MINUTES

MONTANA SENATE
54th LEGISLATURE - REGULAR SESSION

SUB COMMITTEE ON JUDICIARY - WATER RIGHTS

Call to Order: By **CHAIRMAN RIC HOLDEN**, on March 4, 1995, at 7:00 A.M.

ROLL CALL

Members Present:
Sen. Lorents Grosfield (R)
Sen. Ric Holden (R)
Sen. Reiny Jabs (R)
Sen. Mike Halligan (D)

Members Excused: None

Members Absent: None

Staff Present: Valencia Lane, Legislative Council
Phoebe Kenny, Committee Secretary

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

Committee Business Summary:
Hearing: SB 387
Executive Action: SB 387

HEARING ON SB 387

Opening Statement by Sponsor:

Proponents' Testimony:

Jan Rehberg, Attorney, Helena said she prepared amendments which dealt with some of the issues that were raised in the last hearing. **(EXHIBIT 1)** In addition, there were a few cleanup amendments. She had no major objections to the amendments which were given at the last hearing. Only one gave her some pause, the amendment proposed by the Compact Commission **(EXHIBIT 2)** that amended page 3, lines 9 and 10, wherein a person filing a late claim had recourse to object. They also tried to provide a system where a definite date for negotiating a compact would be more certain. She had no problem with this but thought the way the amendment was written did delegate some additional power to the Compact Commission. Her suggestion was to substitute the present wording of "...after the date specified in a compact..."

with the words "...after the date approved by the water court and specified in the compact". She discussed the problem of the way the system worked with **Barbara Cosens**, from the Compact Committee. Some of the compacts are negotiated before the water rights are decreed in those basins and sometimes even before the temporary decrees are out. They talked about the possibility of sending notices to people in those basins, apprising them of compact negotiations at the time they are going on. In this way they could review their water rights and perhaps petition the court to close it to further claims. She thought if they put 'approved by the water court', it gave just enough leeway for an Advisory Committee to consider how best that could be done. She stated that the notice issued with the compacts, and the regular water users, caused some problems in the past and should be addressed by the Advisory Committee. With the suggestion that we put.. 'approved by the water court'.., in there, she had no problems with the remainder of the suggested amendments.

Ms. Rehberg continued there was a concern that came up frequently, i.e., about continuous use for water rights, and really the ones that should be entitled some relief were those who had been continuously used. Therefore, she put that into the Statement of Intent, as guidance for the court and whomever else devised rules which should be considered. She also addressed the cost factor. She suggested if an objection was filed to a late claim, there be an automatic assessment of whatever amount the committee felt would be appropriate. Then let the court assess fees, give it the flexibility for those cases wherein the court felt they shouldn't be assessed, or, that it should be an insignificant amount. **Ms. Rehberg** explained she didn't want to preclude anyone from filing objections just to run up costs against someone. She thought another amendment, of some significance, was including attorneys' fees on page 4, line 25. She felt where it said the court may award other fees and expenses against the party, it should be spelled out, including attorneys' fees. She concluded the other amendments were just cleanup amendments which she thought removed some double negatives and improved the language. She continued with another amendment on page 4, line 24. She felt the way the bill was written it concerned the cost needed in reaching a determination of whether to relieve a party from abandonment. She expanded that statement somewhat to reaching a determination whether to relieve adjudication of the objection. That was, perhaps, more restrictive than intended the way it was written. She expanded it a little, to give the court some additional authority to recoup its costs. She finished by saying the attempt was to let the courts use their equable powers in the way they had historically. She reasoned, from a public policy perspective, that it was important they prepared a solution that would be viable into the future and which gave the people the sense of justice they craved when they went into the courts.

John Bloomquist, Montana Stockgrowers Association said their interests were in sections 5 through 7 of the bill and he believed the amendments offered by Holly Franz to section 6 of the bill on page 7, and their suggested amendment on line 15, that the word shall be changed to 'may', made the provision to grant the court the discretion it needed in those instances on any motion for dismissal. Also, Mrs. Franz's amendment added the ability of parties to object on abandonment issues, enlargement issues, and due diligence issues which he thought were legitimate concerns which could arise on previously declared rights, which should be addressed if parties chose to raise the objection. The only other suggestion they had was in section 5 on the Advisory Committee. It was that the district judge who served as a water division judge, be added to that committee in case there were court rules to be written. **Mr. Bloomquist** believed a water division judge served a valuable role there. He stated again their position on the bill was as proponents of sections 5-7. The late claims issue, Stockgrowers Water Committee, and the memberships were fairly equally divided on that particular issue at this time.

Holly Franz, Montana Power Company commented that she would be happy to assist with questions and suggested that her amendment be adopted. **(EXHIBIT 3)**

SEN. TOM BECK, SENATE DISTRICT 28, Deer Lodge, asked Jim Quigley to tell his story so that the Committee understood why they were constructing the bill.

Jim Quigley explained what happened to him as an individual who owned water rights. The water rights were in his ranch decree for many years. When the adjudication process came in 1988 he had to hire an attorney to make certain the rights were filed correctly. Between 1988 and January 1993 he spent about $25,000. His four cases went to court from January 1993 to January 1994. Those cases cost him $35,000. The cases repeated what had already been done. He just wanted protection for water rights which had already been declared.

Jim Spangelo, Special Council for the City of Havre, presented his testimony. **(EXHIBIT 4)**

<u>Opponents' Testimony</u>:

Mark Simonich, Director of the Department of Natural Resources, indicated the bill was a difficult one for the Governor because of the issues tied to it and the affect they had on people's lives. The Administration felt that through the steps previously taken, and the recommendations that had been made by the Committee and accepted during the last regular session of the legislature, adequate steps were taken which allowed late claimants into the process and gave them a partial remission. They would be subordinated to the timely filed claimants, at least 1000 back into the system, and up to the point of time of

additional filings. The Administration was concerned about the finality of the adjudication, whether they would have something final, and be able to resolve it in basins throughout the state. They also felt the provisions, which were added two years ago and opened the process for an additional three year filing period, gave that finality. In July of 1996, the filing period will be closed again and the subtotal of those new claims will be final. It won't be a matter of claims continually being filed through the preliminary decree stages. He indicated their testimony focused solely on the late claims issue. The Administration didn't object to actions in the bill which allowed the Committee to work with the Attorney General's office and the water court to find a way to resolve the raised adjudication question, in order to minimize the impact on those individuals who filed their rights and had decreed water rights.

Mark Simonich added that a third part of the bill dealt with the Supreme Court appointing a review committee. That was an issue which the Department of Natural Resources and Conservation (DNRC), and the Attorney General's office looked at in quite some detail during the last year and had visited with Judge Loble and Governor Racicot concerning the bill. The idea eliminated legislation and had the Governor appoint an executive review committee which had a slightly different focus as it would be appointed by the Governor rather than a judicially appointed committee. They saw either mechanism working and probably serving a very good purpose, which made sure they streamlined the adjudication process as well as possible, so the DNRC could eliminate field reviews and their demands for details and other types of details which were allowed by the water court. He felt many situations had room for improvement, but believed they could also be done through an executive action, not necessarily a legislative action. He commented the Governor raised no opposition one way or the other.

Chris Tweeten, Attorney with The Department of Justice, stated the Attorney General and the Governor's office always had a unified position with respect to the issue of late claims. He agreed with the position which had been expressed by the DNRC on behalf of the Governor and the Administration. He felt that the work done on the late claims issue by the last legislative session and the time devoted by the Water Policy Committee, had not been emphasized strongly enough in the deliberations that previously had taken place concerning this bill. He wanted to make sure the members of the subcommittee were aware of the study the Water Policy Committee had done because they reached some conclusions, with respect to late claims, that were at odds with the approach taken with the bill. With respect to the amendments that were pending, he knew that Mrs. Rehberg had been in consultation with Barbara Cosens from the Compact Commission and they had reached a level of agreement. He had not studied Holly Franz's amendments in detail but echoed Mr. Simonich's comments that the res judicata issue was an issue that could probably be adjusted in this bill. He thought Mrs. Franz's amendments

probably clarified the approach that was taken in the bill and he certainly had no objection to the general proposition that a water rights decree issued by a district court in Montana ought to be binding on the parties and their successors in interest. He didn't think it impaired the integrity of the adjudication to carry that rule forward with respect to how decrees were treated in the adjudication process and didn't necessarily disagree in principle with that idea. He thought the Advisory Committee was a good idea and suggested the Attorney General be a member of the Committee by statute, rather than leaving it up to the discretion of the Chief Justice to make the appointment. He felt there should be a place on the Committee for a member of the federal government. The federal government was the largest single claimant of water rights on the State of Montana, and it would be appropriate to give the federal government a voice on the Advisory Committee. He suggested that could be a possible amendment.

SEN. BECK said he was mainly concerned about water rights that were filed late in the State of Montana. But he felt there were some adjudicated irrigation water rights that could be bounced out of the system as soon as the temporary preliminary decree came into effect. He felt the people who used that water right previously would not be able to use it when the whole scenario progressed. Secondly, he commented the late claims issue had been here two sessions and he hoped some agreement could be made to correct the process. He also addressed the expense, the litigation, and the paper work claimants must go through. He added there were many unknowns and hoped they could be dealt with. He thought bureaucracy should not be admitted in the Advisory Committee, but rather the Committee should be a source of information to bureaucracy. He left the makeup of the Advisory Committee to the discretion of the Committee, but suggested they work with the water courts and the Governor's office concerning the roster for the Committee. His understanding was the Advisory Committee made suggestions to the water court on how to expedite the adjudication process.

