

## **MINUTES**

### **MONTANA HOUSE OF REPRESENTATIVES 53rd LEGISLATURE - SPECIAL SESSION**

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

**Call to Order:** By REP. DICK KNOX, CHAIRMAN, on December 9, 1993,  
at 11:05 A.M.

#### **ROLL CALL**

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

Rep. Dick Knox, Chairman (R)  
Rep. Rolph Tunby, Vice Chairman (R)  
Rep. Jody Bird (D)  
Rep. Vivian Brooke (D)  
Rep. Russ Fagg (R)  
Rep. Gary Feland (R)  
Rep. Mike Foster (R)  
Rep. Bob Gilbert (R)  
Rep. Hal Harper (D)  
Rep. Scott Orr (R)  
Rep. Bob Raney (D)  
Rep. Dore Schwinden (D)  
Rep. Jay Stovall (R)  
Rep. Emily Swanson (D)  
Rep. Howard Toole (D)  
Rep. Doug Wagner (R)

**Members Excused:** Rep. Jody Bird

**Members Absent:** Rep. Vivian Brooke  
Rep. Russell Fagg  
Rep. Dore Schwinden  
Rep. Howard Toole

**Staff Present:** Todd Everts, Environmental Quality Council  
Alberta Strachan, Committee Secretary

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

##### **Committee Business Summary:**

Hearing: REP. BOB GILBERT, District 22, Sidney,  
opened the hearing on HB74.

REP. WANZENRIED, District 7, Kalispell, sponsor of the bill, said  
it is proposed to change the agreement between the State of  
Montana and the Northern Cheyenne Tribe for reserve water rights  
in southeastern Montana. This is the second agreement approved  
by the legislature and it is the first agreement which has

required Congressional approval as well. Congress made some changes in the agreement ratified by the State. This bill proposes to bring Montana's agreement into compliance with the federal government. The reason the bill is before the committee is that Congress made changes in funding for the Tongue River Dam. In the previous agreement Congress will agree to provide funding for the dam. After the dam approval was made, the water rights were perfected. This issue is here in part because the Water Court Judge asked to look at the agreement. He questions what agreement should be acted upon, the state agreement or the Congressional agreement. It was determined to require the legislature to sign off on the agreement. There are three important changes which the Attorney General's Office will address.

#### PROPONENTS:

**Harley Harris, Assistant Attorney General,** stated that there was a specific process set forth in statute for contacting with Indian tribes and the federal government and the subsequent processing of changes. Given that these are multi-party or bi-party agreements, the respective governments themselves have their process for consenting to an agreement. After an agreement has been properly consented to, Montana law provides the contact is to be submitted to the Montana Water Court for incorporation into ongoing adjudication. In 1991 the compact was ratified by the Montana legislature and at that time by the Northern Cheyenne Tribe. Three provisions of the compact are pertinent to those committees deliberation over the bill. First is Article 5 which says that the terms of the compact may not be altered, voided or amended in any respect without the consent of the parties. The second part of the compact provided that the compact shall not be submitted to the Water Court until the Tongue River Dam is completed. The most important aspect of the Northern Cheyenne water rights compact is the repair and enlargement of the Tongue River Dam. The way the compact was originally set up was that the dam would be built first before the tribe's water rights were finally locked in in the Water Courts. The dam itself must be completed and the aspect of the water rights or the new water which is available to the dam must be available by 1977 or the tribe can void the compact. Subsequent to the legislature's ratification in the 1992, the compact was taken to Congress because of various consents of the federal government required ratification and the appropriation of the federal share of projects. In ratifying the compact, Congress made several changes. However, they fall into basically two major categories: mechanisms of funding were changed and the sequencing of the relation to the Water Court proceedings. While the U.S. Department of Justice stated that federal money could not be spent until confirmation by the Water Court. Approval from the Water Court initially was determined and then the money from the federal government would be approved. That immediately accelerated the whole Water Court process. Over the course of the last year, the compact was initiated. He presented letters

from the Department of Interior and the Northern Cheyenne Tribe indicating their support HB74 **EXHIBIT 1 and 2**

