

## **MINUTES**

### **MONTANA HOUSE OF REPRESENTATIVES 52nd LEGISLATURE - REGULAR SESSION**

#### **COMMITTEE ON NATURAL RESOURCES**

**Call to Order:** By CHAIRPERSON BOB RANEY, on January 30, 1991, at 3:05

#### **ROLL CALL**

##### **Members Present:**

Bob Raney, Chairman (D)  
Mark O'Keefe, Vice-Chairman (D)  
Beverly Barnhart (D)  
Vivian Brooke (D)  
Ben Cohen (D)  
Ed Dolezal (D)  
Orval Ellison (R)  
Russell Fagg (R)  
Mike Foster (R)  
Bob Gilbert (R)  
David Hoffman (R)  
Dick Knox (R)  
Bruce Measure (D)  
Tom Nelson (R)  
Bob Ream (D)  
Jim Southworth (D)  
Howard Toole (D)  
Dave Wanzenried (D)

**Staff Present:** Gail Kuntz, Environmental Quality Council  
Paul Sihler, Environmental Quality Council  
Lisa Fairman, Committee Secretary

**Please Note:** These are summary minutes. Testimony and discussion are paraphrased and condensed.

**Announcements/Discussion:** CHAIR RANEY announced HB 266, HB 360 and HB 361 will be heard. Executive action on these will occur at a later date.

#### **HEARING ON HB 266**

##### **Presentation and Opening Statement by Sponsor:**

REP. MARIAN HANSON, House District 100, stated HB 266 is needed to make state and federal standards consistent. The bill amends the Montana Strip and Underground Mine Reclamation Act by redefining the term "prospecting" to include the gathering of data and exploration work on lands designated unsuitable for coal mining (refer to page 7 of bill). It is a federal requirement

for this expanded definition to be included. The proposed amendments are technical in nature. EXHIBIT 1. There is no expected fiscal impact.

Proponents' Testimony:

John North, Department of State Lands (DSL), stated HB 266 was introduced at the request of DSL. He supported the bill with the proposed amendments. EXHIBIT 2

Jim Mockler, Montana Coal Council, supported HB 266 for reasons previously stated.

Ken Williams, Entech, supported HB 266 for reasons previously stated.

Opponents' Testimony: none

Questions From Committee Members: none

Closing by Sponsor:

REP. HANSON urged the committee to pass HB 266.

HEARING ON HB 360

Presentation and Opening Statement by Sponsor:

REP. HAL HARPER, House District 44, stated HB 360 establishes four year terms for members on the Water Rights Compact Commission. There are no terms now. The Commission was first formed in 1979 with the impression it was temporary. The intent was to have four legislators, currently in term, appointed to serve on the Commission. This would ensure a tie between the Commission and the Legislature. Currently, this is not the case. The Commission is a very useful tool and needs to be tied to the Legislature. EXHIBIT 2A

Informational Testimony:

Susan Cottingham, Reserved Water Rights Compact Commission (RWRCC), stated she has no formal position on the bill and is present to answer questions.

Proponents' Testimony:

George Ochenski, stated this bill is a housekeeping type of bill that cleans up an oversight when the bill was originally drafted. The bill ensures that current legislatures will serve on the Commission. The designated term is necessary as it is unreasonable to expect a commission member to serve for life. He supported HB 360.

Opponents' Testimony:

Gorden McOmber, RWRCC member, opposed HB 360 because of the timing of the proposal. He did not oppose the intent of the bill. The Commission is currently experiencing problems as demonstrated by having only one success in twelve years. A change is needed in the composition and operation of the commission. The State needs to conduct an interim study to review activities up to this point and to develop a long range plan. The Commission at times only meets three times per year and suffers a high turn over rate. While those on the Commission are very competent, they often do the work of the Department of Natural Resources and Conservation, which was not the original intent of the Commission. The Attorney General needs to be more involved in some water rights issues. Montana has set a precedence of negotiating too much and not going to court. The ability to choose to go to court is needed. Mr. McOmber suggested the HB 360 be held until a plan to reorganize the Commission or to set up a new system is developed. EXHIBIT 2B

Questions From Committee Members:

REP. BEN COHEN asked for a brief overview of the Commission's functions. Ms. Cottingham stated in 1979 the Legislature established the Commission with the purpose of negotiating with Indian Tribes concerning water rights. At the time it was very progressive. By 1981 it became evident that it was a major job, larger than originally expected. The Commission was extended for three years. The three year lengths have been continually extended, with the next one expiring in 1993. Nine members serve on the Commission; four appointed by the governor, four legislators, and one appointed by the Attorney General. REP. COHEN asked how many successful negotiations have been accomplished. Ms. Cottingham replied one successful compact was ratified by the Legislature. Current negotiations with the Northern Cheyenne are very positive with preliminary agreements occurring. Other states have had negotiations with tribes that went to Congress. Wyoming chose to litigate which proved to be very costly. REP. ORVAL ELLISON asked how many cases are being worked on. Ms. Cottingham replied work has started with most of the tribes. REP. ELLISON asked how many are outstanding. Ms. Cottingham explained once an agreement is ratified it goes to the Water Court to be decreed. REP. COHEN asked when the Commission runs out in 1993, should the legislature extend the life of the Commission beyond 1993 instead of lengthening the term. REP. HARPER replied the bill specifically is to establish four year terms. He is sensitive to the problem of the timing of the proposal. REP. DAVE WANZENRIED asked if only one current legislator is serving on the Commission currently. REP. HARPER replied yes. REP. BEVERLY BARNHART inquired if all original nine members still are on the Commission. Mr. McOmber replied only two of the original nine still remain.

