

MINUTES

**MONTANA SENATE
53rd LEGISLATURE - SPECIAL SESSION**

COMMITTEE ON JUDICIARY

Call to Order: By Senator Bill Yellowtail, on December 8, 1993,
at 10:35 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: Sen. Halligan (D)

Members Absent: None.

Staff Present: Valencia Lane, Legislative Council
Linda Casey, Committee Secretary

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

Committee Business Summary:

Hearing: SR 1 - SR 2
Executive Action: SR 1 - SR 2

HEARING ON SENATE RESOLUTION 2

Opening Statement by Sponsor:

Senator Yellowtail introduced Governor Racicot for the nomination of Michael McCarter to the position of Workers' Compensation Judge.

Governor Marc Racicot told the Committee Senate Resolution 2 was for the governor's nomination of Michael McCarter for Workers' Compensation Judge. He explained there was a slate of extremely qualified individuals recommended, all of which Governor Racicot knew personally. He continued that Michael McCarter was a "man

of immense intellectual capability, a person who is tireless in his efforts to serve the people of Montana well."

Michael McCarter told the Committee he appreciated the opportunity to serve as Workers' Compensation Judge. He explained he believes deeply in public service and is committed to it. Having served for the past three months he stated he finds it stimulating and challenging and has no regrets in filing for and accepting the position.

Mr. McCarter presented his goals for the position. He explained the workers' compensation court is an important court for workers' and employers. He told the Committee his goal was to get decisions out speedily and that the decisions be reasoned, careful and consistent. He explained another goal was to streamline the process, and to encourage professionalism among attorneys. He stated he has been impressed by the level of competence of the attorneys practicing before him in the past three months.

Implementation of the goals have taken place by hearing all cases himself, without using a hearing examiner. He feels this will allow for consistent decisions. He explained through a meeting with the rules committee there is a restructuring of the rules of the court. Going to a quarterly system, scheduling cases a full year ahead.

Mr. McCarter expressed gratitude to Judge Reardon for a smooth transition.

Proponents' Testimony:

Chris Tweeten, Chief Deputy of Attorney General told the Committee Attorney General Joe Mazurek sends his regards to the Committee. Mr. Tweeten explained Attorney General Mazurek strongly supports the nomination of Michael McCarter to the position of Workers' Compensation Judge. He stated both he and Attorney General Mazurek have great confidence in Mr. McCarter's ability.

Mr. Tweeten explained he has worked with Michael McCarter in Attorney General Racicot's office, and later in private practice. He told the Committee Mr. McCarter "brings to the workers' compensation bench the ability to sit as a judge, and to judge matters based on the facts of the law."

Jim Mockler spoke on behalf of the Judicial nomination commission. He explained the commission heard the applicants who wish to be workers' compensation judge. He told the Committee Mr. McCarter was "most impressive in his candidacy". Mr. Mockler stated he showed through his resume' and public support that he would administer the laws of the court. He explained the commission was impressed with Mr. McCarter and urged, on the

unanimous behest of the commission, Committee concurrence.

Opponents' Testimony:

None.

Informational Testimony:

None.

Questions From Committee Members and Responses:

Senator Blaylock asked Mr. McCarter if he had said he would do the work himself and was told yes. Senator Blaylock asked if he found he was able to keep up and was current as far as the cases are concerned. Mr. McCarter said at the present time he was behind and the reason is the way the trial schedule was set up. When he took office on September 7, he started basically six weeks of trial and took Judge's school for a week. He came home in mid November and all the cases he heard are coming in now, but he will have until January to work on those cases and after that they will have the new trial schedule, will hear the trial schedule for one week and be back in the office at least one week and typically two weeks to work on decisions. Those cases should start coming in a more reasonable fashion rather than all coming in at once. His work on the cases indicates to him that he should be able to handle it.

Senator Towe said he had one question he liked to ask everybody who was to be confirmed and asked it so that hopefully it would be remembered. He asked Mr. McCarter if he had any reason to believe he could not be genuinely fair in the treatment of everybody who comes before him, regardless of what happened in the past, a statement of position or an organization from which the party came from. Mr. McCarter said he had no reservations in this regard.

