These runs brought water there to make a real difference in the lower valley. First we tried to build a small power plant at Painted Rocks thinking that this could provide a steady and more abundant flow in the lower river as well as provide some funds for ~~the~~ river bank improvement. When this failed we encouraged & helped ~~the~~ FWFP to pipe raw water from Painted Rocks to enhance and steady the flow ^{of the Bitter Root} in the late summer & early fall.

3-15-89

HB 707

(3)

This worked! On a hot and steamy night in ^{early} ~~the~~ summer when the water level in the Bitter Root River was sinking, Jim Flynn came over to a ~~private~~ meeting attended arranged by the District and attended by both irrigators and sportsmen. There ~~was~~ was bitter resentment that FG+P had water that which they were going to hold until Fall when it would be of little value to the irrigators. Flynn suddenly offered to give ~~the irrigators~~ ^{to} the following ~~to~~ the FG+P water to the irrigators the water they needed if they would give it back to FG+P in the Fall when the trout needed it and the crops did not. A deal was struck. A severe problem had been solved ~~at least temporarily~~. This arrangement has continued to operate very satisfactorily. A solid relationship between TU & landowners ^{has been established} now FG+P and DNRC, with the help of restitution funds from MPC, are completing arrangements for long term purchase of Painted Rocks water which makes possible a long term solution to the water problem. There is enough enthusiasm ~~now~~ among the landowners that many of the ditch companies, as well as individual owners, ^{intend} ~~are intending~~ to buy additional water which can be used in concert with the FG+P-DNRC, to provide an even more solid solution. Everybody is winning. The BRED is brokering ^{these} water purchases from DNRC by Bitter Root ditch companies & land owners.

DATE 3/15/89

COMMITTEE ON Agriculture 109

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One	
			Support	Oppo
Valt Zell	Hd waters Ag Committee	707		✓
Dale Stradman	self (Rancher)	707		✓
Francis Strotman	self (Rancher)	707		✓
Monte Clemow	Hd Waters Ag Committee Big Hole Ranchers ASS.	707		✓
Reese Helbojn	Lincoln Irrigation	707		✓
James S. Munday	Lincoln Irrigation	707		✓
Jim Hanson	Hd. Waters Ag Committee	707		✓
De Weland	" " " "	707		✓
Marvin Barber	A. P. F.	707		✓
Carol J. Waterman	MSGA, et al	707		✓
Richard Langford	Water Users Irrigation Co	707		✓
W. G. Gilbert Jr.	Self.	707		✓
Steve T. Hess	Water Users Irrigation Co	707		✓
Walt J. Schetter	self (Farmer)	707		✓
Kay Norenberg	WIFE	707		✓
L.M. Powell	Bitterroot Irrig. Dist.	707		X
Richard A. Domschee	Bitterroot Irrigation Dist.	707	X	X
Eugene Manley	Blaine County Commissioner Headwaters Ag Water Comitee	707		X
Jay S Chamberlin	B. HER ROOT Irrigation Dist	707		✓
Bill Murphy	Self	707		✓
Carl M. Davis	Ropy Room Center Owners Water Users Irrigation 38	707		✓
	Black Canyon Div 200 East Branch Ag Water	707		✓
Jerry Jack - Mt Stockgrower	Assoc. of State Grazing Districts	HB 707 HB 465	✓	
Loell Mosher	Mt. Cattle Ranch	707		✓
Mark Etchart	Glasgow - Irrigation Dist	707		✓
White VanderKare	Helena	707		X

DATE

3/15/89

2 of 9

COMMITTEE ON Ag

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One	
			Support	Oppose
GEORGE OCHENSKI	A M W	707	X	
John SALMOND	WETA	707	✓	
John Allhands	Ruby River	707		✓
Stan Bradshaw	Trout Unlimited	707	✓	
John Baring	Self	707	✓	
Warry Michnevich	self	707	✓	
Marshall Bloom	Trout Unlimited	707	X	
Jim Jensen	MEIC	707	X	
KATE MAC MILLEN	self	707	X	
KERNON L. WESTLAKE	REP H.D. 76	707		✓
Jim Skowronski	NORTHWEST EXT MASSOUR	707	X	
Dill Cain	Trout Unlimited	707		
Ray Johnson	elder mont			✓
Raymond M. Gibson	Trout Unlimited	707	X	
Ed Lind	M.S.G.R.	707		✓
Carl S. Sandbier	Rancher	707		
Jack Fenton	Rancher	707		
John C. Anderson	Rancher	707		
Boss Schultz	Rancher	707		
Neil Todd	Ruby River Water Users	707		X
Doug Vogh	Hamilton			
John Gilgore	Three Forks Dist	707		X
Lee Stronck	Trout Unlimited	707	X	
Walter A. Steingruber	APA	707		✓
Wilbur Anderson	Vigilante Electric Co-op	707		✓
John Skufin	Livestock	HP 465	✓	