Closing by Sponsor:

REP. HARPER stated when the Fort Peck agreement come up to be ratified, an intense and bitter battle resulted. The Legislature needs to be actively represented on the Commission. HB 360 will ensure that current legislators serve on the Commission. If the bill is enacted, some trade-offs will occur. Some experienced members who are not current legislators will be replaced with current legislators. HB 360 will help improve the effectiveness of the Commission.

HEARING ON HB 361

Presentation and Opening Statement by Sponsor:

REP. HAL HARPER, House District 44, stated HB 361 clarifies the adjudication process for Federal reserved water rights. The bill encourages the federal government to file with the state government. The intent of the bill is to bring matters in front of the Reserved Water Rights Compact Commission to avoid litigation.

Proponents' Testimony:

George Ochenski, The Wilderness Society, supported HB 361. This bill will clarify the process of the federal government filing water rights. The Commission is the best place to hear water related issues. The compacts, developed by the Commission, are presented to the Legislature which provides the public another opportunity for input.

Ted Doney, supported HB 361. He said when the Water Use Act was passed in 1973 the original intent was to adjudicate all water rights. After 1973 all new ones would have permits and certification. This was to help facilitate record keeping. It was an oversight not to include the federal water rights. The rights prior to 1973 are covered. This bill attempts to bring post-1973 rights into the system. HB 361 is one approach to do that. It gives the federal government a deadline. This may be a problem if or when the Commission expires. Amendments are needed to clean up this potential problem. The bill has no fiscal impacts.

Stan Bradshaw, Trout Unlimited, supported HB 361. The Commission provides a forum to resolve water rights. This forum is very important.

Don MacIntyre, Department of Natural Resources and Conservation (DNRC), supported HB 361. He stated there are two options when the United States Congress passes a bill that has the potential to created reserved water rights. The Congress can either create a reserved right or create a reservation and give the pertinent land management agency the authority to acquire state water rights to protect the reservation. Under the first option, it is

important for the State to be part of the adjudication process. Mr. MacIntyre stated DNRC is supportive of HB 361 because it cleans up the mechanism needed for that adjudication process.

He proposed several amendments. EXHIBIT 3. He stated that the amendments, in effect, negate the whole bill. The current compact negotiation systems in place can accommodate reserved rights after 1973. The process HB 361 is attempting to establish is already currently being done. This may need to be clarified with regard to the Federal government. The amendments attempt to preserve the process of adjudication that is currently happening. This process may be threatened by two court cases. In one suit against Montana, it is claimed that the water adjudication process involves different types of claims; late, timely, and federal. The amendments may help to protect against any strengthening of the equal protection argument made by the plaintiffs. Mr. MacIntyre expressed an interest to work with the sponsor to amend the bill so it protects the litigation process and accomplishes the intent of the sponsor.

Jo Brunner, Montana Water Resources Association, supported HB 361. She encouraged Montana to have authority over water rights. HB 361 provides a tool for a water reservation plan. She expressed concern the Commission will not be able to carry out functions if their term is not extended. Ms. Brunner stated since 1973, an excessive amount of time has passed without clarifying wilderness-related water rights. This needs to be addressed. She supported amendments presented by Mr. MacIntyre.

Gary Spaeth, Montana Water Users Coalition, supported HB 361 as amended by REP. HARPER. He is interested in working with others that expressed concerns or offered amendments.

Lorna Frank, Montana Farm Bureau, supported HB 361. She stated it is better than current legislation. The uncertainty surrounding the length of the Commission's existence and the resulting impact on developing compacts causes concern. She supported amendments and stated her support for SEN. GROSFIELD'S wilderness-related water rights bill.

#### Questions From Committee Members:

CHAIR RANEY asked REP. HARPER to address Mr. MacIntyre's amendments. REP. HARPER stated he supported the general concept of the amendments. The committee may need to rework the bill. REP. RANEY asked for volunteers to work on the bill in a subcommittee. REP. HOWARD TOOLE was named the subcommittee chair with REP. ORVAL ELLISON and REP. MARK O'KEEFE the other subcommittee members. Mr. Ochenski presented an informational handout on water rights in Wilderness. He offered to share more information if the committee finds it helpful. EXHIBIT 4.

Closing by Sponsor:

REP. HARPER said he does not want to pass over the concerns presented by the Commission. These issues need to be addressed.

EXECUTIVE ACTION ON HB 239

Motion: CHAIR RANEY MOVED HB 239 DO PASS.

Motion: CHAIR RANEY moved to amend HB 239. EXHIBIT 5.

Discussion: CHAIR RANEY said the amendments are intended to clarify the statement of intent so that it reflects that the fiscal impacts are minimal.

Motion/Vote: REP. GILBERT moved to adopt the amendments. Motion carried unanimously.

Motion: CHAIR RANEY MADE A SUBSTITUTE MOTION THAT HB 239 DO PASS AS AMENDED.

Discussion: CHAIR RANEY explained the fiscal note. He passed out an amended unofficial fiscal note. EXHIBIT 6. CHAIR RANEY stated he met with Dennis Iverson, Desnal Davis and Paul Sihler and Deborah Schmidt from EQC to discuss the fiscal note and the amended fiscal note. He said the original fiscal note reflects the overall estimated costs of all the solid waste management legislation proposed. The unofficial revised fiscal note reflects more pertinent estimated costs. Licensing and certification are real costs. These are estimated at \$4000/year. The costs may be higher if the number of public complaints is higher than anticipated. The cost to implement the solid waste programs is between \$40,000 and \$80,000. The costs to run this program is estimated at \$4,000/year.