Senator Towe said he had a procedural question and asked if Mr. McCarter had any assistance in helping to prepare decisions after hearing the cases, other than a secretary. Mr. McCarter said he does have a law clerk and also a hearing examiner to reschedule who handles much of the pretrial matters. Senator Towe asked if that was sufficient help and Mr. McCarter said he believed it was at this point. He said if the decisions got back logged, decisions were too complex, and there was just too much, he would have to consider going back and putting another hearing examiner or perhaps contracting to do it on a need basis. Senator Towe said he would encourage Mr. McCarter to do that, and agreed it was efficient if he could do it, rather than have a hearing examiner hear the evidence and then have to do it again himself. He said he would also encourage him not to hesitate in asking for assistance if he needs it.

Senator Harp said in 1989 he had introduced a bill to abolish Mr. McCarter's position. In the past he felt that position had been used, rather than to look at the facts of law, to legislate in some positions and some of the hearings that your predecessor had. He asked what role Mr. McCarter had when a hearing comes up, if he looked at the facts or thought he should expand and legislate what we mean. He said they would be looking at this very closely. Mr. McCarter said he believed his role was not one to legislate, but to limit the facts and apply the law to those facts. He said he was not a result oriented person and will look at the law. He mentioned that he had a difficult case at the present time that he has changed his mind four times on. Looking at the law is a very difficult in this case since there are not any specific Montana cases on it, but are some Montana cases that are parallel to it to help him out. He said there will always be some interpretation of statutes because statutes are not always clear. When that happens he has to look to the Supreme Court and if they interpret the statute he has to follow their decision. He said if it is an open question he would do his best to interpret it, following the judicial rules that have been laid down in regard to interpreting the statutes.

Senator Harp said he believed Mr. McCarter had made an interesting point about the four different periods of law that we have and asked if, in a period of time, there would be any suggestions on how we could improve on this. Mr. McCarter said he did not believe the role of the Judges was to make recommendations on a policy matter. As far as procedural matters, perhaps, but as far as policy matters it is up to the Legislature as to what they want to establish in that area.

Senator Crippen said he was concerned that if the Legislature should decide in a future session to revert back to what he felt was a more proper approach, to look at the schedule of benefits, and if your job is still there, would you support that approach. He asked Mr. McCarter if he would comment on this. Mr. McCarter said he believed it was up to the Legislature as to what kind of dispute resolution mechanism they want to provide. He knew that no matter what was done there had to be some kind of dispute resolution, and even with a schedule of benefits there will be controversies as to whether the injury occurred, whether notice was given, etc. He said he was asked that question in '87 when he testified to the 1987 bill, and his answer at that time was no. He said he did believe that was a Legislative matter, and if his job was abolished he had confidence enough in his skills to believe his life would go on.

Senator Crippen said he was not here to abolish the job, but was firmly of the conviction that Mr. McCarter was going down the wrong road in that particular area. The fact that we have a Work Comp Judge, is the flag that pulls it out. Mr. McCarter said he believed sometimes in legal matters it becomes too much of a dispute. In Workers' Compensation, mediation has been put in to help alleviate some of that and they have, in the adoption of

their new rules, a rule that makes specific provision to request a settlement conference so there is some sort of ability for them to mediate. They are also trying to make the process a little more "head to head", at least in procedural matters. They are implementing an informal method to resolve, for example, pretrial disputes with regard to discovery. There is too much of it, and they will do their best to reduce it as much as possible, but people will still be entitled to their day in court.

Closing by Sponsor:

Senator Yellowtail said since there were no further questions, he would close.

EXECUTIVE ACTION ON SENATE RESOLUTION 2

Motion/Vote:

Senator Doherty moved Senate Resolution 2 do pass. The motion passed unanimously.

HEARING ON SENATE RESOLUTION 1

Opening Statement by Sponsor:

Chair Yellowtail said this resolution is to confirm the nomination of Bruce Loble as Chief Water Judge and recognized Chief Justice Gene Turnage to nominate Mr. Loble.

Chief Justice Gene Turnage said it was a privilege to stand before the Senate Judiciary Committee for the State of Montana, and as the appointing authority, it was also his pleasure to introduce the Honorable C. Bruce Loble, Chief Water Judge for the state of Montana. He said on March 29, 1993, the Honorable W. W. Leslie, as the incumbent Chief Water Judge, passed away and the Legislature, at that time, hired the successor to that office to be one of the nominees presented by the committee on Judicial nominations. The Commission was required by law to submit their nominees to the Chief Justice. He said he had received their report and one of the nominees on the slate was C. Bruce Loble. Bruce Loble's qualifications were obviously the very best and he had received the highest recommendation from the Commission as well. He said his qualifications were then and are now most impressive and if there was any interest at all he would appreciate it if the committee would obtain a copy for it's use. He stressed that Judge Loble is eminently qualified for the position he holds. His term ended June 30, 1993, it is a four year term and this nomination was required again under the law. There was but one application for the job which was C. Bruce Loble which spoke of the approval and satisfaction for the job he had done and was presently doing. He said he was happy to recommend the confirmation of C. Bruce Loble.

