

## **MINUTES**

### **MONTANA SENATE 53rd LEGISLATURE - REGULAR SESSION**

#### **COMMITTEE ON JUDICIARY**

**Call to Order:** By Senator Yellowtail, on April 19, 1993, at 10:06 a.m.

#### **ROLL CALL**

**Members Present:**

Sen. Bill Yellowtail, Chair (D)  
Sen. Steve Doherty, Vice Chair (D)  
Sen. Sue Bartlett (D)  
Sen. Chet Blaylock (D)  
Sen. Bob Brown (R)  
Sen. Bruce Crippen (R)  
Sen. Eve Franklin (D)  
Sen. Lorents Grosfield (R)  
Sen. Mike Halligan (D)  
Sen. John Harp (R)  
Sen. David Rye (R)  
Sen. Tom Towe (D)

**Members Excused:** None

**Members Absent:** None

**Staff Present:** Valencia Lane, Legislative Council  
David Martin, Committee Secretary

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

**Committee Business Summary:**

Hearing: None  
Executive Action: HJR 28, SR 8, HB 692

#### **EXECUTIVE ACTION ON HJR 28**

**Motion/Vote:** Sen. Bartlett MOVED HJR 28 BE CONCURRED IN. The motion CARRIED with Sen. Crippen and Sen. Rye voting NO.

Sen. Halligan said he would carry the bill on the floor.

#### **EXECUTIVE ACTION ON SR 8**

**Motion:** Sen. Brown MOVED SR 8 BE ADOPTED.

**Discussion:**

Sen. Doherty said he was going to vote to confirm John Larson, but he was bothered by articles he had seen in a Missoula newspaper, saying Mr. Larson was going to be sworn in. He said some of the confirmations were not fact-finding exercises or explorations, but were "love-ins". He was disturbed that the Governor had proclaimed Mr. Larson as District Judge before the Senate had a chance to act.

Sen. Yellowtail said the circumstances had been explained to the Chair. He said the Committee should have acted on the day it heard the Resolution, however, he felt it would be unfair to vote since the attendance was sparse that day. He said it was partly his fault and apologized.

Sen. Towe said if this process becomes habit then Senate confirmation becomes less meaningful. He said the confirmation could have been presented in a more timely fashion. He suggested a letter be drafted from the Committee expressing their concern so this problem could be avoided in the future.

Sen. Yellowtail said another possibility would be to adjust the Senate rules or even state law to establish a time frame for reasonable consideration of appointees in the Senate. He suggested that Senators Towe and Doherty could look into these possibilities.

Sen. Towe said there was a discrepancy on when the Senate received the nomination and when the hearing was held, and he did not understand the reason for the discrepancy.

Sen. Yellowtail said neither the Senate nor the Judiciary Committee received notification of the nomination until a week before the hearing. He said if there was a reasonable way to encourage a more timely process, he would.

Sen. Crippen said, in the past, more than 30 days had elapsed from the time the Senate received a notice of employment for the appointments made during the interim. He said the appointees had not been confirmed until 60 or 70 days into the session. He said he did not understand the reason for the concern. He said a person would not officially be a judge until they were confirmed by the Senate.

Sen. Doherty said he was "bothered" because an appointee could be rejected by the Senate. He said it would be difficult to turn down an appointee that had already been sworn in. He said the "swearing in" should wait until the Senate acts.

Sen. Crippen asked if Sen. Doherty was suggesting that a person, appointed to the bench, should not act until the Senate convenes and confirms them. Sen. Doherty said, in this case, the celebration party could have been postponed for one week.

Sen. Yellowtail asked the Committee to move on. He said he hoped this Committee could find a way to avoid this problem in the future.

Vote: The Do Pass Motion for SR 8 CARRIED UNANIMOUSLY.

EXECUTIVE ACTION ON HB 692

Motion: Sen. Towe MOVED HB 692 BE CONCURRED IN.

Discussion:

Sen. Halligan submitted a letter to the Committee (Exhibit #1). He said there had been an effort to address the needs of all groups involved.

Sen. Grosfield said repeated investigations into this issue led to the same conclusion. He said it was significant that there were references to 0.29 CFS, and it was important that the record reflect that such minute amounts of water were involved. He said all water rights were protected and enough water remains for future developments. He said HB 692 was a good compact and should Be Concurred In.

Sen. Towe said he was not convinced by the "firmness" of the letter. He said the federal government should look to the concerns of individuals, which is what counts in the final analysis. He said, in this issue, the concern was that there would be no additional development. He said there are a number of options, and the claims could be adjusted to permit flexibility. He said this would mean that there would not be a major increase in population in Silver Gate and Cooke City.

Sen. Grosfield said there is very little private land in the Soda Butte Creek drainage, so private development would be limited. Sen. Grosfield said he would like to see the Committee come up with \$20,000 to \$25,000 to accomplish metering in the drainage.

Sen. Yellowtail said he was supportive of the concept of metering, but expressed concern that it was an issue that might be better addressed in the next Legislature.

Sen. Towe said he agreed that metering was a good opportunity. He further stated the Compact Commission should have held a meeting in Cooke City which may have addressed some of the problems in the compact.

Sen. Yellowtail said this information may be applicable to the North Fork Compact. He said having a meeting in local towns was successful in the Northern Cheyenne Compact, because people feel comfortable on their own "turf".

Sen. Grosfield said, in defense of the Commission, the toughest issue was the geothermal issue. He said people were satisfied by the results of the Resolution.

Sen. Towe said he was really impressed with the Commission's geothermal work.

**Vote:** The motion HB 692 Be Concurred In CARRIED with Sen. Harp voting NO.

Sen. Grosfield said he would carry HB 692.

**Further Discussion:**

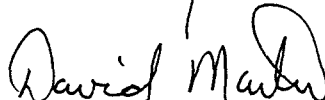
Sen. Yellowtail said Jim Nelson's nomination to the Supreme Court would be scheduled for Wednesday at 10:30 a.m.

**ADJOURNMENT**

**Adjournment:** Meeting adjourned at 10:22 a.m.



SENATOR YELLOWTAIL, Chair



DAVID MARTIN, Secretary

BY/dm

## ROLL CALL

SENATE COMMITTEE

Judiciary

DATE 4-19-93

[illegible]

SENATE STANDING COMMITTEE REPORT

Page 1 of 1  
April 19, 1993

MR. PRESIDENT:

We, your committee on Judiciary having had under consideration House Joint Resolution No. 28 (third reading copy -- blue), respectfully report that House Joint Resolution No. 28 be concurred in.

Signed: Wm Yellowtail  
Senator William "Bill" Yellowtail, Chair

M - Amd. Coord.  
LB Sec. of Senate

HALLIGAN  
Senator Carrying Bill

861039SC.Sma

PRELIMINARY

SENATE STANDING COMMITTEE REPORT

Page 1 of 1  
April 19, 1993

MR. PRESIDENT:

We, your committee on Judiciary having had under consideration Senate Resolution No. 8 (first reading copy -- white), respectfully report that Senate Resolution No. 8 be adopted.

Signed: Wm Yellowtail  
Senator William "Bill" Yellowtail, Chair

SENATE STANDING COMMITTEE REPORT

Page 1 of 1  
April 19, 1993

MR. PRESIDENT:

We, your committee on Judiciary having had under consideration House Bill No. 692 (third reading copy -- blue), respectfully report that House Bill No. 692 be concurred in.

Signed: Wm Yellowtail  
Senator William "Bill" Yellowtail, Chair



HB 692 -- April 19, 1993  
NATIONAL PARK SERVICE -- MONTANA COMPACT

4-19-93

HB 692

The proposed amendments to HB692 pertaining to Soda Butte Creek allow increased use over estimated claimed use by up to 53% in low flow months (see accompanying chart). Under the amendments, the Park's reserved water right during those months would be subordinate to consumptive use rights of between 20 and 100% of the flow. Without the proposed amendments, the Park's reserved water right during the same months is subordinate to consumptive use rights of between 20 and 76% of the flow. The Reserved Water Rights Compact Commission requested response by the Park Service to the proposed amendments. The Park Service and the Department of Justice found them unacceptable. The attached letter details that response.

The Compact protects current private water rights as claimed in the adjudication or permitted by DNRC. The level of consumptive use rights as a percent of stream flow protected on Soda Butte Creek exceeds that of any other stream associated with Yellowstone or Glacier National Parks. The Commission was only able to obtain agreement to subordinate to high levels of claimed use for the winter months because the Park Service could observe that the level of claimed use is not reflected in stream flow. However, the attached memo indicates that Park scientists believe the critical level at which impact occurs has been reached during low flow. To allow increased use was considered unacceptable.

Winter low flows, when the creek is almost frozen, are crucial to protection of fish that winter in unfrozen pools. A 1987 study done through Montana State University indicates that, during the winter months, the entire flow of Soda Butte Creek is necessary to protect the fishery. The Colorado Supreme Court has recognized the protection of fisheries as a purpose for which water is reserved on creation of a national park. EPA studies show that water quality in Soda Butte Creek is below drinking water standards. Increased diversion reduces dilution and would exacerbate that problem.