REP. GILBERT asked the status of amendments presented by Tippy and McCue Law Firm during the hearing. EXHIBIT 7. CHAIR RANEY asked Paul Sihler, EQC staffer, to explain the amendments. Mr. Sihler said the amendments address two questions; what happens to infectious wastes in sewage treatment systems and can septic systems handle infectious wastes. He stated the infectious wastes from the small businesses under discussion, such as small funeral homes, are not significantly different than what goes into a septic system normally. The Tippy and McCue amendment addresses septic systems (referred to as subsurface disposal systems in the amendment) that are installed and operated in accordance with State and local sanitary regulations. Mr. Sihler stated there are no state standards for septic systems. While county health boards have the authority to develop standards, many have not. The Natural Resources Committee recently passed a bill that would require state guidelines to become standards and that counties would adopt standards at least as strict as the state standards. Current county standards may not be very strict or effective. According to the Water Quality Bureau, it can be difficult to

assess if sewage in septic systems is contaminating groundwater. The problem appears to be more with septic system regulation rather than over the effects of infectious versus normal sewage wastes.

**CHAIR RANEY** commented he would not support the Tippy and McCue amendment unless **REP. GILBERT'S** bill was adopted. He said since it appears the bill will be adopted, he will support the amendment.

**Motion:** **REP. GILBERT** moved amendments proposed by Tippy and McCue be adopted.

**Discussion:** **REP. GILBERT** agreed with **CHAIR RANEY**. Acceptance of this amendment is based on the passage HB 162.

**Vote:** Motion to adopt the Tippy and McCue amendment carried unanimously.

**Motion/Vote:** **REP. VIVIAN BROOKS** MOVED DO PASS ON HB 239 AS AMENDED. Motion carried 16 to 1 with **REP. HOFFMAN** voting no and **REP. BEVERLY BARNHART** absent for voting.

#### EXECUTIVE ACTION ON HB 240

**Discussion:** **REP. DICK KNOX** stated he investigated what, if any, funding sources existed for funding the types of programs referred to in HB 240. He said in the Federal Farm Program there is approximately \$5,000,000 nationally for these types of projects. This appears to be a token amount. He asked **Deborah Schmidt**, Environmental Quality Council, to expand upon this. **Ms. Schmidt** referred the question to **Gail Kuntz**. **Ms. Kuntz** said HB 240 is an outcome of an EQC study on ground water, as directed by **SJR 22** in 1989. She confirmed that the information she received showed that \$5,000,000, was appropriated nationally for the water quality programs. Approximately \$400,000 was allocated to western states. Approximately \$1,575,000, was allocated from the Federal Farm Bill to a separate program, called the Low Input Sustainable Agricultural Program. It appears the funding for western states would be comprised of the total of the two funding sources equaling approximately \$1,975,000. **CHAIR RANEY** emphasized the amount of funding for the 15 western states would be under \$2,000,000.

**Motion:** **REP. HOWARD TOOLE** MOVED HB 240 DO PASS.

**Discussion:** **REP. KNOX** expressed his concern that this will add another program to an area that is already under funded. Funding currently is going to areas of proven worth. He stated he does not have a major problem with this type of program but feels money could be spent better elsewhere. The programs need to be prioritized. **REP. GILBERT** stated the intent of the bill is to highlight low chemical agriculture. **REP. ED DOLEZAL** said the bill does not earmark money but allows different projects to

compete for the money. CHAIR RANEY agreed. During the next session, projects will be reviewed and monies will be granted at that time. The application process for the monies is extensive and requires a significant amount of energy. REP. TOOLE asked what types of projects qualify for the funding. Ms. Kuntz replied she didn't have that information with her. REP. GILBERT emphasized HB 240 does not change anything. The bill clarifies that low chemical agricultural projects can apply for the grant money.

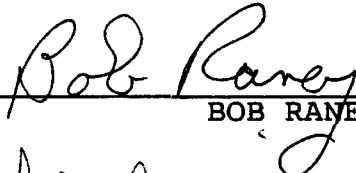
Vote: HB 240 DO PASS. Motion carried 17-1 with REP. KNOX voting no.


Announcements:

CHAIR RANEY said the committee may need to learn more about the Resource Indemnity Trust Tax (RITT) before action can occur on HBs 199 and 215. Steve Bender, Governor's Office of Budget and Program Planning stated they had incorrectly prepared the fiscal note for HB 215. He apologized for the mistakes. The revised fiscal note should be closer to the information presented by the Legislative Fiscal Analyst. REP. GILBERT suggested the Department of Natural Resources and Conservation provide a history of RITT. CHAIR RANEY agreed. He already talked with Karen Barclay, Director of DNRC, and she will present an overview next week.

ADJOURNMENT

Adjournment: 4:30

  
\_\_\_\_\_  
BOB RANEY, Chair

  
\_\_\_\_\_  
LISA FAIRMAN, Secretary

BR/lf



# HOUSE OF REPRESENTATIVES

## NATURAL RESOURCES COMMITTEE

ROLL CALL

DATE Jan. 30, 1991

NAME	PRESENT	ABSENT	EXCUSED
REP. MARK O'KEEFE, VICE-CHAIRMAN	✓		
REP. BOB GILBERT	✓		
REP. BEN COHEN	✓		
REP. ORVAL ELLISON	✓		
REP. BOB REAM	✓		
REP. TOM NELSON	✓		
REP. VIVIAN BROOKE	✓		
REP. BEVERLY BARNHART	✓		
REP. ED DOLEZAL	✓		
REP. RUSSELL FAGG	✓		
REP. MIKE FOSTER	✓		
REP. DAVID HOFFMAN	✓		
REP. DICK KNOX	✓		
REP. BRUCE MEASURE	✓		
REP. JIM SOUTHWORTH	✓		
REP. HOWARD TOOLE	✓		
REP. DAVE WANZENRIED	✓		
REP. BOB RANEY, CHAIRMAN	✓		

CS05NATRES.MAN

8.00 AA  
1-31-91  
TDB

HOUSE STANDING COMMITTEE REPORT

January 30, 1991

Page 1 of 1

Mr. Speaker: We, the committee on Natural Resources report that House Bill 239 (first reading copy -- white) do pass as amended.