Questions From Committee Members and Responses:

SENATOR LORENTS GROSFIELD, Senate District 13, Big Timber, asked **SEN. BECK** if the issue of the Committee and making the process work better was directly related to late claims.

SEN. BECK answered no.

SEN. GROSFIELD asked **Judge Loble** if the water court or the department, prior to the issuance of the Temporary Preliminary Decree, sent or gave notification of verification of having received the file of those who did file.

Bruce Loble, Chief Water Judge, answered that from the water court standpoint, whenever a basin-wide mailing was done, a flyer was included which contained a "notice of opportunity" to file a

late claim. He believed the Department of Natural Resources had advertised state wide.

SEN. GROSFIELD said he was not referring to the late claim issue but was talking about mailing his claim a month ahead of time, thinking his claim would be filed by the deadline. However, something happened to the mail truck, like it was bombed, for example. Or, even if they were received on time, would he be notified that the department actually received his claim?

Judge Loble responded that the department sent an acknowledgement of a water right claim, but he didn't know how long after the filing. If the claim was not received by the department, however, nothing would be sent back. Therefore, those whose claims were not received by the department, would never know unless they checked on them.

SEN. GROSFIELD asked if anyone else could talk about how quickly an acknowledgement went and what form was used?

Gary Fritz, Department of Natural Resources, Administrator Water Resources Division, said they sent an acknowledgement to the claimants from whom they had received a claim, but he was unsure of the time frame. He felt it would have been a reasonable amount of time after the claim was filed.

SEN. GROSFIELD asked from the Attorney General's perspective if no deadline was in the bill, would that jeopardize their adjudication process under the McCarran Amendment?

Chris Tweeten answered he was not sure the deadline issue, by itself, was critical under the McCarran Amendment or that it made a difference where they put the deadline. He believed the wish to revive a water right that no longer existed was the real problem. In 1982, when the filing deadline passed, according to the Montana Supreme Court, those rights that were not filed on time ceased to exist as legal water rights. Now certainly the water users may have continued, because of the acquiescence of the water users on the stream. But, according to the Montana Supreme Court the water rights ceased to exist. He stated the problem remission bills cause for the adjudication arose from the fact that the legislature was able to essentially recreate non-existing water rights and put them back in the system, to the prejudice of people who filed on time. He felt this was the main concern and not the filing deadline.

Don MacIntyre, Chief Legal Council Department of Natural Resources explained that the legislature created the deadline in previous sessions. As a result, the Montana Supreme Court determined the effect of the failure to file and the meaning of conclusive presumption abandonment, was essentially forfeiture. Remission in and of itself didn't become a McCarran Amendment issue in the sense that the McCarran Amendment was jurisdictional. As they called the whole judication under

McCarran, they started to get into the issues of finality. Adjudication is pending in state and federal courts right now. If the federal government and the Ninth Circuit of the Supreme Court believed Montana's water court system was failing, it would be brought back into the federal court system. Opening up the deadline for remission was a concern; continuing to open it up created a greater concern.

SEN. GROSFIELD asked if a late claim was still enforceable under the district court decree until such time it got to the temporary preliminary decree stage that was enforceable?

Judge Loble thought it was practical that people continued to use their water rights even though they weren't filed in a timely fashion. He said the statute read that they were presumptively abandoned. If the water court didn't operate in that area then people continued to use the right. He added there was a rather unknown decision which went to the Montana Supreme Court years ago in which Jack Gehring, from the Helena area, didn't file his water right claims and the dispute came to the Supreme Court. The Supreme Court, in an unpublished opinion, said his water rights were terminated because he hadn't filed them. The water court wasn't in the area and he was unsure if Mr. Gehring was using his water rights.

Janice Rehberg also addressed Senator Grosfield's questions on the issue of forfeiture. She stated there was a US Supreme Court decision dealing with drug forfeitures which said a hearing must be had on forfeiture. Her position, based on the US Supreme Court decision, was that Senator Grosfield's assumption was correct. Until the time there would be some ruling, such as a preliminary decree in which there was a particularized inquiry into the forfeiture question, the statute might say these water rights be forfeited. But until the inquiry into the issue with respect to those rights, she believed they are forfeited and they are legitimate up until that time.

Don MacIntyre responded to Senator Grosfield's question and explained until there was an enforceable decree by the water court, the decree issued by district court was still alive and if there was a late claim it was still alive within the terms of the decree. It was up to one of the parties to make a call on the subordinated right. Until that time, the person could use the water as he always had.

SENATOR HOLDEN asked **Ms. Rehberg** what her thoughts were on the finality issue.

Ms. Rehberg thought the key point was that without consideration of equable principle and the rules of civil procedure, the adjudication became different than any other civil adjudication we have in the state. She tried to adopt the principles which were traditional and used everywhere. She stated that in any other judgment on an issue, brought into court, there were always

provisions which helped adjust for human error. In any other case in this state, or any other state, and in any federal court, the concepts of equity permit one to go into court to say the rule of law was known but directed by fairness, so listen to my story, and the court then made a decision on the question. She hadn't heard whether the Governor or the Attorney General had a reason why water right users in the State of Montana were treated differently than others in any other court in the country. She stressed these rules were fundamental to our justice system and if equity was taken out of the justice system we were in big trouble. She knew there were concerns about time limits and cost effectiveness but that was the justice system, and the goal was to protect Montana water rights. She strongly believed that equity in the justice system was critical and the courts needed time to consider the fairness of things. She felt if that was taken out of the courts it would be pretty cold to look at.

SENATOR MIKE HALLIGAN, SENATE DISTRICT 15, Missoula said the equity part was an appealing way to go but he was very concerned with finality, and didn't think a fiscally conservative, Republican dominated legislature, wanted to fund the process forever. He thought parents gave children deadlines and sometimes adults needed to be given deadlines also, especially for very critical issues such as water rights. He thought 1996 was reasonable and it couldn't be put off into the future until all the basins were adjudicated.

Janice Rehberg commented also on the finality issue that adjudication, in the sense of this bill, would be as final as the court determined it should be. What we did was take the decision and said it's up to the court to decide whether the reasons are good enough to extend the system. She thought the court was fully capable of doing that. She felt it was not a matter of it never being final, rather that the decision would be moved from the legislature to the judicial body. This freed the judge to impose whatever conditions he thought appropriate.

SENATOR JABS, SENATE DISTRICT 3, Hardin asked why Mr. Quigley went through his litigation? He wondered if it was because someone wanted to take his rights away or if the state had said he didn't have a right. He was curious about all the paper work and litigation he was going through at the time.

Jim Quigley answered in the first case, a neighbor wanted part of his water right. The neighbor already took Mr. Quigley's folks to Supreme Court over the ditch. His grandfather went through the Supreme Court himself and owned the water rights on the ditch, and repeated the process two or three times. In the second case, a miner connected with the Quigley name came in. The miner hadn't bought the mining claim until after the 1980's. He was 80 years old and couldn't understand that the creek was decreed from mining to agriculture. Mr. Quigley continued he still had to go to court even though the miner couldn't hire a lawyer. He spent time in court with the miner questioning him.

He said it was interesting. The third case, was another mining case in which it was stated right in the decree that this party took nothing. The water court said since they had something to do with the rights in the late thirties they possibly could refute his claim after '73. That was not good enough; they wanted the one the Quigleys established. But the Supreme Court decided in 1930 they should have nothing. The last case is the one he is in right now and is over a decreed creek in 1913 and 1940. Neighbors had expanded their property and wanted the decree to fit themselves and still hold him with the old decision. He explained his costs were very high even though the last case went to court in September. He believed the paper work and the costs of the process were an on-going mess.

SEN. JABS asked **SEN. BECK** how this bill would help remedy the procedure that Mr. Quigley went through.

SEN. BECK answered there was a term in the bill that said if one previously litigated a case on a decreed stream they couldn't bring that litigation back up again. That part of the bill didn't deal with late claims. If one had litigated something already as far as the Supreme Court or wherever, why should the same wounds be brought back up again. The re-adjudication process conveyed to people that water rights could be brought up again.

SEN. GROSFIELD asked Mr. Quigley if he was a late claimant?

SEN. GROSFIELD clarified that Mr. Quigley's concern was with decreed rights being re-adjudicated.

Mr. Quigley agreed.

SEN. GROSFIELD asked what section of the bill dealt with the re-adjudication issue.

SEN. BECK thought Sections 5 and 6.

SEN. GROSFIELD went back to the late claims issue and asked Mr. Tweeten if he said the Attorney General's office agreed to do something about previously decreed rights and if he thought they were able to pull in previously decreed rights which were not timely filed as late claims, and somehow gave them back their original priority date with not upsetting the adjudication process.