**Mark Simonich, Director, Department of Natural Resources and Conservation** stated his support of this bill. It is a very important piece of legislation for the department. After years of negotiations, the Northern Cheyenne reserve water rights compact was ratified by the legislature and signed by the State and Tribe in 1991. The Tongue River Dam is a state owned dam. This dam is a high hazard, unsafe dam. It is in need of repair because of the spillway design. Rehabilitation of the dam is a central feature of this settlement. The dam is not only being repaired but enlarged and in doing so this will provide the tribe with additional water from the storage of the dam for irrigation and other possible uses of the tribe. Some of the changes that Congress required the entry of the Water Court decree prior to the dispensing of federal construction funds. There is a short time frame to get this dam built. There are people on the project working doing some of the general planning, started into the environmental compliance phase regarding public scoping. If the Water Courts decree does not materialize soon the project will be slowing down. The compact envisioned \$11.5 million loan to the State from the federal government to help pay a portion of the state's share of the construction costs. Congress ran the money through the tribe instead of allocating the money directly to the Department of Natural Resources. The Tribe then makes a loan to the State and the State pays the money back into the Tribal trust. One of the provisions included in the original compact was 30,000 feet of storage water from the Big Horn Reservoir to the Northern Cheyenne Tribe. As a result of some concern voiced by the Crow Indian Tribe during the process, Congress amended the compact to provide assurances to the Crow that the Northern Cheyenne cannot begin to market the water for a ten year period unless the Crow Tribe agrees. The Congressional Act also established a provision for the BLM to transfer some land along the shore of the Tongue River Reservoir to the Northern Cheyenne Tribe. The department has no problem with the hiring preference for tribal members and has been actively involved for the last several months negotiating with the tribe on a hiring preference agreement. The Act also provides for fish and wildlife enhancement that must be approved by the State.

**EXHIBIT 3**

**Susan Cottingham, Staff Director, Reserve Water Rights Compact Commission**, presented a fact sheet to the committee. **EXHIBIT 4** She stated that she was in constant contact with other states and with congressional staffers regarding matters of water rights. These Indian water rights settlements are very complex and costly. Existing non-Indian water users have established water rights in a basin, and there is a tribe establishing that they have existing water rights through the federal water right process. There is usually not enough water to go around, and one of the benefits of the settlement is negotiations to improve the storage and create some new water to solve conflicts. This is

the first compact established which has been approved by Congress.

**REP. MARIAN HANSON, District 100, Ashland,** stated that her town would be destroyed if this dam goes. The dam is in good shape but the spillway is the concern. It is imperative that the Congressional changes be made. The ratification of these entities has been a very delicate process.

**OPPONENTS:**

None.

**QUESTIONS BY COMMITTEE:**

**REP. FOSTER** asked how much BLM land was going to the tribe. He then questioned the hiring preference. He asked, regarding fish and wildlife enhancement, how much money this will entail. NIPA compliance and its cost was then questioned.

**Mr. Simonich** stated that 320 acres would be involved. Regarding the hiring process, it is very unspecific at this time. During negotiations between the tribe over a period of months, quotas were studied which the tribe rejected. The identification of jobs on project were considered but closure has not been met. Because the project is a cost share agreement, fish and wildlife enhancement will cost the State. The cost will be \$1.1 million for this enhancement. Use of some federal available sportsmen dollars available is anticipated. The time frame would be 1996-1997.

**Gary Fritz, Administrator, Water Resources Division, Department of Natural Resources and Conservation,** stated that the cost for the NIPA compliance would be somewhere in the amount of \$600,000 to \$700,000 which is a total federal responsibility. The State will be reimbursed for monies spent on NIPA compliance.

**REP. STOVALL** said that, when the Cheyenne Tribe changed chairmen, the new person did not agree with this compact and said he was going to determine it voice. **REP. STOVALL** asked whether a tribal chairman could do this.

**Mr. Harris** said he did not know. Since Congress has blessed this compact. there is some fairly limited discretion the tribe has in that connection. This compact was somewhat contentious in the Tribe and while it was in Congress there were tribal elections going on. After it was passed through the Congress one of the provisions of the federal act required that the compact be submitted to the Tribe for a referendum by tribal members. The Tribal counsel is now strong proponents to this venture. Once this act is ratified in the Water Court the tribe cannot back out because there are legal documents that are binding.

**REP. SWANSON** asked if the state is committing itself to further

and unknown state funding or whether Fish, Wildlife and Parks will come through with the money.

**Mr. Simonich** said that other than the \$1 million that the fish and wildlife enhancement there is a firm grasp on all the dollars that are involved and what the state responsibility is. In conversations with the Department of Fish, Wildlife and Parks regarding the money, until recently it was believed that would be the case. The only question in this point in time is if anything changes in Congress, it begins to change here also. If there is an effort to take monies which comes from handguns and ammunition, that money may be used at a national level for crime control rather than fish and wildlife enhancement. The Department feels that the money is available unless some major changes.

**REP. WAGNER** questioned the Crow's marketing the water.

**Ms. Cottingham** said that the tribes do have the ability to market their water but if it sells the water anywhere off the reservation it must be in full compliance with state law. The tribes have agreed to follow all of the provisions in state law and marketing off of the reservation. BLM can only market water in two year time periods without further notice to the tribes and that is deference to the Crow tribe who wanted to get their negotiations started with the State and get their water rights settled before the Northern Cheyenne could go forward.

**REP. WAGNER** then asked about the attitude of the Crow and their unhappiness in this situation.

**Ms. Cottingham** said that the attorneys of the Crow tribe state that the federal legislation is preferable from their prospective because it has the amendments they desire. There is no official communication from the Crows because it has been so difficult to communicate. The Department has spoken to members of the tribe that are here in the Legislature.

**REP. WAGNER** questioned the environmental analysis and its status.

**Mr. Simonich** said that the scoping process has begun and their are people in the field doing environmental checks but have not done any full fledged writing an environmental impact statement because of the status of the funding.

**REP. WANZENRIED** closed on the bill.

#### EXECUTIVE ACTION ON HB74

**Motion:** **REP. HARPER** made a motion DO PASS on HB74.

**Discussion:** **REP. WAGNER** stated that this was a very urgent issue but he had reservations about this type of legislation because of

the critical balance.

**REP. HARPER** said that the Legislature was lucky to have had the opportunity to approve these amendments because this is one process that is working. This compact process is one that is working and with all of the efforts that this Legislature has put forth, this is probably one of the best examples of how people can work together when they want to. It also shows how different levels of government and actually different nations can work together if they want to.

**REP. GILBERT** said this is one of several compacts not ratified by Congress. Negotiations with the Rocky Boy tribe and also with the Crow tribe in which we need to continue this process. Until we have all of these water rights adjudicated and settled, the citizens of Montana, both the tribal members and non-tribal members are all citizens of the same state. We are trying to go forward to do the right thing.

**Motion/Vote:** A motion of DO PASS was voted on with a 15-1 vote of affirmative. **REP. WAGNER** voting no.

**ADJOURNMENT**

**Adjournment:** 12:00 P.M.

  
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**REP. DICK KNOX, Chairman**

  
\_\_\_\_\_  
**ALBERTA STRACHAN, Secretary**

DK/as

HOUSE OF REPRESENTATIVES  
NATURAL RESOURCES COMMITTEE

ROLL CALL

DATE 12-9-93

NAME	PRESENT	ABSENT	EXCUSED
REP. DICK KNOX, CHAIRMAN	X		
REP. ROLPH TUNBY, VICE CHAIRMAN	X		
REP. JODY BIRD			X
REP. VIVIAN BROOKE			X
REP. RUSSELL FAGG			X
REP. GARY FELAND	X		
REP. MIKE FOSTER	X		
REP. BOB GILBERT	X		
REP. HAL HARPER	X		
REP. SCOTT ORR	X		
REP. BOB RANEY	X		
REP. DORE SCHWINDEN			X
REP. JAY STOVALL	X		
REP. EMILY SWANSON	X		
REP. HOWARD TOOLE			X
REP. DOUG WAGNER	X		

HR:1993  
wp:rollcalls.man  
CS-10



## HOUSE STANDING COMMITTEE REPORT

December 9, 1993

Page 1 of 1

Mr. Speaker: We, the committee on Natural Resources report that House Bill 74 (first reading copy -- white) do pass.

Signed: \_\_\_\_\_

*Dick Knox*  
Dick Knox, Chair

Committee Vote:  
Yes 15, No 1.

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*12-9-93*  
*12:35*



12/08/93

15:00

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B I A BILLINGS

EXHIBIT 1

002/002

DATE 12-9-93SB NATURAL RESOURCES

## United States Department of the Interior

TAKE  
PRIDE IN  
AMERICA

## BUREAU OF INDIAN AFFAIRS

Billings Area Office

316 North 26th St.

Billings, Montana 59101

IN REPLY REFER TO:

Land and Minerals  
Code 350

DEC 08 1993

Harley R. Harris  
Assistant Attorney General  
Department of Justice  
P.O. Box 201401  
Helena, Montana 59620-1401

Dear Mr. Harris:

I have reviewed HB74, which is intended to remove any doubt that the Montana Legislature has consented to those parts of the Northern Cheyenne Indian Reserved Water Rights Settlement Act of 1992 (P.L. No. 102-374) that differ from the Northern Cheyenne-Montana Compact.

We support the efforts of the Montana Legislature in obtaining legislation to conform to P.L. 102-374 and to satisfy the requirements of the Chief Judge Loble of the Montana Water Court.

This water settlement is of vital importance to the State of Montana and the Northern Cheyenne Tribe. Favorable action by the Legislature will allow the Tongue River Dam project to proceed and remove any uncertainties that may exist.

Sincerely,

David W. Pennington,  
Federal Chair, Northern Cheyenne  
Implementing Team

cc: R. Aldrich  
Ronny Skates  
James Rawlings  
Robert Delk  
Area Director  
John Duffy  
Joe Little, Special Assistant, Office of Assistant  
Secretary-Indian Affairs  
Joe Miller, Bureau of Reclamation

DEC- 9-93 THU 11:29

EXHIBIT 2  
DATE 12-9-93  
SB NATURAL RESOURCES



- WOHEHIV -  
The Morning Star

**NORTHERN CHEYENNE TRIBE**  
INCORPORATED

P.O. Box 128  
LAME DEER, MONTANA 59043



- WOHEHIV -  
The Morning Star

**RECEIVED**

DEC 09 1993

ATTORNEY GENERALS OFFICE  
HELENA, MONTANA

December 9, 1993

Harley R. Harris  
Assistant Attorney General  
Department of Justice  
P.O. Box 201401  
Helena, Montana 59620-1401

Dear Mr. Harris:

I write on behalf of the Northern Cheyenne Tribe to indicate the Tribe's support for HB 74, which is a bill intended to clarify that the Montana Legislature consents to the provisions of the Northern Cheyenne Indian Reserved Water Rights Settlement Act of 1992 (Pub. L. No. 102-304, 106 Stat. 1188).

The Northern Cheyenne Tribe remains fully committed to the Northern Cheyenne-Montana Compact and the modifications to the Compact contained in the federal act. Passage of HB 74 is the most effective way to ensure there will be no delay in the completion of the Tongue River Dam project and the final settlement of the Tribe's water rights. This matter is of vital importance to the Northern Cheyenne Tribe and we accordingly urge the passage of HB 74.

Sincerely,

William Walsaling, Vice President  
Northern Cheyenne Tribal Council

cc: Calvin Wilson, Tribal Attorney  
Richard Aldrich

TESTIMONY OF THE  
DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION  
ON HOUSE BILL 74

BEFORE THE HOUSE APPROPRIATIONS COMMITTEE

DECEMBER 9, 1993

A bill for an act entitled: "An Act Providing Consent to the Northern Cheyenne Indian Reserved Water Rights Settlement Act of 1992 and Certain Specified Amendments to that Act; Conforming the Northern Cheyenne-Montana Water Rights Compact to that Act; and Providing an Immediate Effective Date."

After years of negotiations, the Northern Cheyenne Reserved Water Rights Compact was ratified by the 52nd Montana Legislature and signed by the State and the Tribe on June 11, 1991. Federal legislation was introduced to approve the compact and was signed by President Bush on September 30, 1992. Some additions were made to the bill in Congress. The purpose of this bill is consent to the Act and to conform the Montana-Northern Cheyenne Compact to the Congressional Act.

Rehabilitation of the state-owned Tongue River Dam is the central feature of the settlement. The enlarged dam will furnish the Tribe with a portion of its water supply as negotiated in the Compact, and the rehabilitation will substantially increase the safety of the dam, bringing this project in line with today's dam safety requirements.

Congressional action added provisions to the Compact that DNRC believes to be appropriate. Following are the significant modifications made to the Compact by Congress.

1. Entry of a water court decree approving the Compact prior to dispensing of federal construction funds.
2. Originally an \$11.5 million loan to the State of Montana to pay a portion of the State's share of construction costs was to be repaid to the federal treasury; the loan is now repaid to the Northern Cheyenne Tribe.

(Over)

3. Congress amended the provisions relating to storage from Big Horn Reservoir to address the Crow Tribe's concerns. No portion of the 30,000 acre-feet of storage water from Big Horn Reservoir allocated to the Northern Cheyenne Tribe may be marketed for 10 years unless the Crow Tribe agrees. Any water marketing contract out of Big Horn Reservoir requires advance notice to both Tribes, is subject to alteration or termination pending the resolution of the Crow Tribe's water claims and is limited to 2 years with a right of renewal after notice to the tribes.
4. Certain BLM land on the shore of Tongue River Reservoir is transferred to the Northern Cheyenne Tribe.
5. The Act requires construction contractors on the Tongue River Dam repair to provide a hiring preference to Northern Cheyenne tribal members.
6. The Act provides for fish and wildlife enhancement that must be cost-shared by the state.
7. The Act requires NEPA compliance in the implementation of the Compact.

Conforming the Compact to the Act is critical if we are to move ahead with the repair of the Tongue River Dam in an expeditious manner. This project is the administration's highest priority water project and will require concentrated effort over the next four years. The time required to decide the issue of whether the compact or act is to be entered in the water court decree entry process would delay construction at the dam by about one year and result in increased costs and potentially place the entire compact in jeopardy.

House Bill 74 is needed to provide Montana's consent to the federal act; this Special Legislative Session is being asked to provide this consent because waiting for the next regular session would result in costly delay. I urge your support for House Bill 74.

FACT SHEET

HB 74

A Bill to Amend the Northern Cheyenne-Montana Water Rights Compact

In 1991 the Montana Legislature ratified the water rights settlement reached by the Northern Cheyenne Tribe and the State of Montana. The centerpiece of the agreement was the repair and enlargement of the State-owned Tongue River Dam, an unsafe dam upstream of the Reservation. Federal cost share commitments and other provisions required Congressional approval; and in September 1992, Congress passed the Northern Cheyenne Indian Reserved Water Right Settlement Act of 1992. Subsequently, in January of 1993, the Northern Cheyenne Tribe ratified the settlement by referendum provided for in the federal legislation.

The federal legislation differed from the Compact in a number of areas, expanding the scope of the State-ratified compact to include federal concerns on implementation, National Environmental Policy Act compliance, and funding specifics. Amendments were also made to address concerns raised by the Crow Tribe and to implement specifics such as a land trade and construction hiring preference. These Congressional changes have been agreed to by State officials from the Department of Natural Resources and Conservation, the Reserved Water Rights Compact Commission, and the Attorney General's Office as well as water users.

One of the key changes made was to require entry of a water court decree approving the Compact prior to dispensing of federal funds. In March 1993, the parties petitioned the Montana Water Court; and on November 16, 1993, the Court held a hearing to determine procedures to be followed in the decree process. Key questions were raised as to which settlement should be entered: the one ratified by the State Legislature or Congress?

HB 74 is designed to clear up this ambiguity through state ratification of the federal legislation, allowing the Water Court to proceed with a single document. The alternative risks delays which could jeopardize funding for the Tongue River Dam and ultimately the Compact.

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Key Congressional changes or additions to the State-approved Compact include:

- The State of Montana will pay a portion of its share of the construction costs through repayment of an \$11.5 million loan from federal monies appropriated to the Northern Cheyenne Tribe and repaid to the Tribe (rather than the federal government) over 39 years. The 1993 Legislature, in HB 12, authorized the issuance of coal severance tax bonds as security for this loan.
- Congress amended the provisions relating to storage from Big Horn Reservoir to address the Crow Tribe's concerns. No portion of the 30,000 acre feet of storage water from Big Horn Reservoir allocated to the Northern Cheyenne Tribe may be marketed for 10 years unless the Crow Tribe agrees. Any water marketing contract out of Big Horn Reservoir requires advance notice to both Tribes, is subject to alteration or termination pending the resolution of the Crow Tribe's water claims and is limited to 2 years with a right of renewal after notice to the Tribes.
- Certain Bureau of Land Management land on the shore of Tongue River Reservoir is transferred to the Northern Cheyenne Tribe.
- The Act requires construction contractors to provide a hiring preference to Northern Cheyenne tribal members.
- The Act provides for fish and wildlife enhancement and sets up procedures for NEPA compliance.

## HOUSE OF REPRESENTATIVES

## VISITOR'S REGISTER

Natural Resources COMMITTEE BILL NO. HB 74  
 DATE 12-9-93 SPONSOR(S) Wangenried

PLEASE PRINT

PLEASE PRINT

PLEASE PRINT

NAME AND ADDRESS	REPRESENTING	BILL	OPPOSE	SUPPORT
MARK Simonich	DNRC			X
Jim Jensen	MEIC			X
Susan C. Hingham	PWRCC	HB 74		X
Harley Harris	AG	HB 74		X

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