Signed: B. Raney  
Bob Raney, Chairman

And, that such amendments read:

1. Page 1, line 22.

Following: line 21

Insert: "It is also the intent of the legislature that [sections 1 through 6] be implemented with minimum fiscal impact. The department and professional licensing boards shall ensure compliance with [sections 1 through 6] through the course of normal inspections, the existing licensing process, and the investigation of complaints. The department and professional licensing boards may impose and adjust annual fees commensurate with the costs of regulation and inspection."

2. Page 5, line 21.

Following: "treatment."

Insert: "A subsurface disposal system installed and operated in accordance with state or local sanitary regulations is, for the purpose of this subparagraph, a sewer system providing secondary treatment."

Lisa

CLERICAL

House Bill No. 239

Date: 1/31/91

Time: 11 am

MER  
(Legislative Council Staff)

☒ Natural Resources  
S / ☒ H Standing Committee

Bob Ravey  
(Chairman) RAVEY

☐ S / H Committee of the Whole  
  
(Sponsor)

In accordance with the Rules of the Montana Legislature, the following clerical errors may be corrected:

Amendment #2, insert  
"... purpose of this (subparagraph) subsection (b),"

An objection to these corrections may be registered by the Secretary of the Senate, the Chief Clerk of the House, or the sponsor by filing the objection in writing within 24 hours after receipt of this notice.

HOUSE STANDING COMMITTEE REPORT

January 30, 1991

Page 1 of 1

Mr. Speaker: We, the committee on Natural Resources report  
that House Bill 240 (first reading copy -- white) do pass .

Signed:   
Bob Raney, Chairman

EXHIBIT 1  
DATE 1-30-91  
HB 266

AMENDMENT TO HB 266  
Introduced Bill

1. Page 7, line 8.  
Following: "beginning"  
Strike: "surface"  
Insert: "strip or underground"

Testimony of John North  
Department of State Lands  
House Natural Resources Committee  
January 30, 1991

House Bill 266 was introduced at the request of the Department of State Lands. It would amend the Montana Strip and Underground Mine Reclamation Act, under which the Department regulates coal mining in Montana.

The need for the bill arises because, under the federal surface mining act, Montana must have in effect laws and rule that are as stringent as the federal law and rules. We were recently notified that our definition of prospecting, which currently includes only exploration activities, must be expanded to include gathering of data on areas that have been designated unsuitable for coal mining. Although we are able to make most federally required program changes by amending our rules, this change requires an amendment to the statute because the definition of prospecting is statutory.

What would the effect of this bill be? Under the current Montana law, an area can be designated unsuitable for coal mining if it has potential historic, cultural, scientific, or scenic value, if it has a critical ecological role, or if it contains hazards, such as unstable geology or frequent flooding. A person who wishes to have this designation terminated can go onto the land, gather data and do testing without a permit from the Department. This testing could be harmful. It could, for example, include taking geologic samples in an area of unique geology or vegetation samples in an area that had been designated unsuitable because of the existence of a rare plant species. House Bill 266 would require this person to obtain a prospecting permit from the Department before conducting these activities. It would also apply to these activities within national parks, wilderness areas, wild and scenic rivers, and national recreation areas. This would allow the Department to ensure that the features for which the area received its designation are not harmed or destroyed. It would also allow us to require reclamation of any significant disturbance of the area.

The Department that the Committee give this bill a favorable recommendation with the attached technical amendments, which substitutes the term "strip or underground" for the term "surface". The terms have the same meaning, but the former term is the proper one for the state statute.

FACT SHEET

...  
MONTANA RESERVED WATER RIGHTS COMPACT COMMISSION  
...

- RWRCC
- established by the 1979 Montana Legislature.  
SB 76: "An act to adjudicate claims of existing water rights in Montana"  
CH 697. Statutory language attached.
  - nine member commission authorized to negotiate with Indian tribes and federal agencies claiming federal reserved water rights in Montana: four members appointed by the governor, four by the legislature (two House, two Senate) and one by the Attorney General. List of Commission members, Indian Tribes and federal agencies attached.
- FEDERAL  
RESERVED  
WATER  
RIGHTS
- a federal reserved water right is created when Congress reserves land for a specific purpose (an Indian reservation, a national forest...) from the public domain. This doctrine was confirmed in a unanimous 1908 Supreme Court decision, U.S. v. Winters 207 U.S. 564 (1908), which involved water rights conflicts between the Ft. Belknap Tribe and Milk River irrigators.
- LEGAL and  
LEGISLATIVE  
CHRONOLOGY
- in 1975 the U.S. on behalf of Montana's Indian tribes, filed a lawsuit in federal district court to adjudicate their reserved water rights. The case, along with a parallel one in Arizona, went all the way to the U.S. Supreme Court, which ruled in 1983 that states do have the power to adjudicate these federal rights under the McCarren Amendment 43 USC 666 (1952). see Arizona v. San Carlos Apache Tribe 463 U.S. 561 (1983). Northern Cheyenne Tribe v. Adsit 721 F2d 1187 (9th C. 1983).
  - in 1977 a legislative interim committee was established to recommend how the State's water adjudication could be improved. Members included, among others, Representatives Jack Ramirez and John Scully and Senators Galt, Boylan and Turnage. Since the tribal lawsuits were still moving through the federal courts, the committee recommended an innovative way to deal with these conflicts: in SB 76, the Compact Commission was established and the adjudication of federal rights was temporarily suspended until July 1, 1982 (85-2-217 MCA). In 1981, realizing these issues were far from resolution, the Legislature extended the Commission's mandate until July 1, 1985 (HB667).
  - by 1985 the U.S. Supreme Court had ruled on the State's power to adjudicate and the Commission had successfully concluded a compact with the Assiniboine and Sioux Tribes of the Fort Peck Reservation. The Commission was extended to 1987 (SB 28) and again in 1987, to July 1, 1993 (SB 92).