C. Bruce Loble said he had always placed great stock in the opinions of the Chief Justice and appreciated his recommendation. He said he looked forward to four additional years to build on what Judge Leslie did so well during his ten years as Chief Water Judge. He handed out a copy of the map of Montana (exhibit 1) together with an outline of the adjudication process. (exhibit 2) He said the map, the schematic of Montana broke it into 85 hydrologic basins and demonstrates where they are and what they are doing. On the reverse of that map there is a brief outline of how the adjudication works. He gave a brief history of the legal process of adjudication of water rights in Montana and explained the process of water rights, how it worked and how it was handled.

Proponents' Testimony:

Chris Tweeten, Attorney General's Office, said the Attorney General Mazurek supports C. Bruce Loble as Chief Water Judge for the state of Montana. He said Attorney General Mazurek has known Judge Loble for a long time and has great confidence in his legal and professional abilities. He said the AG's office is responsible for appearing before the Water Court with respect to a number of matters of great import to the state of Montana and they are convinced that if it is the Legislature's will that SB 76 is to be implemented, it requires that there be a person in the Chief Water Judge's office with the background and abilities Judge Loble brings to that position. He urged confirmation of Bruce Loble as Chief Water Court Judge.

Jim Mockler, Judicial Nomination Commission, said this would probably be the first, last and only time they would have a selection process as easy as this one. He said they had asked numerous questions on the working of the Water Court and had received a lot of information on how the Water Court works. He was amazed that it did work since it seemed designed for conflict, and it takes a person with unique character to make that system work. He said the fact that it did work was largely the responsibility of both Judge Leslie and Judge Loble. It does work and works very well, and since there were no negative comments made it was working to the satisfaction of the Water Rights people and he encouraged the committee to confirm the nomination of Judge Loble.

Opponents' Testimony:

None

Informational Testimony:

None

Questions From Committee Members and Responses:

Senator Crippen asked if a bill had not been passed in the Senate last week which extended the time for filing water rights. Judge Loble said he was not sure but believed it referred to water rights before July 1973 and what effect it would have on down stream water rights. He believed what Senator Crippen was referring to was the reservation process the Department of Natural Resources is involved in and the public agency had an opportunity to file application to reserve water for future uses. All of those water rights involve waters that are post '73. The adjudication of water rights really deals with what the constitution calls "existing" water rights, which are those water rights protected before July 1973. He said their cut-off period is really July 1, 1973 and what the Legislature does in postponing the reservation process will not have any affect on the water total, what affect it will have on the down stream states IS something he does not know.

Senator Crippen mentioned the federal water rights and asked Judge Loble if he had the authority to modify or reject the filing procedures passed around (exhibit 2). Judge Loble answered yes.

Senator Crippen asked what would give him a cause to modify a particular claim and Judge Loble gave the example of one he is in the process of modifying. He said it is a claim that came under the Gallatin River in which the Water Master had a hearing in which he did not permit evidence to come in as to the historic nature of the water right. He felt he could make a decision on the historic nature, and the place of use of the water right, based upon what was in the statement of claim filed by the claimant and based upon the field investigation report that the DNRC gave. The opponents of that particular claim wanted to present evidence that the claimant had not used water on that piece of property for a good many years. When they tried to put that evidence in, the Water Master said he was not going to hear it, and when it came to him they have the three step process and he concluded that the Water Master had erred by not allowing that evidence in. He vacated and modified his decision and they are now going to have evidence on the historic place of use. Most of the Water Masters' reports that come to the Water Judge are not objected to by the claimants.

Senator Crippen referred to Senate Bill 310 in the last session, and said they had a situation where the attorney representing the claimants erred and did not file certain rights. There were a number of people who came in and said we might have had 14 water rights that got filed and number 15, for some reason, got left out. Other information and forms were there, but they could do nothing, and said they did not have the authority under this modification, to go back in, modify it, and allow the claim to be modified with the decree. Judge Loble said the Legislature had decreed that anybody who filed, even though mailed late, their water rights had been terminated and the Supreme Court had said so. Senate Bill 310 now permits late claims to be filed up to

July 1. There is a water policy committee that is examining that particular bill.