DATE

3/15/89

COMMITTEE ON

HB 707

3 of 9

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One	
			Support	Oppose
Don R Work	Self	707		<input checked="" type="checkbox"/>
William A Stender	Self Rancher	707		<input checked="" type="checkbox"/>
Jay Barnosky	Rancher	707		<input checked="" type="checkbox"/>
Wally O'Hair	Justice Branch Council	707		<input checked="" type="checkbox"/>
Bill Strong	Union Ditch and self	707		<input checked="" type="checkbox"/>
John Frost	Supply Ditch and self	707		<input checked="" type="checkbox"/>
Wilbur Anderson	Vigilante Electric Co-op	707		<input checked="" type="checkbox"/>
Blake W. Hurley	Self - Ranching	707		<input checked="" type="checkbox"/>
Leo Vogt		707		<input checked="" type="checkbox"/>
Barbara A. Jabo	Cowbells/WIFE self	707		<input checked="" type="checkbox"/>
Randall P. Smith	self	707		<input checked="" type="checkbox"/>
William W. Foust	self	707		<input checked="" type="checkbox"/>
James P. Reynolds	Reynolds		and just amendment	
Bill Dammion	Dammion Rancher Inc	707		<input checked="" type="checkbox"/>
Barne H. Sanders	Relief	707		<input checked="" type="checkbox"/>
W. G. Stender	" "	707		<input checked="" type="checkbox"/>
Glenda Bradshaw	self - fisherman	707	<input checked="" type="checkbox"/>	
Dave McClure	Mont Farm Bureau	707		<input checked="" type="checkbox"/>
Earl M. Wolfson	Self - Rancher	707		<input checked="" type="checkbox"/>
Don Andrews	Whessfield Irrigation	707		<input checked="" type="checkbox"/>
CHRIS KRUMHOLTZ	MISSOURI, MI	707	<input checked="" type="checkbox"/>	
Kang Barclay	DNV R + C	707	<input checked="" type="checkbox"/>	
Al Brunner	MWRA	707	<input checked="" type="checkbox"/>	
Charles P. Hahn	Hahn Ranch	707		<input checked="" type="checkbox"/>
Francis Johnson	Self	707		<input checked="" type="checkbox"/>
Curt Diehl	Self	707		<input checked="" type="checkbox"/>

DATE MARCH 15, 1989

COMMITTEE ON

AGRICULTURE

409

HB 707

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One	
			Support	Oppose
Sam De Boer	Self Manhattan			<input checked="" type="checkbox"/>
Joseph Fochuk	self Townsend			<input checked="" type="checkbox"/>
Joseph Kerlanice	Self - Drummond			<input checked="" type="checkbox"/>
JOHN A. WELSON	SELF DRUMMOND			<input checked="" type="checkbox"/>
John C. Anderson	Ruby Dabney Cons. Dist.			<input checked="" type="checkbox"/>
Jack Fenton	SELF Sheridan			<input checked="" type="checkbox"/>
Kim Entekud	MT Assoc. State Grazing Dist			<input checked="" type="checkbox"/>
Diane Bromley	Bitter Root Cattle Co, Darby			<input checked="" type="checkbox"/>
Oliver J. Day	Self Day Ranch			<input checked="" type="checkbox"/>
Jerome & Miller	Vice President Bitterroot Coal Belter			<input checked="" type="checkbox"/>
Paula Nelson	Self Drummond Mt			<input checked="" type="checkbox"/>
Lois Chalmers	Self Drummond Mt			<input checked="" type="checkbox"/>
John ...	Deer Lodge Mt			<input checked="" type="checkbox"/>
Corvallis Grange	Corvallis Grange			<input checked="" type="checkbox"/>
Wendell Hodge	self Corvallis			<input checked="" type="checkbox"/>
Corvallis Grange	Corvallis Grange			<input checked="" type="checkbox"/>
Ms. Mrs. Tom Murphy	Miss Tom Murphy			<input checked="" type="checkbox"/>
Sup. Bensinger	Hamilton			<input checked="" type="checkbox"/>
John W. Mc Clintic	Panther. SOLA MT			<input checked="" type="checkbox"/>
James ...	Rancher, Selk, mt.			<input checked="" type="checkbox"/>
Bob Brinkerhoff	Stevensville, MT			<input checked="" type="checkbox"/>
Beth Horak	Hamilton MT			<input checked="" type="checkbox"/>
George C. Horak	Hamilton, MT			<input checked="" type="checkbox"/>
Lee Jacobson	Deer Lodge MT			<input checked="" type="checkbox"/>
Robert Evans	Deer Lodge, MT			<input checked="" type="checkbox"/>
Robert Knout	Flanagan, MT			<input checked="" type="checkbox"/>