Chris Tweeten said his comment about previously decreed claims dealt with the res judicata provision of the bill. He understood it to operate independently of the late claims provision. He had no problem with what the bill said about previously decreed rights. The fact was once they had been decreed, the parties of that decree and their successors in interest, should not be able to re-litigate those issues again. He thought that was a fundamental principal of law and he didn't think implementing

that would necessarily jeopardize the adjudication. With respect to grant further remissions of forfeiture for late claims that represent decreed rights, he thought the comments made would apply to that as well. It was said all along that it was a policy for the legislature to make, whether to reopen this for late claims or not. They should be advised and understand when the decision is made, it is not a decision without an element of risk. It is not something one could do without concern for the identified potential consequence of meddling with the adjudication, particularly with respect to late claims. He felt it had been stated consistently in the debate over the situation in the last two years. If one made changes in the adjudication that would jeopardize its fairness with respect to those who file timely, and prejudice the rights of those who file timely, including the federal government, one raised the risk that the federal government would challenge the adequacy of the adjudication and try to move the adjudication of its rights into federal court. The federal government made it very clear to them. The letter from Richard Aldrich (submitted to the Agriculture Committee in a hearing) also made it real clear that they had serious concerns about further remission of water rights, and one of the reactions from the federal side could be to try rekindling those federal suits and get the federal rights out of state courts. The Indian tribes in Montana would like nothing better than to get their rights out of our water court and into federal court; they wanted them there in the first place and took us to the US Supreme Court to try to keep them there. That threat was taken very seriously and **Mr. Tweeten** thought the legislature needed to be advised as they go through the process and as they made that decision. He realized the risk was a very real one and if it were to happen, people who spent thousands of dollars in state courts would have to repeat it again in federal court.

SEN. GROSFIELD asked if there was a difference between a late claim that was previously decreed or a late claim that was never decreed?

Chris Tweeten answered that there was certainly a difference from the water user's perspective. If one looked at it with respect to the adequacy of the adjudication, he didn't think it made a difference. As far as the federal government's concerns, he didn't think it mattered to them whether the late claim rights are decreed rights or filed rights.

SEN. GROSFIELD asked **Mr. MacIntyre** if from the executive branch perspective he agreed with what Mr. Tweeten had said or if he had a different viewpoint.

Mr. MacIntyre said the administration's position was reflected by Mr. Tweeten.

SEN. GROSFIELD asked if decreed rights were treated differently if equal protection problems were raised.

Mr. MacIntyre responded that if decreed rights were treated differently than other rights for purposes of remission that would be a true statement. How you treat decreed rights with respect to the portion of the bill in Section 6 did not raise any protection problems.

SEN. GROSFIELD commented if they were to do anything with respect to late claims, they should not distinguish them as used rights, filed rights, or decreed rights. They should treat them all the same from an equal protection perspective.

Mr. MacIntyre agreed.

SEN. HALLIGAN asked Jim Spangelo why Havre couldn't comply with the existing 96 statute. Was it just the subordinations part of it?

Jim Spangelo answered it only gave claims back to 1973. It make all the water right claims a water right to '73, so if someone, with an earlier water right made a call, the water rights would be invalid. He believed it didn't go back far enough.

SENATOR HOLDEN, SENATE DISTRICT 1, Glendive asked **Sen. Grosfield** when the new filing deadline was set up to admit late claims, why was a priority established? Someone could be dropped down in priority when maybe, traditionally, they always were the number 1 user of that water?

SEN. GROSFIELD said that the reason they dropped it down was to deal with the person who had timely filed. According to the law, everyone who did not timely file had abandoned their rights. If that was changed and it put someone in front, there would be a pretty good argument in court if it was pursued. That was really the question and still is, whether the risk was great enough that they would likely pursue it? If they were convinced they would not likely pursue it, then they could do whatever they wanted and get by with it. Again, it was really a question of how great was the risk. He thought the reason there hadn't been any litigation in the last two years, was because the process put into place did not jeopardize the federal government. Basically, those late claimants were still alive but they were at the bottom of the list. Therefore, there was no particular reason for anyone to go to court. Eventually someone will go to district court and say that some person is trying to jump ahead of the current decree and use the water and his priority date is 1973 and not 1903 like he thought it was. That was the bill that was passed last time.

SEN. HALLIGAN stated Janice Rehberg had an argument about equity. He asked if in terms of notice and opportunity to be heard and those kind of things we stand the chance of everything being thrown out.

Janice Rehberg stated 20 legal issues could be raised on either side of this. For instance, the Supreme Court has taken many

arguments. If this legislation doesn't pass, all the late claimants would have to seriously consider taking their challenges to the Federal Court, complaining that the act violates the takings provisions of the Constitution. There could be arguments about what the United State was going to do. She pointed out that about half of the late claims already on file were actually put back in their original point. There wasn't a big outcry about that as far as the equity considerations. There could be arguments raised about the due process of waiving ten years before it was necessary to take these rights away from people. There was a filing deadline. We talked statute of limitations and yet nothing was done for ten years. Such arguments could be raised on behalf of the late claimant. So, the whole situation is frought with potential for lawyers on both sides. The effort was there to develop a system that minimized those problems by putting them into concepts that were understandable and traditional. That was why she adopted that particular approach, using rule 55 and rule 60. If Mr. Tweeten hypothesized we were in Federal Court today, rule 55 and rule 60 and the concept of equity would apply. However, how many general adjudications were the Federal Courts handling. Federal Courts wouldn't want to abjudicate all the water rights in the State of Montana. She had the paper she presented on the McCarran Amendment. **(EXHIBIT 5)** The Federal Court had the opportunity to take cases but they don't have the money or resources, nor a procedure set up to handle it. As long as the situation is kept at a comfort level with all concerns considered, nothing precluded the federal government from advising the court to tell the claimants they waited too long and they had no justifiable excuse.

SEN. HALLIGAN said if he had a timely filed claim and this procedure was going on and the late filer came in and he didn't say anything for ten years, was he, by failure to object by a certain time giving up a right there in the water law concept.

Jan Rehberg replied there was a statute of limitations on forfeitures where no one applied. She believed that was an issue that existed today, and in equity court would be attended to. She explained the proper place for that to be considered was before a judge because the situation dealt with a concept; unless your case was valid you don't know what was the right decision. She thought the legislature was unable to know all the facts; that was why she believed it should be in the court. Then the federal government, the late claimants, the timely filed claimants, could all come together and raise the issue there. Provisions were put in which enabled the court to subordinate late claims to timely filed claims, if it was determined it should do so in order to be just to the parties. The court could assess attorneys' fees, assess costs, and as much as possible to give the court the tools it needed to make those decisions and preserve the system.

REP. SAM ROSE, HOUSE DISTRICT 87, Choteau represented two or three thousand ranchers who were unaware of what was going on in the legislature that day. He talked about equity and fairness saying that particular water bill or water legislation was advertised at 500 different meetings in the State of Montana in the past three years. It appeared in every major agricultural paper, it appeared in every government paper, it was on the radio, everything had been advertised through all the extension agents. There were 206,000 Montana people who spent millions of dollars filing in a just and timely manner. With respect to the lawyers here, they called it the "lawyer relief act". Three thousand human errors! **REP. ROSE** said "Let's join the real world, every day we see people paying the penalty for human error and this is no different. We better think of the 206,000 people who were correct". The 1993 Senate attempted to do something but it won't be resolved until those people are placed in jeopardy. He spoke for the State of Montana when he said that with 6 compacts with Indian tribes in our state agreements, they were opening up something which could cost the state a tremendous amount of money. He stated the legislators here represented their constituents and when they went home and opened up these water rights, they would have this Capitol filled with people. He believed this was a very deceitful approach and if they wanted to advertise it statewide and open up all the water rights, the state should be fair to the people and tell them that. The state should give them the same opportunity that a select few had.

SEN. HOLDEN asked if the people honor the 1996 deadline and some of those ranchers and cities file, would their rights would go back as far as 1973?

Judge Loble agreed.

SEN. HOLDEN asked if instead of using their assets to hire attorneys, couldn't they use those same assets to buy water rights.

Judge Loble answered they surely could, assuming there was a willing seller.

<u>Closing by Sponsor</u>: **SEN. BECK** said he had always been under the assumption that if one had a decreed right, it was adjudicated by the courts and documentation that you had a right to use the water in that stream even more so than a filed on right. He didn't understand why, when the re-adjudication process started, those decreed water rights weren't automatically put into this adjudication process. His intent was not to hurt anyone's water right that was filed on time. His intent was not necessarily to take a frivolous filed on water right and put it into this process. His intent was if someone thought they had a water right and didn't know they had to file again, their priority date shouldn't be taken away from them. His intention was not to hurt any compact, nor to get tied up in the McCarran decision or anything of that nature. He tried to create a fairness issue and

if it was impossible to do that, he could accept it. But he hoped they would take a look at some other things that were in the bill also.

EXECUTIVE ACTION ON 387

Discussion: **SEN. GROSFIELD** commented that there were parts of the bill that he liked and thought could be workable. The late claims issue made him very nervous. He felt that quite a bit had been done for the late claimants in the last session. He was convinced that this legislature should not do anything that might jeopardize the 206,000 claims that were timely filed. He had been through the process himself and filed a timely claim. He remembered there was a great deal of information and help for people to get it done and, although there were some unfortunate stories out there, he didn't believe that they were worth jeopardizing the many people who did timely file. With respect to the late claimants that were discussed, they are in if their priority date is after the last timely filed claim, whenever that may be. The latest it could be was July 1, 1993. He remained concerned that they could do something to jeopardize the process by granting additional remission of forfeiture.