Senator Crippen asked if there were changes so they would not have to go back through the whole application process. Judge Loble said he was reluctant to give an advance Judicial opinion because someone may raise that issue with the Water Court and he would probably be on it.

Closing by Sponsor:

Senator Yellowtail said he closed.

EXECUTIVE ACTION ON SENATE RESOLUTION 1

Motion: Senator Grosfield moved SR 1 do pass.


Discussion: Senator Bartlett, commenting on this Resolution as well as the previous one, said she knew both of the individuals and they were eminently well qualified and she was sure they would do an outstanding job in each of those positions. She asked the record show that she would urge the Judicial nominating committee and the Appointing Authorities, to do their level best to find and nominate as well qualified people in other positions so that we may have more participation in the Judiciary from most sectors of our society.

Vote: Motion passed unanimously with Senators Towe, Brown and Franklin leaving their aye vote.

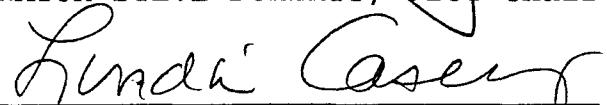
Chair Yellowtail thanked Governor Racicot and Judge Turnage as well as others who participated and came to the proceedings.

ADJOURNMENT

Adjournment: 11:20 a.m.



SENATOR STEVE DOHERTY, Vice Chair



LINDA CASEY, Secretary

SD/lc

ROLL CALL

SENATE COMMITTEE JUDICIARY DATE 12/8/93

NAME	PRESENT	ABSENT	EXCUSED
SENATOR YELLOWTAIL, Chair	X		
SENATOR DOHERTY, V. C.	X		
SENATOR BARTLETT	X		
SENATOR BLAYLOCK	X		
SENATOR BROWN	X		
SENATOR CRIPPEN	X		
SENATOR FRANKLIN	X		
SENATOR GROSFIELD	X		
SENATOR HALLIGAN			X
SENATOR HARP	X		
SENATOR RYE	X		
SENATOR TOWE	X		

Attach to each day's minutes

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SENATE STANDING COMMITTEE REPORT

Page 1 of 1
December 8, 1993

MR. PRESIDENT:

We, your committee on Judiciary having had under consideration Senate Resolution No. 1 (first reading copy -- white), respectfully report that Senate Resolution No. 1 be adopted.

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

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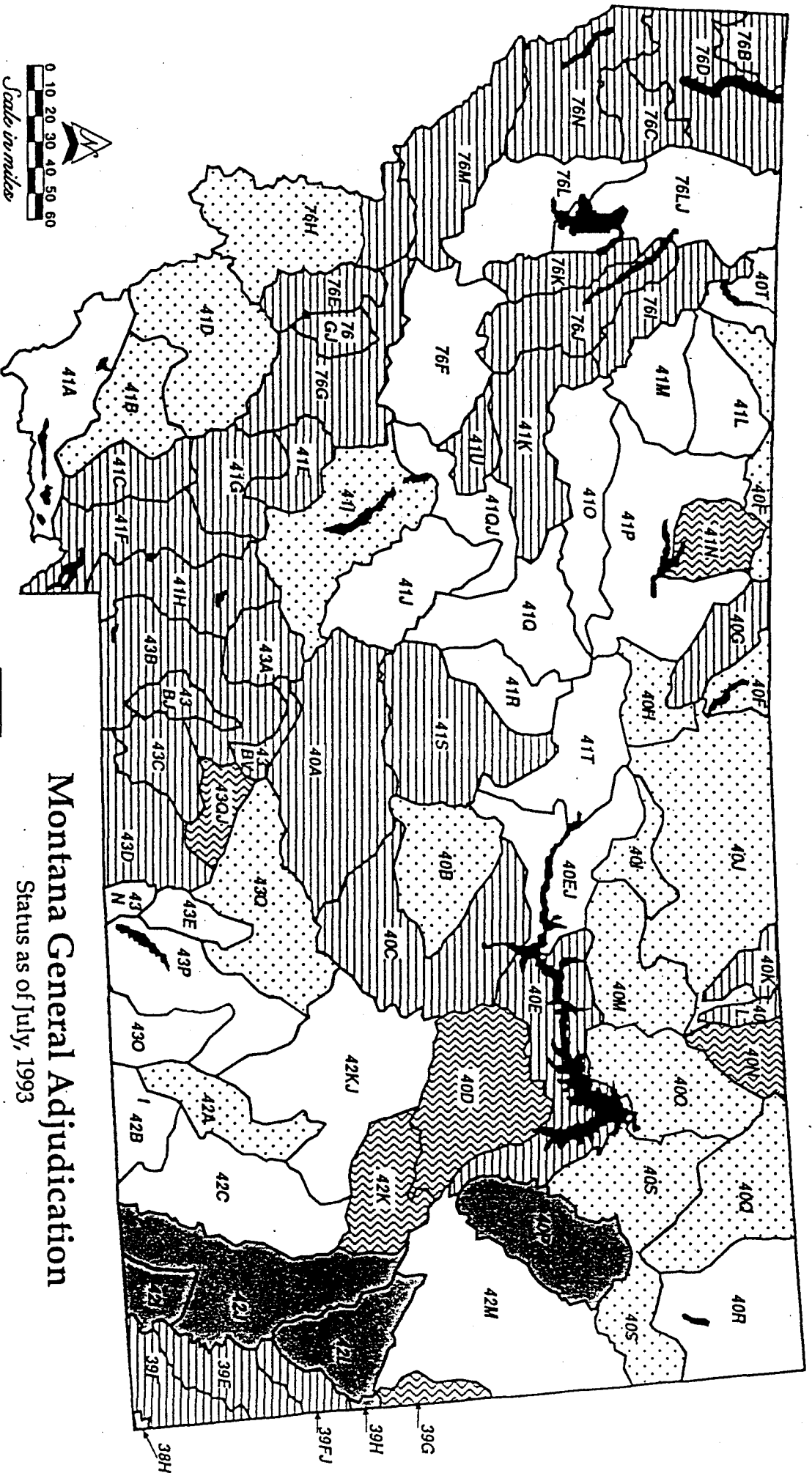
SENATE STANDING COMMITTEE REPORT