STATUS OF  
NEGOTIATIONS

- seven Indian Reservations in Montana:
  - Ft. Peck - concluded
  - Northern Cheyenne - nearing conclusion of negotiations with anticipated legislation in 1991
  - Ft. Belknap - Tribal proposal for settlement anticipated this spring; staff technical work essentially complete. (1985 legislature prioritized Milk River Basin adjudication)
  - Rocky Boys/Blackfeet - have signed a cooperative agreement with Ft. Belknap on Milk River Basin; technical work in progress.
  - Crow/Flathead - no active negotiations at present.
  - Turtle Mountain Band of Chippewa (N.D.) have approximately 60,000 acres of "public domain allotments" in Montana. Legal research is being done to determine whether these lands have reserved water rights.
- four federal agencies claim reserved rights in Montana
  - U.S. Fish & Wildlife Service - 5 wildlife refuges; all technical work is complete
  - National Park Service; all technical work complete, no active negotiations since 1986
  - BLM - Missouri Wild and Scenic; technical field work complete, water model for Missouri Basin is currently being developed to determine water availability
  - USDA - claims rights for National forests and research stations; no active negotiations at present.

PROCESS

- once settlements are agreed to by the parties (State, Tribe, Federal government, acting as trustee for the Tribe) the proposed compact is first sent to local water users and public hearings are held.
- the compact must then be ratified by the Montana Legislature and the appropriate tribal entity
- certain provisions of a compact may require Congressional approval
- the compact is then integrated into a preliminary decree(s) for the affected water basin(s) where water users have one final opportunity to object before a final decree is issued. If the water court makes any changes in the compact it must go back to the original parties for re-negotiation.

STAFF

- RWRCC has an authorized staff of 12 FTE's - attorneys, hydrologists, remote sensing computer specialists, an agricultural engineer and a soil scientist.

FUNDING

- FY 92: \$447,624
- FY 93: \$446,840
- 40% general fund
- 60% RIT special revenue account

For more information contact: Susan Cottingham  
Program Manager 444-6716



DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION



STAN STEPHENS, GOVERNOR

LEE METCALF BUILDING  
1520 EAST SIXTH AVENUE

STATE OF MONTANA

DIRECTOR'S OFFICE (406) 444-6699  
TELEFAX NUMBER (406) 444-6721

HELENA, MONTANA 59620-2301

February 4, 1991

Representative Hal Harper  
Speaker, Montana House of Representatives  
Capitol Station  
Helena, MT 59620

Dear Representative Harper:

It has come to our attention that during a hearing on January 30, 1991 on your bill to set term limits for the members of the Reserved Water Rights Compact Commission (HB360), the discussion expanded to include the purposes, accomplishments, and current 1993 sunset provision for the Commission.

At its meeting on January 18, 1991, the full Commission discussed this and other reserved water rights bills before the 1991 Legislature. While there was no inclination on the part of the Commission members to take a position on the bill, some concern has been expressed about continuity of membership on the commission especially since the issue of federal reserved rights is so complex.

As you know, during the interim, the Legislative Water Policy Committee heard testimony about the Compact Commission and its work. At its meeting of September 8, 1989, concerns about the slow pace of negotiations and the structure of the Commission and its staff were raised by Mr. McOmber, who apparently spoke of these same issues at Wednesday's hearing. You will recall that subsequently, on November 9, 1989, Water Policy Committee also heard testimony from Vice Chairman, Chris Tweeten, who represented the majority view of the Commission. He spoke of the benefits of negotiation and the commitment of the 1989 Legislature to expand the scope of the Commission's technical staff's work. He indicated that the Commission continues to believe that negotiations are preferred over litigation because:

1. They promote cooperation, rather than confrontation, between the Tribes and the State;

Representative Hal Harper  
February 4, 1991  
Page 2

2. They offer greater flexibility for water management and administration than a court settlement;
3. They are more cost effective for all parties than protracted litigation; and
4. They offer greater opportunities for the protection of state water users, who might be impacted by an early priority date and large quantity of water decreed to a tribe by a court.

At that meeting, Representative Iverson echoed the view that litigation was short-sighted and that the end results of negotiations would be far better for the state. The Wyoming example was cited: After \$25 million and 15 years of litigation to quantify the water right, the parties are back in court fighting over how to administer the water.

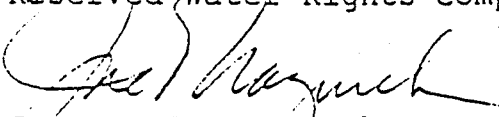
Mr. Tweeten indicated that the issues raised by Mr. McOmber certainly merit consideration by the Legislature and he welcomed scrutiny of the Commission's process and accomplishments to date.

Hal, we want to reiterate our willingness to completely discuss these important issues in the proper forum. We would also welcome the opportunity to present the majority view of the Commission, if you think it necessary, this Legislative Session. Otherwise, we certainly will continue to keep the legislative Water Policy Committee appraised of our work as we have done in the past.

It is our understanding that Chairman Raney, House Natural Resources Committee, has requested a fact sheet on the Reserved Water Rights Compact Commission for the information of committee members. We will be glad to provide this and any other information which would be helpful to you in your deliberations.

Warm regards,

  
Jack Galt, Chairman  
Reserved Water Rights Compact Commission

  
Senator Joe Mazurek

SC/JG/JM/jmr  
Harper.HB360

...It is the intent of the legislature to conduct unified proceedings for the general adjudication of existing water rights under the Montana Water Use Act.

..It is further intended that the state of Montana proceed under the provisions of this part in an effort to conclude compacts *for the equitable division and apportionment of waters between the state and its people and the several Indian tribes claiming reserved water rights within the state.*

Montana Code Annotated Section 85-2-701 (1).

The Compact Commission may also enter into separate negotiations with the federal government *concerning the equitable division and apportionment of water between the state and its people and the federal government claiming non-Indian reserved waters within the state...*

Montana Code Annotated  
Section 85-2-703.

MONTANA RESERVED WATER  
RIGHTS COMPACT COMMISSION

Senator Jack E. Galt, Chairman (Martinsdale)

Chris Tweeten, Vice-Chairman (Helena)

Gene Etchart (Glasgow)

Carl Davis (Dillon)

Everett Elliott (Conrad)

W. Gordon McOmber (Helena)

Senator Joseph P. Mazurek (Helena)

Representative Gary Spaeth (Red Lodge)

Representative Dennis Iverson (Whitlash)

FEDERAL AGENCIES CLAIMING  
FEDERAL RESERVED WATER  
RIGHTS IN MONTANA

National Park Service

Glacier National Park

Yellowstone National Park

Big Horn National Monument

Big Hole National Battlefield

Custer National Battlefield

United States Fish and Wildlife Service

National Bison Range

C.M. Russell National Wildlife Refuge

Black Coulee National Wildlife Refuge

Benton Lake National Wildlife Refuge

Bowdoin National Wildlife Refuge

United States Bureau of Land Management

Wild and Scenic Missouri River

United States Department of Agriculture

National Forests

Wilderness Areas

Range and Livestock Research Station

Sheep Experiment Station

**INDIAN TRIBES CLAIMING  
FEDERAL RESERVED WATER  
RIGHTS IN MONTANA**

Assiniboine & Sioux Tribes of Fort Peck

Assiniboine & Gros Ventre Tribes of Fort Belknap

Blackfeet

Chippewa Cree of Rocky Boy's Reservation

Confederated Salish & Kootenai of the Flathead

Crow

Northern Cheyenne

Turtle Mountain Band of Chippewa

EXHIBIT 2A  
DATE 1-30-91  
HB 360

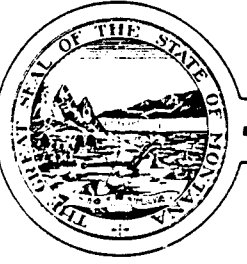
**AMENDMENTS TO HB 360**

Pg. 2, line 10; following "4-year terms" insert:  
"beginning in 1990,"



RESERVED WATER RIGHTS  
COMPACT COMMISSION

EXHIBIT 20  
DATE 1-30-91  
HB 360



Stan Stephens  
Governor

Chris D. Tweeten, Vice-Chairman  
Carl M. Davis  
Everett C. Elliott  
Gene J. Etchart

Jack E. Galt, Chairman

Dennis Iverson  
Joseph P. Mazurek  
W. Gordon McOmber  
Gary Spaeth

STATE OF MONTANA

December 12, 1990

The Honorable Hal Harper  
Speaker of the House  
Montana State Legislature  
Helena, Montana 59601

Dear Hal:

This letter follows our recent conversation in which I again recommend the 1991 Legislature commence reassessment of Montana's procedure for resolution of claims for Federally Reserved Water Rights in Montana.

To put the issue in perspective: In 1979 when the Legislature undertook the adjudication of water rights in the state, Federal agencies and Indian tribes were reluctant to be included in the process.

As a compromise the Legislature authorized a three year moratorium during which:

1. The tribes and Federal agencies were excluded for three years from the filing provisions required of state rights claimants.
2. The Reserved Water Rights Compact Commission was created to either:
  - A. Resolve quantification of those claims for Federally reserved rights in a negotiated compact to be submitted to the Montana Legislature for ratification or,
  - B. Turn those claims back to the Water Courts to be treated as other claims and,
3. The State agreed that while negotiations were being pursued, proceedings to adjudicate Federally reserved rights would be suspended.

3 At the request of the Commission, the Legislature has ~~four~~ times extended the life of the moratorium and the Commission.

Marcia Beebe Rundie  
Legal Counsel/Program Manager  
1520 East Sixth Avenue  
Helena, Montana 59620-2301  
(406) 444-6841

During its over 11 year life, the Commission has concluded one compact for an Indian reservation, no compact for a Federal agency reservation and turned no claim back to the Water Court.

Increased funding and staffing authorization by the 1989 Legislature has not accelerated the process.

The Commission has compiled a better record of extending the life of the bureaucracy than concluding compacts.

Because present law precludes final adjudication in basins involving Federally Reserved Water Right claims while negotiations are in process, the Water Court is fast running out of basins to adjudicate.

The Department of the Interior growing impatient has threatened to bypass the Commission and take resolution directly to court; an action it has been preparing for during the preceding 11 years while Montana has doggedly clung to its unproductive Pollyanna negotiate only approach.

The crux of the hangup is first, that many claims for Federally Reserved Rights (which haven't been identified or quantified) are for the same water that has been used for years, even generations, by Montana's farmers and ranchers; and second, claims for in stream flow rights - a new element in Western Water Right law that the Commission has insufficient precedent or experience to deal with.

Tribal and Federal agency claims are backed by the United States Department of Justice, Department of the Interior, the Bureau of Indian Affairs and contract lawyers from some of the nation's leading law firms.

The Commission unable or unwilling to deal conclusively with such a powerhouse and not wishing to admit its impotency by turning the case over to the Water Courts, drifted into a policy of shifting priorities to another tribe or Federal Agency when faced with a hard decision.

The question is - does the state's existing approach provide Montana and its citizens the best available process to protect for Montana what belongs to Montana.

My experience as a member and former chairman of the Commission tells me it doesn't.

It is my feeling that the 1991 Legislature should commence an objective evaluation of Montana's negotiation

only approach to resolution of claims for Federally Reserved Water Rights. The goal should be to have ready for consideration by the 1993 legislative session a completely revised procedure that includes:

1. Replacing the unrealistic self-imposed negotiate only policy with laws that allow both negotiation and litigation. Indian tribes and Federal agencies are authorized to both negotiate and litigate and have utilized the last 11 years of Montana's negotiate only approach to prepare for court resolution. Depriving the state of the same right is like attempting resolution with one hand tied.

2. Discharging the Commission with a vote of thanks for accomplishing what the 1979 law intended it to accomplish. A nine member committee meeting sometimes only three times a year is not the proper authority to direct staff or deal with the complicated and time consuming responsibility of adequately serving Montana's interest.

3. Placing Commission authority and responsibility for resolution of contested Federally Reserved Water Right claims in the Attorney General's office with instructions to negotiate solutions if possible, but take them to court if necessary.

4. Placing technical information development responsibility back with the Department of Natural Resources where it belongs.

5. Providing for a citizens oversight or advisory committee to assure all Montana's interests are considered.

In addition, I would suggest Montana develop a methodology to quantify justifiable in stream flow.


Claims for in stream rights have injected an entirely new dimension into Water Right law. Methodologies being put forth to justify those claims have been developed by agencies and special interest groups with a vested interest in minimizing diversion of water for other beneficial uses.

We are all aware there is no easy fix to the problem. In addition to the Tribes and Federal agencies, Wyoming and Canada can lay a legal claim to some of Montana's water. The solution lies in a well thought out, well planned long range adequately financed program.

The Commission is justifiably proud of the Ft. Peck Compact and is working diligently to have one more compact ready for submission to the 1991 Legislature for ratification.

However, it is not realistic to expect the Commission with its cumbersome operational capability and limited authority, to deal conclusively with more than a few of the claimants for Federally Reserved Water Rights in the foreseeable future. The Legislature would be well advised to start planning on the inevitable transition needed to adequately deal with the issue.

Sincerely,



W. Gordon McOmber

CC: The Honorable Joe Mazurek  
President of the Senate

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION  
AMENDMENTS TO HB 361

1. Title, lines 6 and 7.

Following: "AMENDING"

Strike: remainder of lines 6 through "MCA" on line 7

2. Page 1, line 11

Strike: section 1 in its entirety

3. Page 2, line 4

Strike: section 2 in its entirety

4. Page 2, line 22

Strike: section 3 in its entirety

Insert: "NEW SECTION. Section 1. Post July 1, 1973 federal reserved rights -- process and adjudication. Under authority granted to the states by 43 U.S.C. 666, a federal agency of the United States of America asserting a claim to a federal reserved water right with a priority date of July 1, 1973, or later, must comply with the processing and adjudication provisions applicable to existing water rights in accordance with Title 85, chapter 2. A water judge, where necessary, may reopen any decree issued prusuant to Title 85, chapter 2, to process the claimed or negotitated right."

5. Page 3, lines 9 and 11

Strike: "3"

Insert: "1"

6. Page 3, lines 10 and 11

Strike: "part 2,"

1-20-  
361



EXHIBIT 4  
DATE 1/30/91  
HB 361

## Montana Wildlands Coalition

September, 1990

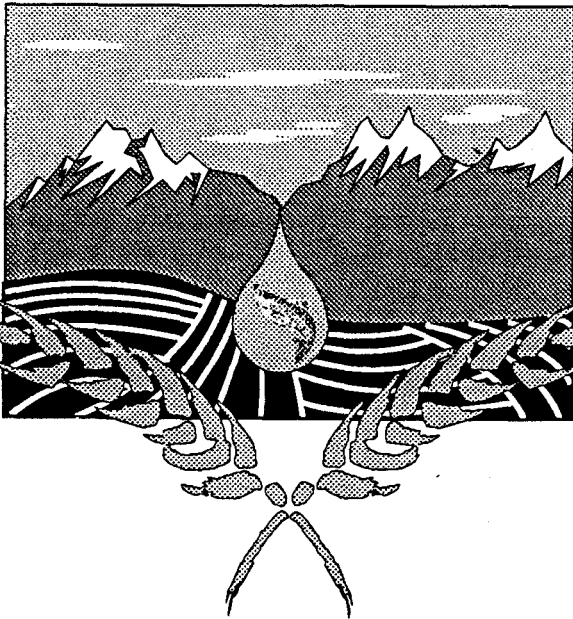
P.O. Box 213 • Helena, Montana 59624

(406) 442-2566

### WATER RIGHTS AND WILDERNESS

*A Special Report by George Ochenski, Natural Resource Consultant, Helena*

**A** great treasure pours forth from Montana's mountains every year - clean and abundant water. For those "headwaters" areas that are not yet developed, wilderness designation would provide the best possible protection from mining, logging, and road building, and would assure high quality, stable water yields for years to come.



But the idea of using or diverting water in wilderness areas is a topic of debate in many areas of the country, including Montana. Burgeoning water demands in population centers such as Denver and Los Angeles increase pressure to tap the wilderness for its water resource.

While Montana has no large cities, the region is not immune to urban thirst. For example, the City of Los Angeles recently attempted to influence national forest planning in Wyoming's Snake River basin by promoting larger timber harvests. The city's goal was to increase runoff, lay claim to the additional water, and pump it to L.A.

In Colorado, the Front Range cities want to build a project called Homestake II, a system of tunnels and diversions that would reach deep into the the Holy

Cross Wilderness. The project would drain 90 percent of Cross Creek and its tributaries during runoff, drawing down spectacular waterfalls and depleting wetlands.

Though Montana is not currently subject to such imminent threats, the strongest possible water protection should be sought for wilderness areas - both existing and proposed - most of which are top-of-the-drainage areas. Such protection would benefit not only the wilderness areas themselves, but downstream water users who depend on clean and plentiful water from the high country.

Strong wilderness water rights are good for wildlands and wildlife, of course, but also for local municipalities, farmers and ranchers, and other established Montana water users. Wilderness water rights, if understood correctly, can be supported enthusiastically by all Montanans.

**LEGAL AMBIGUITIES** - Many people assume water goes with wilderness and would be protected with all other wilderness resources. Indeed, why would the federal government protect a natural area for future generations and not preserve its biological lifeblood?

Unfortunately, the Reagan administration had a combative, if not logical, answer to that question. Just before Attorney General Edwin S. Meese III left the Justice Department in 1988, he adopted an opinion by the Solicitor of the Department of the Interior which held that no water rights were implied by the Wilderness Act, passed by Congress in 1964. Thus, said Meese, the policy of the federal government would be to not claim water rights for wilderness purposes.

Meese's action followed a series of legal victories for conservationists in a federal court in Colorado, where Judge John L. Kane ruled that "wilderness" is a legitimate and important land classification and that the Forest Service has a legal obligation to protect the water within it. After Kane ordered the Forest Service to submit plans for obtaining wilderness water rights, the Solicitor's opinion and Meese's ensuing edict muddied the issue. Today the ambiguity remains.

Amendments to House Bill No. 239  
First Reading Copy

Requested by Rep. Raney  
For the Committee on Natural Resources

Prepared by Paul Sihler  
January 28, 1991

1. Page 1, line 22.

Following: line 21

Insert: "It is also the intent of the legislature that [sections 1 through 6] be implemented with minimum fiscal impact. The department and professional licensing boards shall ensure compliance with [sections 1 through 6] through the course of normal inspections, the existing licensing process, and the investigation of complaints. The department and professional licensing boards may impose and adjust annual fees commensurate with the costs of regulation and inspection."

# SPONSOR'S FISCAL NOTE

Form BD-155

There is hereby submitted a Sponsor's Fiscal Note for:

, Version:

EXHIBIT W

DATE 1-30-91

HB 239

HB 239

## SOLID AND HAZ. WASTE (DHE)

FY 92

FY 93

Expenditures	Current	Proposed	Current	Proposed
FTE	0.00	0.70	0.00	0.5
Personnel	0	26,909	0	16,994
Operating	0	19,105	0	12,065
TOTAL	0	46,014	0	29,059 = 75,000

FUNDING SOURCE: SB 209 EAC Solid waste funding bill

## Licensing/Certification Bureau (DHE)

FY 92

FY 93

Expenditures	Current	Proposed	Current	Proposed
FTE	0.00	?	0	?
Personnel	0	35,000	0	4,000
Operating	0	0	0	0
Total	0	35,000	0	4,000 = 39,000
FY TOTAL:	0	81,014	0	33,055

PRIMARY SPONSOR DATE

Fiscal Note for:

Version:



*Tippy & McCue*

ATTORNEYS AT LAW

1215 Eleventh Avenue  
P.O. Box 543  
Helena, Montana 59624  
406-442-4448 FAX 406-442-8018

*Roger Tippy*  
*Mary Kelly McCue*

DATE: January 28, 1991  
TO: House Committee on Natural Resources  
FROM: Roger Tippy for Montana Dental Association,  
Montana Veterinary Medicine Association  
RE: HB239--Infectious Waste Management Act

Amendment  
(First Reading Bill)

Section 5, page 5, line 21  
Following: "treatment."

Insert: "A subsurface disposal system installed and operated in accordance with state or local sanitary regulations is, for the purposes of this subparagraph, a sewer system providing secondary treatment."

Rationale: Many providers who would be potentially affected by this act are located in outlying areas or smaller communities not served by sewers. A septic system with a properly operating drainfield is, according to the Water Quality Bureau, providing the functional equivalent of secondary treatment. This amendment would enable dental offices and other facilities, such as funeral homes, to discharge liquid or semisolid wastes on the same terms as their counterparts in the cities can do.

HOUSE OF REPRESENTATIVES  
VISITOR'S REGISTER

Natural Resources COMMITTEE BILL NO. HB 266  
DATE 1-30-91 SPONSOR(S) Rep Marion Hanson

PLEASE PRINT

PLEASE PRINT

PLEASE PRINT

NAME AND ADDRESS	REPRESENTING	SUPPORT	OPPOSE
Ken Williams - Butte	Entech	✓	
John North	State Lands	✓	
Jim Mockler	MT. Coal Council	✓	

PLEASE LEAVE PREPARED TESTIMONY WITH SECRETARY. WITNESS STATEMENT FORMS  
ARE AVAILABLE IF YOU CARE TO SUBMIT WRITTEN TESTIMONY.

**HOUSE OF REPRESENTATIVES  
VISITOR'S REGISTER**

Natural Resources COMMITTEE BILL NO. HB 3100  
DATE 1-30-91 SPONSOR(S) Rep. Harper

**PLEASE PRINT**

[illegible]

**HOUSE OF REPRESENTATIVES  
VISITOR'S REGISTER**

Natural Resources COMMITTEE BILL NO. HB 361  
DATE 1-30-91 SPONSOR(S) Rep. Harper

PLEASE PRINT

PLEASE PRINT

PLEASE PRINT

NAME AND ADDRESS	REPRESENTING	SUPPORT	OPPOSE
Susan Cottingham	RWRC		
Jim Madden	"		
Gary Edwards	Montana Water Users Coalition		
Stan Bradshaw	Mt. Frost (Limited)	✓	
GEO. OCHENSKI	TWS	✓	
Don MacINTYRE	DWRC	✓	
Jim [unclear]	MSGA		
Lorna Frank	Farm Bureau	✓	
Jo Brunner	Muna	✓	

PLEASE LEAVE PREPARED TESTIMONY WITH SECRETARY. WITNESS STATEMENT FORMS ARE AVAILABLE IF YOU CARE TO SUBMIT WRITTEN TESTIMONY.