Motion:

SEN. GROSFIELD then moved to strike sections 1, 2, 3, 4 from the bill. He felt that would have the effect of eliminating any further forfeiture remission for late filed water claims. He thought the statement of intent probably had to be removed also, and changes to the title needed to be made. He clarified his motion to strike page 1, line 11, through line 4, on page 5, the statement of intent and sections 1-4.

SEN. HOLDEN asked for further discussion.

SEN. JABS asked if they still had until July 1996 to file?

SEN. GROSFIELD said the net effect would be they were back to the bill which was passed last session which allowed until July 1, 1996 to file late claims. They will not get their original priority date, but they will get the 1973 priority date. They still will have a right even if it's not as good as the one before. He commented that this was a judicial adjudication there which had a cutoff date on it. Everyone should have been aware of that deadline.

SEN. JABS asked if the sections were left in the bill if it still didn't guarantee that they would get their original water right back.

SEN. GROSFIELD said to his understanding it could give them their original water right back. He attested it would give them their original priority date subject to the adjudication process through the courts.

SEN. HOLDEN warned if there was anyone who still needed to file, they had better do so. He voiced his support of Senator Grosfield's motion. He thought that before farmers, ranchers and cities swamped the court system, they should first seek a willing seller of some water, and also to see if they could use their money to purchase water instead of hiring attorneys to litigate the matter. If they can't buy the water they thought they needed, and that you can't get by filing now, then they still can proceed through the court system and see how it proceeds from there.

SEN. GROSFIELD closed on his motion by saying, with respect to municipalities, he realized there were some towns that didn't timely file, but he didn't believe there was a real problem because towns have the ability to condemn. It seemed to him that if he was Joe Rancher on a stream from which a town was getting its water, and he said "... you're a late claim and I want us to shut off your water so I can irrigate my field...", the town could say "...that's fine..." and then condemn your water right. He didn't believe the towns were in jeopardy. The Department of State Lands was a different situation; the state should know better. Again, in very many of those cases where if they filed in 1995 they would probably have the first water right. There were cases which won't be valid, but state lands won't be a problem. There was no doubt this was a tough issue because it will hurt some people, but he had to choose potentially hurting a few people as opposed to potentially hurting a very large number of people.

SEN. HOLDEN asked Valencia to restate the motion.

Valencia Lane stated the motion was to strike the statement of intent and sections 1-4 of the bill with the appropriate changes to the title and basically taking out sections of the bill which dealt with late claims.

Vote:

SEN. HOLDEN called for a vote. **THE MOTION CARRIED 4 TO 0.**

SEN. HOLDEN said sections 5 and 6 were still left to consider.

SEN. GROSFIELD stated, with respect to section 5, it was suggested that the committee should include a district judge, and he didn't have a problem with that. The committee was comprised of 7 people. If a district judge was added, that would make 8. He said the Governor's office and the Attorney General's office were talking about forming a group to look at the adjudication process. He didn't know if that should be specified in section 5 or whether it would be better to let the Governor or the Attorney General appoint someone.

SEN. HOLDEN replied the section was needed. Where it discussed the water judge making the appointments and the Montana Supreme

Court, maybe it should say the Governor. That way there would not be a conflict of interest later through litigation.

SEN. HALLIGAN proposed that on page 5, line 11, the Governor be allowed to appoint a Water Adjudication Advisory Committee instead of the chief water judge making the appointment. Also, add a district court judge, and remove 1 of the 4 attorneys on page 5, line 14, so it would read 3 attorneys and 3 water users, and a district court judge, keeping the committee at 7.

SEN. HOLDEN asked if there were any other lines where the word Governor would have to be inserted.

SEN. HALLIGAN replied he didn't think so.

Valencia Lane said the way it read on line 11, the chief water judge was to set up the committee. She said they should look at section 3-7-103, title 3, which concerned judiciary. It may actually be more appropriate to put the Advisory Committee in a different section of law. If one looked at subsection 1, we're actually in a statute which dealt with the authority of the Supreme Court. If an amendment is drafted, she would find an appropriate place in which to insert it in the existing code. She would draft it as new language for lines 11- 24, but put it in an appropriate statute making it the Governor, rather than the chief water judge doing the appointing. They might want to put the new language in some of the statutes which dealt with the Governor's authority. On lines 11-24, subsection (b), it stated who actually made up the committee. Currently, it's 4 attorneys and 3 water users. Halligan's amendment would make that 3 attorneys 3 water users and a district court judge. Their subsection 2 was ex officio members and allowed the chief water judge to serve as an ex officio member. The next sentence allowed the Supreme Court to discretionary appoint the Attorney General or someone from the Attorney General's office and another person from DNRC as ex officio members.

Motion:

SEN. HALLIGAN wanted to make certain it was consistent with the Governor. **He moved to strike 'the Montana Supreme Court may appoint' and put 'the Governor may appoint'** in order to be consistent and to put the new language in an appropriate section of the MCA.

SEN. JABS asked if a water judge or district court judge were being put on the committee.

Valencia Lane answered district court judge.

Vote:

SEN. HOLDEN called for a vote on Senator Halligan's motion. **MOTION CARRIED 4-0.**

Motion:

SEN. HALLIGAN moved Holly Franz's suggested amendment which amends section 6.

Vote:

SEN. HOLDEN clarified Sen. Halligan's motion that Holly Franz's amendment be adopted. He explained it could be found on page 7, line 23. He called for the vote. **MOTION CARRIED 4-0.**

Motion:

SEN. HALLIGAN moved to strike 'shall' and insert 'may' on page 7, line 15.

Vote:

SEN. HOLDEN clarified the motion that on page 7, line 15, the word 'shall' which followed the word 'court' be lined out and the word 'may' be inserted. He called for the vote. **MOTION CARRIED 4-0.**

SEN. GROSFIELD was unclear about line 19, on page 7. He wondered what (b) and (c) meant. He asked Janice Rehberg if he were to say he had his rights, and someone else had their rights, and no one questioned those, but a third party said here were his rights. The first two said the third party couldn't go that far. Did that mean the first two challenged that, or did it mean that all the rights which were in that process, were in a litigation which was a challenge. Which is the correct meaning?

Janice Rehberg replied that traditionally res judicata would apply if the party were the same and the issues involved were the same. Now, one had the opportunity to raise issues about those water rights. If one had a lawsuit which dealt with water rights on this creek and was brought into that and had the opportunity to raise issues at that time, they were precluded.
Holly Franz agreed. She thought Senator Grosfield had a point that they needed to be careful in what they were doing. They were codifying an existing legal theory into the statutes. She didn't think the purpose was to make that legal theory more limited than it currently was. That was certainly not **SEN. TOM BECK'S** intention there. They might even be able to take out (b) and just say the claimant's water right was actually litigated in the previous decree litigation. They must know exactly what they were saying because, for instance, if she filed it and the other parties defaulted, her water right had still been litigated but no one actually challenged that particular water right. She thought that might be what their concern was and this made it a little more clear.

Chris Tweeten thought the language tried to codify what were the common law requirements for an aspect of res judicata that's called collateral estopple, which is issue preclusion. It was extremely complicated and a difficult area of the law, but what it broke down to was two different rules: one, that applied to an argument which an entire claim had previously been the subject of a lawsuit - it had been adjudicated and the claim can't be brought into court; two, there was what is called issue preclusion, which stated that even if one brought a different claim (if the same parties had actually litigated the same issue before), your different lawsuit on a different claim can't be resurrected and fought all over again. In order to make an argument for issue preclusion, that issue had previously been litigated, one had to show that the issue was actually raised, which is what **Mr. Tweeten** thought subsection (b) was; that the claimant's water right was challenged. And that the issue was actually litigated, which he thought was what subsection (c) was designed to do. He thought that was what they tried to do with that language, just codify those common law principles of issue preclusion, applied to a water right. To go along with Holly's comment, it might be clearer and less likely to cause problems, rather than trying to go through subsections (a) through (e). One simply said the water court could grant a motion for dismissal if the objection pertains to an element of a water right that was previously decreed, and the objection ought to be dismissed under applicable rules of issue and claim preclusion period. Under the common law rules of issue and claim preclusion, or something like that, it simply made it clearer to try to import into the water court practice the common law rules of res judicata and collateral estopple and don't let it go farther than that.

SEN. HALLIGAN believed this was a good approach. He thought from using specific language here, the specific would prevail over the general, and the courts would obviously look at this language and the essential common law doctrine. He thought the more clear a person could be here, the less one would get in trouble. He suggested one should just use the common law doctrine, as they fit. He was worried if one had a successor in interest who may not have been the original party. How did the common law doctrine fit with party preclusion.

Chris Tweeten said if one made a claim under a right that had previously been involved in that litigation, then they were bound by the litigation just as though they had been a part of it.

SEN. GROSFIELD agreed with pulling the doctrine of res judicata with respect to previously decreed rights into this because he thought it would go a long way toward solving some of the problems that were heard. He would like to do that in this bill but didn't want to wind up that doctrine as had been discussed.

Valencia Lane thought there was a problem if it was made too specific. Then one could argue about what did this word mean and

they might have a broader doctrine than intended. She thought the amendment would probably take out (a)-(e) and put in a statement which kept lines 15-17. The water court might grant a motion for a dismissal to an objection if the objection pertains to a water right that was previously decreed, applying the common law principles of issue and claim preclusion.

SEN. HALLIGAN asked if Jim had a comment?

Jim Spangelo pointed out the problem with the law was that prior to 1973 there was no way to obtain a base line adjudication. Doctor Stone wrote many articles concerning whether or not there were any adjudicated water rights in Montana. What happened was just litigation between Joe vs. John. They might have tried to serve everybody else on the drainage, and technically, on the language they then had, they would be res judicata even though their water right had never been litigated. That was one of the evils which Dr. Stone tried to get rid of in 1973. Therefore, one must be very careful about taking a lawsuit between two parties even though it looks like a stream-wide adjudication, and try implement in that law because you will hurt some innocent people.

SEN. GROSFIELD didn't think that this would do that. He believed there had been cases that had specifically stated that if you or your predecessor in interest were not a party to a decree, then the decree is not binding on you. He thought that was just part of the principle of the doctrine of res judicata.

SEN. HOLDEN asked **SEN. BECK** if this was what he wanted done?

SEN. BECK said it was.

SEN. HOLDEN asked if the judge thought it sounded like this was a reasonable thing to do.

Judge Loble said it was, but he was concerned that the water court already followed the doctrine of the res judicata. If it was changed to put it into a statute, then the water court would follow what was told to them to do and it might be different than what all the district courts were using for res judicata. One of the concerns or problems with the adjudication was that all the statements of claim are prima facie proof of the contents so that was a natural conflict if somebody filed a decreed right or said they had a decreed right. They had to take it at face value and the only way they could find out whether or not it's a decreed right was to give everybody due process. That's the problem that Mr. Quigley was running into. People filed these statements of claim which may or may not be valid. They saw this across the state. When they did that, claiming a decreed water right, they had a situation which was called the "decree exceeded". When all the water rights were added up that were decreed it came out to be more than they were actually decreeing. That was something they had to think about when they made that kind of language. He

liked what Mr. Tweeten said because he believed it gave them more flexibility.

Motion:

SEN. HALLIGAN moved to strike (a) through (e) on page 7 and insert the language that was discussed to allow the court to issue a dismissal based on the common law principles of issue and claim preclusion. However, it could be drafted better in legal terminology.

SEN. JABS said he didn't understand all the legal language but he thought the judge said that this is what they had been doing and in spite of it, Mr. Quigley still got in trouble. He didn't think that it solved anything.

Judge Loble said what he heard today made him think the water court ought to be a little more pro-active on decreed streams. Typically, the litigation was left up to the lawyers. Let them do the issues; maybe they ought to get them in a room earlier and try to do exactly what Senator Beck was trying to do and find out for sure what the decreed rights were rather than waiting for the lawyers to fight it out. He thought that was what they would do regardless of the legislature's decision.

SEN. GROSFIELD explained what they tried to do was expedite the adjudication process by giving those previous decrees a little higher degree of visibility. They directed the water court to grant a motion to dismiss, based on that previous decree. It would seem this would help those situations in future adjudications because there would be that direction. He hoped the language was strong enough to accomplish this.

Judge Loble thought that was a good point because he previously said we wait until the lawyers file the motion of res judicata. If you leave this information here, he would tell his staff that when they came up with a decree, they should raise that issue on their own and get people talking about it.

Valencia Lane recapped the amendments for the committee. On page 7, lines 17-23, after the word "and" strike the colon and subsections (a) through (e) and insert "and if dismissal is consistent with common law principles of issue and claim preclusion".

Vote:

SEN. HOLDEN called for the vote. **MOTION CARRIED 4-0.**

SEN. HOLDEN asked if there were any other amendments.

SEN. BECK said there was a letter he had received from Moore, O'Connell and Refling **(EXHIBIT 6)** on matters which he thought they discussed with the water court. He had them look at page 6,

section 3, of the bill on line 25. One of the things they said they could strike out of the bill, which evidently wasn't required from the water court, was that the request must specify the paragraphs and pages contained in findings and conclusions to which objection was made. He asked if Judge Loble could say if that was correct.

Judge Loble agreed that was correct.

SEN. BECK asked if that was struck out of the bill, would that be fine?

Judge Loble said it wouldn't hurt the water adjudication at all.

SEN. BECK asked that this amendment be moved, that line 25 be stricken.

SEN. HALLIGAN suggested the first and second section of subsection 3, be stricken as well.

Judge Loble said that to some extent they did not pay attention to that either, because they let people develop the specific evidence at a later date after their objection.

Motion:

SEN. GROSFIELD moved that on page 6, line 23, strike from the word "contained" all the way down through the underlined word "must", on line 26.

SEN. BECK said it would read as follows: " The request for a hearing must state the specific grounds and evidence of which the objections are based".

Vote:

SEN. HOLDEN called for a vote. **MOTION CARRIED 4-0.**

SEN. BECK said there was one more amendment on page 8, section 2, which read an "interlocutory ruling by the water judge upon a motion raising a question of law may be appealed by any party affected by the decision and who participated on the proceedings of the motion". They suggested this terminology be put in "on interlocutory ruling by the water judge upon a question of law may be appealed by any party affected by the decision and who participated in the matter in which the ruling was issued". It takes out "upon a motion raising".

SEN. HOLDEN asked if there were any thoughts about that?

SEN. GROSFIELD wanted to know the effect of that.

SEN. HALLIGAN said it meant the court could do it on its own, without prompting from either party. If the court felt it needed to get some direction from a higher court it could.

Janice Rehberg thought what they were getting at was that the issues might not always be raised on a motion, and so there could be questions of law that come up.

SEN. BECK read the explanation in the letter. **(See EXHIBIT 6).**

SEN. HALLIGAN thought it was an improvement over the old language but didn't make much difference.

SEN. GROSFIELD said it sounded fine to him.

Judge Loble explained what they were trying to do. He said when the temporary preliminary briefs came out, they had a hearing, they had a master, generally the hearings officer, and the master made a decision on issues of fact and issues of law. They then sent out the master's report. People had the chance to object to it and after any objections it came through the water judge to be resolved. It was still a temporary decision because they were waiting for the issuance of a preliminary decree which would contain the compacts, the federal government, or the Indian tribes. If they couldn't get to a compact, they would have those claims brought to the court so they can shuffle the state based claims and the federal rights all together into one. The problem was it took a lot longer than anyone anticipated. Mr. McElyea is concerned if the water court reaches a legal conclusion in 1993 or 1994, and if it's only a temporary preliminary or a interlocutory decision. Those decisions typically were not subject to appeal to the Supreme Court. What he wanted was the ability to appeal to the Supreme Court on issues of law and resolve that across the state. The water court didn't have a particular problem with that. He didn't know if the Supreme Court had a problem with that or not.

Motion:

SEN. HALLIGAN moved the amendment with the language that was written in the letter.

Vote:

SEN. HOLDEN called for the vote. **MOTION CARRIED 4-0.**

Motion:

SEN. HALLIGAN MOVED THAT THE SUBCOMMITTEE RECOMMEND TO THE JUDICIARY COMMITTEE THAT THE BILL DO PASS AS AMENDED.

Vote:

SEN. HOLDEN called for the vote. **MOTION CARRIED AS AMENDED 4-0.**

ADJOURNMENT

Adjournment: The meeting adjourned at 10:00 am.

RIC HOLDEN, Chairman

PHOEBE KENNY, Secretary

RH/PK

Exh 1

EXHIBIT 1
DATE 3-4-95
SB 387

SENATE BILL NO. 387

Proposed Amendments
submitted by
Janice L. Rehberg

March 4, 1995
(before SB 387 Subcommittee)

1. Page 1, Line 14.
   Following: "powers"
   Insert: "and continuous use of the claimed water right"

2. Page 2, line 29.
   Following: "claims"
   Strike: "are subject"
   Insert: "may be"
   Following "to"
   Strike: "adjudication"
   Insert: "adjudicated"

3. Page 3, line 5.
   Following: "may"
   Insert: "not"
   Following: "or"
   Strike: "may"

4. Page 3, line 6.
   Following: "court"
   Strike: "only to the extent that"
   Insert: "unless"

5. Page 3, line 19.
   Following: "(e)"
   Insert: "the priority date of"
   Following: "be"
   Strike: "subordinate"
   Insert: "subordinated by the court"

6. Page 4, line 3.
   Strike: "late"
   Insert: "Late"
   Following: "provisions of"
   Insert: "this section and"

7. Page 4, line 7.
   Following: "85-2-225."
   Strike: "**Filing fee -- processing fee for remitted claims.**"
   Insert: "**Fees.**"

8. Page 4, line 17.
Following: "subsection"
Strike: "(3)(c)"
Insert: "(3)(d)"

9. Page 4, line 22.
Following: "(b)"
Insert: "In the event an objection is filed against a late claim,"
Strike: "The"
Insert: "the"
Following: "judge shall"
Insert: "shall assess an initial fee of $____ against the late claimant and"

10. Page 4, line 24.
Following: "which"
Strike: "in reaching a determination whether to relieve a party from abandonment as provided in 85-2-214."
Insert: "in the adjudication of the objection to the late claim."

11. Page 4, line 25.
Following: "85-2-214."
Insert: "(c)"
Renumber: subsequent subsections

Ex #2

EXHIBIT 2
DATE 3-4-95
SB 387

SB 387

PROPOSED AMENDMENTS

RESERVED WATER RIGHTS COMPACT COMMISSION

February 17, 1995

Page 2, line 22-23:

Strike: "prior to July 1, 1993"

Page 3, line 10-11:

Strike: "that is ratified by the legislature prior to July 1, 1993"

approved by the water Ct as

Insert: "after the date specified in a compact"

Page 3, line 14:

Add after "law": "; or be decreed as senior to a water right recognized in the compact"

Text with proposed amendments:

Page 2, lines 21-24:

"Accordingly, with respect only to a basin that has not been closed to further appropriation pursuant to a compact ratified by the legislature under part 7 of this chapter, a claim of an existing water right not filed with the department on or before April 30, 1982, may be filed with the department on forms provided by the department."

Page 3, lines 9-14:

"(c) a person filing a late claim does not have the right or standing to object to any water rights compact reached in accordance with part 7 of this chapter **after the date specified in a compact**, except to the extent that right or standing to object exists based on a claim of water right filed on or before April 30, 1982, or to claim protection for the right represented in the late claim under any provision of a compact that subordinates the use of a water right recognized in the compact to a right recognized under state law**; or be decreed as senior to a water right recognized in the compact**"

EXHIBIT 2
DATE 3-4-95
SB 387

SB 387

TESTIMONY OF -- ON BEHALF OF

THE RESERVED WATER RIGHTS COMPACT COMMISSION

February 17, 1995

The following testimony addresses only the impact of SB 387 on compacts between the State and federal and Tribal governments settling water rights. It does not address the broader implications of the impact of SB 387 on the adjudication or the exposure of the State to takings claims.

SB 387 adversely impacts compacts in two ways:

(1) language in SB 387 is in direct conflict with SB 203, the compact between the State and the National Park Service settling water rights for the Little Bighorn Battlefield National Monument and Bighorn Canyon National Recreation Area which was passed by the Senate on a 50-0 vote and now awaits executive action in the House Natural Resources Committee; and

(2) open ended late claim filing will jeopardize negotiation of future compacts by creating uncertainty in the status of water allocation in the affected basin.

#1 Conflict with SB 203:

SB 387 states on page 2, lines 21-24:

> Accordingly, with respect only to a basin that has not been closed to further appropriation pursuant to a compact ratified by the legislature under part 7 of this chapter **prior to July 1, 1993**, a claim of an existing water right not filed with the department on or before April 30, 1982, may be filed with the department on forms provided by the department.

SB 203 requires closure of drainages flowing into Bighorn Canyon National Recreation Area. Agreement concerning level of development allowed prior to closure was based on evaluation of existing claims. The 1993 date in SB 387 is in direct conflict with SB 203.

Remedy: remove "prior to July 1, 1993" from line 22-23

SB 387 states on page 3, lines 9-11:

> a person filing a late claim does not have the right or standing to object to any water rights compact reached in accordance with part 7 of this chapter **that is ratified by the legislature prior to July 1, 1993** . . .

SB 203 (Article II, Section C.2), page 10, lines 9-15 states:

> The reserved water rights described in the Compact shall not be subordinate to water rights which were forfeited by 85-2-212 as interpreted in In the Matter of the Adjudication of the Water Rights within the Yellowstone River, 253 Mont. 167, 832 P.2d 1210 (1992), nor shall any claimant of such forfeited water right have standing, based solely on such claimed right, to object to this Compact or any reserved water right described in this Compact . . .

This language is in direct conflict. It is likely that in statutory interpretation the more specific law, SB 203, would control. However, by not amending the language in SB 387, that decision is left to the discretion of a court. By amending SB 387 the legislature retains control of interpretation of its intent and prevents the risk of forcing re-negotiation of SB 203.

Remedy: replace "that is ratified by the legislature prior to July 1, 1993" on page 3 line 10-11, with: "after the date specified in a Compact"

#2 Future Compacts:

Negotiation of compacts focuses on allocation of water between federal and Indian rights and State-based rights. The DNRC database on filed and decreed rights and permits forms the basis for identification of State uses that require protection. SB 387 allows late claims to be filed at any time. State negotiators will lack certainty in the level of water use which must be protected, and federal and Tribal negotiators will be unlikely to agree to subordinate to existing use when that level of use is uncertain. For this reason, it is insufficient to replace the July 1, 1993 date discussed above with July 1, 1995. The more general remedies set forth above are necessary. In addition, the following amendment will assure negotiators that new claims will not be granted seniority after a compact is ratified:

Remedy: Page 3, line 14:

> Add after "law": "; or be decreed as senior to a water right recognized in the compact"

EX #3

EXHIBIT 3
DATE 3-4-95
SB 387

Amendment to Senate Bill 387
First Reading Copy

Prepared by Holly Franz
February 17, 1995

1. Page 7.
Following: line 23
Insert: "(8) The provisions of subsection (7) do not apply to issues arising after entry of the previous decree, including but not limited to abandonment, expansion of the water right, and reasonable diligence.

HJF\02058hjf

Ex # 4

EXHIBIT 4
DATE 3-4-95
SB 387

CITY OF HAVRE

Phone (406)265-6719
P.O. Box 231
HAVRE, MONTANA 59501

February 17, 1995

Chairman Senator Chuck Swysgood
Senate Agriculture Committee
State of Montana
Capitol Station
Helena, MT 59624

RE: Senate Bill 387

Dear Chairman Swysgood and Committee Members:

I am special counsel for the City of Havre, representing the City on water rights matters. After the City filed its water rights claims in 1982, it entered negotiations with the Reserved Water Rights Commission concerning its rights. It also continued searching for other water rights. As a result several water rights in the name of the City but administered by the Hill County Airport Board and the local flood control districts were discovered.

The City filed upon these rights, and filed alternative claims on rights previously filed upon because of concern about the meaning of "municipal" as a water right use. However, these claims were filed in 1983, and thus were "Late Claims". We then quit negotiating with the compact commission. A statute seems to indicate any claims filed while we were negotiating are timely.

Under "In The Matter of Adjudication of the Water Rights Within the Yellowstone River, 253 MT 167, 832 P.2d 1210 (1992), the water rights covered by these claims were subject to "forfeiture" without any notice to us or opportunity to argue our special factual situation.

The City of Havre was involved with the passage of Senate Bill 310 in the last session, and in particular Section 10, while authorized a "Late Claim Interim Study" by the Water Policy Committee, and particularly Sections (i) dealing with trust responsibilities and (k) dealing with "impacts on municipal in Government . . ." No hearing was held on these matters by the committee.

The City of Havre supports this Legislation (SB 387) and asks favorable consideration by the Committee. Small Governmental Agencies have little or no staff, and have a variety of arguments to bring in favor of allowing the "Late" claims.

Thank you.

James W. Spangelo

Ex # 5

EXHIBIT 5
DATE 3-4-95
SB 387

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MEMORANDUM

DATE: February 16, 1995

TO: Senate Agriculture Committee

FROM: Janice L. Rehberg

RE: Implications of the McCarran Amendment

I. The McCarran Amendment validates the state's jurisdiction over the federal government in general adjudications of a river system or source.

The McCarran Amendment was adopted by Congress in the early 1950s in response to a growing interest on the part of the states to obtain comprehensive adjudications of both federal and state water rights. The Federal government's continued assertion of sovereign immunity stymied the state's efforts which resulted in the passage of the McCarran amendment. See, White, McCarran Amendment Adjudications--Problems, Solutions, Alternatives, XXII Land & Water L. Rev. 631 (1987).

Over the years, both state and federal courts have had an opportunity to construe the amendment, and have consistently recognized the intent of Congress to give deference to state adjudication proceedings which are general in nature, i.e., those which include all rights on a particular river system. The United States Supreme Court, in one of the critical McCarran Amendment cases

stated that "the most important consideration in any federal water suit concurrent to a comprehensive state proceeding, must be the 'policy underlying the McCarran Amendment.'" Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 570 (Citation omitted). The policies the Court sought to further included a recognition of the expertise and technical resources available to the states, the general bias against piecemeal litigation, the lack of any ongoing federal proceedings, the prevention of duplicative litigation, tension and controversy between state and federal courts, and "the unseemly and destructive race to see which forum can resolve the same issues first." Id. at 567, 569, 570. In reviewing these policy considerations, the Court, in San Carlos decided that Montana had jurisdiction within its general adjudication to determine federal water rights, including federal reserved rights.

Nevertheless, the passage of SB 310 and the inquiry into additional remission of forfeiture has raised the specter of a challenge in federal court by the United States to the adequacy of the State Water Court's adjudication of federal reserved water rights. This speculative challenge, it is asserted, might seek to invoke federal jurisdiction over the adjudication of those rights and attempt to reinstate federal cases currently stayed by the 9th Circuit Court of Appeals following the San Carlos decision.

This memorandum will focus on the likelihood of success of such a challenge. The Attorney General's memorandum to the Water Policy

Committee dated August 31, 1993, suggests that certain language in the San Carlos decision provides an avenue by which the federal government could either divest the state courts of jurisdiction or convince the federal court to proceed concurrently with an independent adjudication of all, or at least the federal reserved, claims. For clarification purposes, the questioned language is set forth as follows:

> "FN 20. In a number of these cases, respondents have raised challenges, not yet addressed either by the Court of Appeals or in this opinion, to the jurisdiction or adequacy of the particular state proceeding at issue to adjudicate some or all of the rights asserted in the federal suit. These challenges remain open for consideration on remand. Moreover, the courts below should, if the need arises, allow whatever amendment of pleadings not prejudicial to other parties may be necessary to preserve in federal court those issues as to which the state forum lacks jurisdiction or is inadequate."
>
> "FN 21. We leave open for determination on remand whether the proper course in such cases is a stay of the federal suit or dismissal without prejudice (citations omitted) In either event, resort to the federal forum should remain available if warranted by a significant change of circumstances, such as, for example, a decision by a state court that it does not have jurisdiction over some or all of these claims after all."
>
> "[O]ur decision in no way changes the substantive law by which Indian rights in state water adjudications must be judged. State courts, as much as federal courts, have a solemn obligation to follow federal law. Moreover, any state-court decision alleged to abridge Indian water rights protected by federal law can expect to receive, if brought for review before this Court, a particularized and exacting scrutiny commensurate with the powerful federal interest in safeguarding those rights from state encroachment."

San Carlos Apache Tribe, 463 U.S. at 570 and 571 (Emphasis added.).

Because these excerpts from the case are the focus of the alleged challenge, this memo will attempt to explain why the threat of a loss of jurisdiction is insignificant.

II. The "particularized and exacting scrutiny" language establishes a standard of review and does not threaten Montana's jurisdiction.

It has been asserted that any challenge by the United States would result in "a particularized and exacting scrutiny" of the entire Montana adjudication process. However, such an assertion is more dramatic than correct when this phrase is viewed in its proper context. The language of the court expresses a standard of review to be followed by the appellate court. As such it expresses the court's commitment to a careful review of any state court decision which applies federal law to determine federal rights. Thus, the strict scrutiny language does not provide an independent avenue to challenge the jurisdiction of the state water court. In fact, for the "exacting" scrutiny standard to come into play, there must be a state decision to review.

In order to understand the implications of this standard, the Committee will need to take note of the difference between a federal reserved water right and a state appropriation right. Under what is termed the Winters doctrine, enough water is impliedly reserved for an Indian reservation, or other federally reserved land holding, as is necessary to accomplish the purposes of the federal reservation. Quantification of Indian reserved rights, therefore, is determined

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solely on the basis of reservation needs with no consideration given to off-reservation state-based rights. For Indian reservations, the quantity is often based upon the number of irrigable acres on the reservation, and the priority date is the date the reservation was established. Thus, the quantity and priority of the federal claims are not impacted by external conditions or rights. They exist independent of state law, and if adjudicated will be quantified based upon federal law.

What does this mean in the context of Montana's adjudication?

With respect to negotiated compacts, there is no state court decision. Instead, the compacts serve as a settlement agreement which the court may incorporate into the decree. The United States, therefore, cannot allege that the Water Court has failed to properly apply federal law or otherwise abridged the federal right, and the imposing "particularized and exacting scrutiny" standard of review is inapplicable.

If the negotiation process fails and the federal rights are adjudicated, federal law will be applied to determine the quantity and priority date of the reserved rights. If the state court's decision is appealed, the U.S. Supreme Court will look with strict and exacting scrutiny to determine if the federal substantive law was properly applied. Whether late claims have been allowed into the process will have no bearing on this examination, because the state claims have no impact on the federal law. Whether or not there are 20 state

claimants or 25 state claimants on the stream simply does not affect how much water is needed to irrigate the irrigable acres on the reservation, nor the date the reservation was established. What the Court is concerned with is whether the state court correctly applies federal law. If not, the U.S. Supreme Court will make the final determination or remand the case to the state court with instructions to properly apply the law as clarified during the review process. Thus, although it has been argued that the strict and exacting scrutiny of the U.S. Supreme Court somehow threatens the adjudication process, the argument is not well founded. The Supreme Court's scrutiny simply tells the Montana Court that when it quantifies federal reserved rights, it must carefully apply the concepts of federal law.

Because the exacting scrutiny provides no basis for a challenge to the state's jurisdiction, the remaining arguments must rely on the vague "adequacy of the state proceeding" language in footnote 20 or the "significant change in circumstances" language of footnote 21 of San Carlos Apache Tribe.[1]

III. The "Adequacy of the state proceeding" is not altered by allowing late claims.

The next argument raised in the attorney general's memo suggests that the federal government may argue that the addition of late claims

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[1] It should be noted that this language is legal "dicta" which means it is not necessary to the main decision and has no binding precedential value.

somehow makes the Montana system " inadequate" to determine the federal claims. While it is true there is not a great deal of decisional law to give guidance in this matter, the Montana Supreme Court has addressed the issue.

Following the issuance of the San Carlos decision, the attorney general's office sought a determination that the Montana system was adequate. In deciding that it was, the Montana court stated:

> [F]ederal law controls federal water rights. Current federal law does not permit abandonment of reserved rights for non use. ... "[s]tate courts, as much as federal courts, have a solemn obligation to follow federal law." (citation omitted). The Water Court like any other court must follow federal law when federal law conflicts with state law. Unless and until federal law is changed, a Montana decree of abandonment of a federal reserved water right would be improper. We conclude that, to the extent necessary to fulfill the purposes of their reservation, federal reserved water rights cannot be decreed to be abandoned by reason of non-use. We note that the Colorado Supreme Court has reached an identical conclusion with reference to federal reserved rights in that state. (citation omitted)... Based upon our analysis of the distinctions between federal reserved water rights, Indian reserved water rights, and state appropriative use rights and the manner in which the Water Use Act permits each different class of water rights to be treated differently, we hold that the Act is adequate to adjudicate federal reserved rights.

St. ex rel. Greely v. Conf. Salish & Kootenai, 219 Mont 76, 99 (1985). Thus, the Montana Court's analysis is in accord with that offered above. As long as the state recognizes the applicability of federal law and faithfully applies it to federal reserved rights, the

adjudication is valid. Entry of late claims does not affect the court's ability to apply federal law.

It can also be argued that rather than render the adjudication inadequate, the recognition of late claims enhances the judicious and equitable aspects of the comprehensive state adjudication by providing a more fair and complete adjudication than would otherwise occur. A federal court looking at the adequacy of the adjudication would not be blinded to the fact that allowance of late claims is applicable to all claimants and thus, protects federal, state and private rights.[2]

In addition, amending the Water Use Act to allow late claims enhances the "general" nature of the adjudication. A general adjudication, for purposes of the McCarran amendment, is an action which will finally adjudicate all rights on the stream. If future constitutional or statutory challenges to the forfeiture provisions are successful, the court may be facing a piecemeal adjudication which could destroy the McCarran amendment jurisdiction or force the Court to reopen at some unknown time in the future, the entire adjudication in order to process the late claims.

---

2 For instance, the Greely decision notes that federal rights cannot be abandoned. Because the Montana Court has ruled that the provisions of MCA 82-2-226 result in "forfeiture" rather than abandonment, has the state exposed itself to a challenge an grounds that any federal reserved rights that are not timely filed are forfeited?

Because the entry of additional claims into the system preserves the general character of the litigation and has no impact on the court's ability to apply federal law, the adequacy argument must fail.

IV. The allowance of late claims is not a "significant change of circumstances.

The last argument that can be raised is that the revival of late claims creates a significant enough change in circumstance to warrant a federal assumption of jurisdiction. Based upon prior legislative testimony it is estimated that the late claims constitute approximately 2% of the claims on file. Consequently, it has been suggested that adjudicating these claims will extend the adjudication process and delay a final disposition. The significance of this delay in the context of the San Carlos decision is certainly questionable. Though some delay will necessarily result, it would pale in comparison to the delays and confusion that would occur should a brand new adjudication process be commenced in federal court. Furthermore, as evidenced in the footnote, the type of change contemplated by the United States Supreme Court was a change which actually deprives the state courts of jurisdiction. That is not the case here, and it is not believed that the state's efforts to protect its citizens would be viewed as a change warranting resort to the federal forum.

V. The policies underlying the McCarran amendment support the state adjudication.

Finally, any argument that the state will somehow lose jurisdiction over all or a part of the adjudication must be analyzed

within the context of the policies underlying the McCarran amendment. When this is done, it becomes clear that any such challenge will hold little sway with the federal courts.

It must be remembered, that what the alleged challenge entails is a request that the federal court (a) take over the entire adjudication system or (b) commence an independent review of the federal reserved water rights simultaneously, or concurrently, with the state courts. It is in these types of situations that the federal courts have time and again relied upon the policies of the McCarran amendment and opted not to deprive the states of jurisdiction.

Once again, the policies recognized by the federal courts include (1) the expertise and technical resources available to the state, (2) the general bias against piecemeal litigation, (3) the lack of any ongoing federal proceedings, (4) the prevention of duplicative litigation, (5) tension and controversy between state and federal courts, and (6) the "unseemly' race to the courthouse. A few comments on each of these is illustrative of how the addition of late claims will not cause the Montana system to run afoul of the McCarran Amendment.

Clearly, the state has an established system both within the Water court and the DNRC to address water right issues. It is unlikely that the federal courts would be interested in establishing a similar system within the federal judiciary and certainly would avoid any action which would place the burden of the entire adjudication

upon the federal government. Even with respect to federal reserved rights, the state court has the benefit of the assistance of the DNRC and its cadre of water masters. The federal courts would have no such assistance in dealing with the technical issues involved in quantifying reserved water rights.

Based upon the lack of technical support, it is inconceivable that a federal court would assert jurisdiction over the entire statewide adjudication. Any attempt to segregate out the federal claims, however, will necessarily result in a piecemeal and duplicative adjudication process -- the very evil the McCarran amendment was designed to avoid. Although it is true that there are several cases on the federal dockets which could potentially be reactivated, no activity has taken place in these cases since the San Carlos decision in 1983. A withdrawal from the state proceedings, therefore, could void 10 years of work in state court and require the federal court to relitigate matters already resolved in state court. There can be little doubt that establishing concurrent state and federal proceedings would lead to both legal and procedural tension, as well as create the potential for inconsistent judgments.

Finally, any decision involving the assumption of federal jurisdiction will be rendered with an eye toward the potential for opening the door for a multitude of similar claims.

Based upon the above analysis, it is difficult to envision how the allowance of late claims into this proceeding will cause the court

to reinstitute the federal cases. All in all the underlying policies of the McCarran amendment still weigh heavily in favor of state adjudication.

Conclusion

The proposed legislation presents a case in which the legislature must weigh the benefits of the proposed legislation against the potential risks. It is hoped that the above analysis provides the committee with an understanding of the legal concepts involved in this analysis. More important than the legal concepts, however, is common sense. Given the cost and time involved in this adjudication, the reluctance of the federal courts to undertake duplicative procedures and the financial burden jurisdiction would impose upon the federal judiciary, is it likely that the federal courts will assert jurisdiction? Based upon the legal analysis and plain old common sense, the answer is NO.

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FEB 16 1995

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COPY FOR
YOUR INFORMATION

February 15, 1995

VIA FACSIMILE - 444-4604

Senator Tom Beck
Montana Senate
State Capitol
P. O. Box 201702
Helena, Montana 59620-1702

RE: SB 387
Our File No. 66040-95

Dear Senator Beck:

I took the liberty of providing the Water Court with a copy of SB 387 for their review and comment. The Court has provided some good suggestions regarding your legislation.

The Court's comments, which were provided primarily by Water Master Kathryn Lambert, are set forth below.

Section 3 of the bill pertaining to amendments of 85-2-225(3)(c) should be revised as follows:

> (c) For a statement of claim that was filed after April 30, 1982, but prior to July 1, 1993, the processing fee provided for in subsection (3)(a) must be paid on or before a date to be established by the department by rule, but no later than July 1, 1999.

The language pertaining to state agencies should be removed from this portion of the statute so that state agencies are not required to file processing fees before issuance of a preliminary decree. Under the current language, the state might be required to file processing fees before the preliminary decree is issued, thereby creating a requirement for state agencies that would not apply to other water rights owners.

Section 6 of the bill pertaining to revisions of MCA 85-2-233(3) should be revised so that it reads as follows:

> (3) The request for a hearing must contain a precise statement of the findings and conclusions in the temporary preliminary decree or preliminary decree with which the department or person requesting the hearing disagree. The request must state the specific grounds and evidence on which the objections are based.

Historically, the Water Court has not required an objector to cite paragraphs and pages pertaining to findings and conclusions. Moreover, abstracts for decrees typically do not contain separate paragraphs. The deletions of language in paragraph 3 suggested above would not change the substantive meaning of the statute, and would conform with the actual manner in which water rights are decreed.

The following additional language should also be supplied for 85-2-233(7)(e). Section 7(e) of this statute, as currently drafted, only requires that "the right as claimed conforms to the previous decree." It is common for decreed water rights to be changed subsequent to issuance of the decree. Thus, the claimant of a decreed water right who had moved the water right from the originally decreed lands, but who had claimed the water right in conformance with the decree, could dismiss objections that are meritorious, and thereby protect an invalid water right. Similarly, the owner of a decreed water right that had never been developed, or had been abandoned shortly after issuance of the decree, could also move to dismiss otherwise meritorious objections.

In order to solve this problem, paragraph (e) should be revised to read as follows:

> (e) the right as claimed conforms to the previous decree and has been historically used as decreed.

Section 7 of the bill pertaining to 85-2-235(2) should be modified as follows:

> (2) An interlocutory ruling by the water judge upon a question of law may be appealed by any party affected by the decision who participated in the matter in which the ruling was issued.

These modifications need to be made in order to allow appeals of legal issues that are raised by the Court *sua sponte*, or issues that are settled in a hearing, but not necessarily raised because of a motion. As the statute is currently worded, appeals might be limited only to legal issues raised on motion, but not legal issues decided in a Master's Report issued as a result of a hearing in which no motions were made.

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CONCLUSION

Addition of the amendments suggested above will strengthen your legislation without compromising its original purpose. I recommend that you include these amendments in the bill as early in the legislative process as possible.

Sincerely,

RUSS McELYEA

WRM:mp
cc: Michael Kakuk, Environmental Quality Council
John Bloomquist
Jan Rehberg
Kathryn Lambert
Bruce Loble

SENT TO S.A.C. 3/6/95 2:35 PM

Amendments to Senate Bill No. 387
First Reading Copy (white)

For the Committee on Judiciary

Prepared by Valencia Lane
March 6, 1995

1. Title, lines 4 through 6.
Following: ""AN ACT" on line 4
Strike: remainder of line 4 through "DISMISSED" on line 6
Insert: "CLARIFYING APPLICATION OF COMMON-LAW RULES OF ISSUE AND CLAIM PRECLUSION TO THE ADJUDICATION OF EXISTING WATER RIGHTS"

2. Title, line 7.
Following: "CLAIMS;"
Strike: "ESTABLISHING"
Insert: "AUTHORIZING THE GOVERNOR TO APPOINT"

3. Title, lines 8 and 9.
Following: "SECTIONS" on line 8
Strike: remainder of line 8 through "85-2-226," on line 9

4. Title, line 9.
Following: "85-2-233"
Strike: ","

5. Page 1, lines 11 through 19.
Strike: statement of intent in its entirety

6. Page 1, line 23 through page 5, line 24.
Strike: sections 1 through 5 in their entirety
Insert: "NEW SECTION. **Section 1. Water adjudication advisory committee -- appointment.** (1) The governor shall appoint a water adjudication advisory committee to provide recommendations to the water court, the Montana supreme court, the department of natural resources and conservation, and the legislature on methods to improve and expedite the water adjudication process.

(2) The committee consists of three nongovernmental attorneys who practice before the water court, one district court judge, and three water users who have filed statements of claim with the department of natural resources and conservation under Title 3, chapter 7.

(3) The chief water judge or the judge's designee shall serve as an ex officio member of the committee. The governor may appoint the attorney general or the attorney general's designee, a representative from the department of natural resources and conservation, and a representative of the United States government as ex officio members of the committee.

(4) The committee members shall serve at the pleasure of the governor and shall serve without compensation.

(5) The committee shall file a report with the

governor by October 1, 1996, and as often thereafter as determined by the governor."
Renumber: subsequent sections

7. Page 6, lines 23 through 26.
Following: "must" on line 23
Strike: remainder of line 23 through "must" on line 26

8. Page 7, line 15.
Strike: "shall"
Insert: "may"

9. Page 7, line 17.
Strike: ":"
Insert: "if dismissal is consistent with common-law principles of issue and claim preclusion."

10. Page 7, lines 18 through 23.
Strike: subsections (a) through (e) in their entirety
Insert: "(8) The provisions of subsection (7) do not apply to issues arising after entry of the previous decree, including but not limited to the issues of abandonment, expansion of the water right, and reasonable diligence."

11. Page 8, line 2.
Following: "upon"
Strike: "a motion raising"

12. Page 8, line 3.
Following: "in the"
Strike: "proceedings on the motion"
Insert: "matter in which the ruling was issued"

13. Page 8, line 4.
Insert: "NEW SECTION. **Section 4. {standard} Codification instruction.** [Section 1] is intended to be codified as an integral part of Title 2, chapter 15, part 2, and the provisions of Title 2, chapter 15, part 2, apply to [section 1]."
Renumber: subsequent section

DATE March 4, 1995

SENATE COMMITTEE ON Judiciary SubCommittee

BILLS BEING HEARD TODAY: SB387

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T. Spangelo	Assistant			
Mark Simonich	DNRC			
Dan MacINTYRE	DNRC			
Rep. Sam Rose	Self			
Jim C Quigley	Self			
Holly Franz	Mt. Power Co.			
John Bloomquist	Mt. Stockgrowers			
Jan Rehberg	Trigg L & L	387	✓	
Larry Brown	Ag Pres. Assoc	387	✓	
BRUCE LOBLE	MONTANA WATER COURT			

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