Page 1 of 1
December 8, 1993

MR. PRESIDENT:





We, your committee on Judiciary having had under consideration Senate Resolution No. 2 (first reading copy -- white), respectfully report that Senate Resolution No. 2 be adopted.

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



Montana General Adjudication

Status as of July, 1993

-  Basins Being Examined (15 basins)
-  Temporary Preliminary Decree (34 basins)
-  Preliminary Decree (6 basins)
-  Final Decree (6 basins)

SENATE JUDICIARY

EXHIBIT NO. 1

DATE 1/21/93

RII NO. SR1

MONTANA STATE SENATE-JUDICIARY COMMITTEE
DECEMBER 8, 1993
BY
C. BRUCE LOBLE
CHIEF WATER JUDGE

ADJUDICATION OF PRE-JULY 1973 WATER RIGHTS

- A. SB 76 passed Legislature in 1979
- B. General adjudication
 - 1. McCarran Amendment
 - 2. State Court jurisdiction over Federal water rights
- C. Water Court established - Located in Bozeman
 - 1. Five Water Masters - Rule 53 M.R.Civ.P.
 - 2. Water Judges - Full time District Court Judges
 - a. Judge Roy Rodeghiero - Roundup
 - b. Judge Joe Hegel - Miles City
 - c. Judge Ted Mizner - Deer Lodge
 - 3. Water Court jurisdiction
 - a. Exclusive over "existing rights"
 - b. Pre July 1973 priority dates
- D. April 30, 1982 filing deadline
 - 1. Over 201,000 claims filed
 - 2. 91,000 (45%) filed w/i 30 days of deadline
 - 3. Failure to file (w/ minor exceptions)
 - a. Conclusive presumption of abandonment
 - (1) Section 85-2-226 MCA
 - b. SB 310 allows late claims
 - (1) July 1, 1996
 - (2) 85-2-221(3) MCA
- E. Federal reserved rights
 - 1. Adjudication suspended pending negotiations
 - 2. Reserve Water Rights Compact Commission
 - a. Fort Peck Compact - 1985
 - b. Northern Cheyenne Compact - 1991
 - c. National Park Service Compact -1993
- F. 85 hydrologic basins in Montana
- G. DNRC examination of claims by basin
- H. Issuance of temporary or preliminary decree by basin
 - 1. "Notice of Availability" mailed and published
 - 2. Computer generated abstracts and index
- I. Objection period of 180 days w/ two 90 day extensions
- J. Objection list prepared
 - 1. "Notice That Objections Have Been Filed" mailed
 - 2. 60 day period to file Notice of Intent to Appear
- K. Case consolidation
- L. Status conferences held by telephone and in person
- M. Pretrial and evidentiary hearing
- N. Master's Report issued
- O. Water Judge adopts, modifies or rejects