The Commission has offered to dedicate staff time to assist the water users on Soda Butte Creek in obtaining a state grant to meter water use. Once water use is metered, the caps on consumptive use will apply to actual, not decreed use. This should open up a significant volume of water for new development.

Even without metering, significant water may be available for future use on Soda Butte Creek in summer months depending on final decrees by the water court. (Adjusted claims on the accompanying chart reflect only an estimate of what the water court might do. It is the jurisdiction of the court to determine those rights. The Compact will protect the rights as decreed.) Storage of water is a viable alternative. State grants are available for development of rural water systems if this is the solution chosen by the water users on Soda Butte Creek.

Soda Butte Creek at NE Entrance to Yellowstone National Park  
April 19, 1993

	Mean	5%	Adjusted	Adjusted			
	Monthly	Of	Surface	Surface	RWRCC		
	Flow	Mean	Water	Water	proposal	2 cfs =	2 cfs =
	(cfs)	(cfs)	Claims	Claims	AF	AF	% increas
Jan	5.7	0.3	6.16	1.31	80.33	122.98	53.1
Feb	5.4	0.3	6.16	1.31	72.56	111.07	53.1
Mar	4.2	0.2	6.16	1.31	80.33	122.98	53.1
Apr	1.8	0.1	6.22	1.37	81.72	119.01	45.6
May	123	6.2	6.34	1.49	378.15	378.15	
June	350	17.5	6.56	1.71	1041.32	1041.32	
July	127	6.4	6.56	1.71	390.45	390.45	
Aug	48.8	2.4	6.56	1.71	150.03	150.03	
Sept	16.1	0.8	6.56	1.71	101.57	119.01	17.2
Oct	14.9	0.7	6.42	1.57	96.47	122.98	27.5
Nov	9.8	0.5	6.22	1.37	81.72	119.01	45.6
Dec	6.6	0.3	6.16	1.31	80.33	122.98	53.1
total =					2634.96	2919.95	

\* Column 5: "Adjusted" means Silver Gate municipal claim  
reduced from 5 cfs to 0.15 cfs (about 60 gpm)

EXHIBIT 1  
DATE 4-19-93  
HB 692



# United States Department of the Interior



## NATIONAL PARK SERVICE

Water Resources Division  
1201 Oak Ridge Drive, Suite 250  
Fort Collins, Colorado 80525

April 16, 1993

IN REPLY REFER TO:

L54(479)  
General

Rep. Dave Wanzenried, NPS Negotiating Team Chairman  
Montana Reserved Water Rights Compact Commission  
1520 East Sixth Avenue  
Helena, Montana 59620-2301

Re: Proposed Modifications to the National Park Service/Montana Reserved Water Rights Compact

Dear Rep. Wanzenried:

I contacted National Park Service (NPS) and Department of Justice (DoJ) field staff and presented, for their consideration, the amendment offered by Mr. Doney. Specifically, to increase the amounts on page 51 of Senate Bill 692, as suggested, is 2.0 cfs. I also presented an alternative which would increase by 0.29 cfs, the value listed in the column labeled "Adjusted Surface Water Consumpt. Claims (cfs)" entered in testimony by the Montana Reserved Water Right Compact Commission this morning (16 April 1993). The 0.29 cfs is the difference between 2.0 cfs and 1.71 cfs (the maximum value in that column).

NPS technical staff responded by stating that they could not support either change or, for that matter, any increase in use above what has been negotiated. Park management is very concerned about water quality and associated impacts to the fisheries and other resources on Soda Butte Creek during periods of low flow. In their view, any increase would constitute a conflict with the NPS' mandate to prevent impairment of resource values.

When I contacted DoJ counsel at the field level, I was told that it would be difficult to justify a recommendation for compact approval with the proposed change as the legal standards for reserved water rights will not be met unless the NPS is confident there would be no impairment of park resource values. Counsel also reminded the NPS negotiation team that a significant concession had already been made to use the 1993 date rather than the 1973 date discussed early in negotiations. Additionally, it was pointed out that such a change may have impacts under paragraph II.B.2.d. which was also the subject of considerable negotiation and therefore might have to be revisited if a change were made.

In view of the foregoing, the NPS negotiation team will feel compelled to recommend against approval of this compact if the Montana State legislature increases the limit on total current and future consumptive use on Soda Butte.

Sincerely,

*Daniel J. Williams*

for Owen R. Williams  
Chief, Water Rights Branch

EXHIBIT 1  
DATE 4-19-93  
HB 692