DATE

MARCH 15, 1989

COMMITTEE ON

AGRICULTURE

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VISITORS' REGISTER

HB 707

NAME	REPRESENTING	BILL #	Check One	
			Support	Oppos
JOINT PECK	PRESS			
Bob Gilbert	Helena			
John Houtchens	Stevensville, Mont.			✓
Jed Newman	Stevensville, Montana			✓
George W. Sullivan	Sp. Supply Ditch Stevensville			✓
Thomas W. Wadsworth	Stevensville, Mont.			✓
Betty Swift	Hamilton			✓
D. Liller	Bozeman			✓
Nellie S. Fadden	Marvin Fadden & Son, Inc. Marshalltown, Mt. Helena			✓
Clare E. Kimm	Marquette, Mt.			✓
Alex Kimm	Marquette, Mt.	405		✓
Shirley Clark	Dept of Livestock	405 draft		
Russell Rasmussen	Stevensville, 197			✓
Maurice J. Ferrat	Waterright - Toston Mt.			✓
B. J. De Carol	Helena " "			✓
Ann B. B. B.	Toston Mt.			✓
William J. Humphrey	Helena, Mont.			✓
Donald M. Humphrey	Hamilton, Mont.			✓
Japheth Horn Milender	Hamilton, Mont.			✓
Harold Foley	Corvallis, Montana			✓
Blanca Hyatt	Hamilton, Mt.			✓
Janice L. Kase	Hamilton, Mont.			✓
Georgia L. Humphrey	Hamilton, Mt.			✓
Margaret West	Hamilton, Mt.			✓
Robert H. West	Hamilton, Mt.			✓
Steve Van Dyken	Marquette, Mt.			✓

DATE

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COMMITTEE ON

By

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VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One	
			Support	Oppose
Luise Monroe		707		✓
Maynard Smith	Rancher -			✓
Shirley Buegli	Rancher	707		✓
Lorna Grant	Farm Bureau	707		✓
HRIS Hunter	Am. Fisheries Society Montana Chapter	707	X	
Alfred Williams	Business			✓
Bob Whalen	Trout Unlimited	707	✓	
Rosa French	Ruffatto Land + Cattle	707		✓
Francis Folds	Greenfield Irrigation	707		✓
Jack Fiske	Florence MT	707		✓
Raymond Hunter	Wisdom, Mont.	707		✓
Ed Hardy	Jackson MT	707		✓
Eggy Hagedorn	MT Assoc. of Cons. Dist	707	✓	
W. A. Perkins	Rancher	707		✓
Tom Wilson	Skiing Club	707	✓	
Paulette Bailey	self	707	X	
Pietrand Gosman	water users (Kama Doin) investigation	707		✓

(Please leave prepared statement with Secretary)

DATE

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COMMITTEE ON

Agriculture

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VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One	
			Support	Oppose
Bill Staudermeyer	Self Red Rock River	707		<input checked="" type="checkbox"/>
Charlie Galipe	Rancher	707		<input checked="" type="checkbox"/>
Michael W. Stender	Rancher	707		<input checked="" type="checkbox"/>
Dennis Koenig	OUTFITTER	707	<input checked="" type="checkbox"/>	
Janet Ellis	Audubon	707	<input checked="" type="checkbox"/>	
Tony Schonen	Stylinea Amende Sports	707	<input checked="" type="checkbox"/>	
Poland Mosler	Rancher	707		<input checked="" type="checkbox"/>
Allan Martinell	Water Management Co	707		<input checked="" type="checkbox"/>
Warren Titeca	Tieft nichelson Ditch Co	707	<input checked="" type="checkbox"/>	
Mark Kambeck	Rancher			<input checked="" type="checkbox"/>
Jack Sedgwick	DEPT. OF LIVESTOCK	HB-465	<input checked="" type="checkbox"/>	
Ken Mitchell	" " "	HB-465	<input checked="" type="checkbox"/>	
Jerry Nyse	Greenfield Irrigation District	707		<input checked="" type="checkbox"/>
James Kause	Greenfield Irrigation Dist.	707		<input checked="" type="checkbox"/>
Lorna Frank	Farm Bureau	HB 465	<input checked="" type="checkbox"/>	
Lorents Grosfield	Board of Natural Resources	707	<input checked="" type="checkbox"/>	
Olenn Mark	Governor's Office	707	<input checked="" type="checkbox"/>	
Wm & Bi Moser	Rancher	707		<input checked="" type="checkbox"/>
Jan Konigsberg	Self (M&A M W)	707	<input checked="" type="checkbox"/>	
Bili Wurd	Self	707	<input checked="" type="checkbox"/>	

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COMMITTEE ON

AGRICULTURE - SENATE

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VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One	
			Support	Oppose
Richard Bayler	Walden Creek			<input checked="" type="checkbox"/>
Orin Likens	Clancy		<input checked="" type="checkbox"/>	
DAT FLAM	WOLF CREEK		<input checked="" type="checkbox"/>	
Tom Skibausk	WOLF CREEK		<input checked="" type="checkbox"/>	
Nancy Burnham	Hess		<input checked="" type="checkbox"/>	
Paul				
Jim Smith	Missouri		<input checked="" type="checkbox"/>	
Jerry L. Howard	Williams		<input checked="" type="checkbox"/>	
John E. Howard	no name			<input checked="" type="checkbox"/>

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COMMITTEE ON

HB. 707

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VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One	
			Support	Oppos
PETE TEST	T.V.	707	X	
Dennis Cates	Trout unlimited	707	X	
Bernie Swift	Repr Dist # 64 Self	707		X
Richard Sparks	Self	707	X	
ILGA BAY	Self	707	X	