IN THE WATER COURT OF THE STATE OF MONTANA
 YELLOWSTONE DIVISION
 CLARKS FORK YELLOWSTONE RIVER BASIN (43D)
 * * * * *

IN THE MATTER OF THE ADJUDICATION OF)
 THE EXISTING RIGHTS TO THE USE OF ALL)
 THE WATER, BOTH SURFACE AND UNDERGROUND,)
 WITHIN THE CLARKS FORK YELLOWSTONE)
 RIVER DRAINAGE AREA INCLUDING ALL)
 TRIBUTARIES OF THE CLARKS FORK)
 YELLOWSTONE RIVER IN BIG HORN, CARBON,)
 PARK, STILLWATER AND YELLOWSTONE)
 COUNTIES, MONTANA)

SENATE JUDICIARY
 EXHIBIT NO. 2
 DATE 12/8/93
 BILL NO. SRI

NOTICE OF OBJECTION
 AND REQUEST FOR HEARING

1. Claim # _____; Page Number(s) in Decree _____
2. Source _____; County _____
3. Type of Claim: Irr ____ Dom ____ Stock ____ Other Use ____
4. Name of Owner to whom the water right was issued:

5. Objector's name, address and phone number:

Last Name	First Name	Middle Initial
Street Address or Post Office Box		
City	State	Zip Code
Area Code	Phone Number	

6. Name of objector's attorney and address, if any:

Last Name	First Name	Middle Initial
Street Address or Post Office Box		
City	State	Zip Code
Area Code	Phone Number	

7. Basis of Objection:

- | | |
|--|---|
| <input type="checkbox"/> Ownership | <input type="checkbox"/> Point of Diversion |
| <input type="checkbox"/> Priority Date | <input type="checkbox"/> Means of Diversion |
| <input type="checkbox"/> Purpose of Right | <input type="checkbox"/> Period of Use |
| <input type="checkbox"/> Volume | <input type="checkbox"/> Flow Rate |
| <input type="checkbox"/> Place of Use and/or Maximum Acres | <input type="checkbox"/> Source |
| <input type="checkbox"/> Abandonment/non-perfection | <input type="checkbox"/> Other (specify) |

(TURN FORM OVER AND COMPLETE OTHER SIDE)

8. State the changes that you think should be made to this claim and why. State the specific ground and evidence on which the objections are based. (Use additional paper if necessary)

DATED this ____ day of _____, 19__.

Signature of Objector or
Objector's Attorney

UNLESS YOU ARE OBJECTING TO YOUR OWN WATER RIGHT, YOU MUST MAIL A COPY OF THIS OBJECTION TO THE OWNER OF THIS WATER RIGHT. COMPLETION OF THE CERTIFICATE OF MAILING, FOUND BELOW, REPRESENTS TO THE COURT THAT YOU HAVE MAILED A COPY OF THIS OBJECTION TO THE OWNER OF THIS WATER RIGHT.

CERTIFICATE OF MAILING

I, _____, do solemnly swear that on
(Your Name)
the ____ day of _____, 19__, I placed a copy of
this objection in the U. S. Mail, postage prepaid, addressed to:

Name: _____

Address: _____

City & State: _____

(Use additional paper if needed for more names & addresses)

(Your Name)

Please send this completed form to: Montana Water Court
P. O. Box 879
Bozeman, MT 59771-0879

DATE 12-8-93

SENATE COMMITTEE ON Judicial

BILLS BEING HEARD TODAY: SR 1 SR 2

< ■ >

PLEASE PRINT

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Check One

Name	Representing	Bill No.	Support	Oppose
<i>J. D. Tunney</i>	<i>Confederate</i>	<i>SR 1</i>	<input checked="" type="checkbox"/>	
<i>Chris Tweeten</i>	<i>Attorney General</i>	<i>SR 1 & 2</i>	<input checked="" type="checkbox"/>	
<i>Jim Mockler</i>	<i>Judicial Nominations Comm</i>	<i>SR 1 & 2</i>	<input checked="" type="checkbox"/>	
<i>PAUL GATZMEIER</i>	<i>Self</i>			

VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY

NAME J. A. Turnage
ADDRESS Justice Building
HOME PHONE 442-5585 WORK PHONE 444-5490
REPRESENTING Chief Justice
APPEARING ON WHICH PROPOSAL? Conf. Judge Loble
DO YOU: SUPPORT OPPOSE AMEND

COMMENTS:

WITNESS STATEMENT

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY