

## MINUTES

### MONTANA SENATE 55th LEGISLATURE - REGULAR SESSION

#### COMMITTEE ON NATURAL RESOURCES

**Call to Order:** By **CHAIRMAN LORENTS GROSFIELD**, on January 15, 1997, at 1:00 PM, in Room 405.

#### ROLL CALL

**Members Present:**

Sen. Lorents Grosfield, Chairman (R)  
Sen. William S. Crismore, Vice Chairman (R)  
Sen. Vivian M. Brooke (D)  
Sen. Mack Cole (R)  
Sen. Thomas F. Keating (R)  
Sen. Dale Mahlum (R)  
Sen. Bea McCarthy (D)  
Sen. Ken Miller (R)  
Sen. Mike Taylor (R)  
Sen. Fred R. Van Valkenburg (D)

**Members Excused:** None

**Members Absent:** None

**Staff Present:** Larry Mitchell, Legislative Services Division  
Gayle Hayley, Committee Secretary

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

**Committee Business Summary:**

Hearing(s) & Date(s) Posted: SB 108; Posted January 9, 1997  
Executive Action: SB 50, SB 59, SB 72

#### HEARING ON SB 108

**Sponsor:** SEN. TOM BECK, SD 28, Deer Lodge

**Proponents:** John Bloomquist, Montana Stockgrowers Association  
Mike Murphy, Montana Water Resources Association  
Bud Clinch, Dept. of Natural Resources  
and Conservation (DNRC)  
Harley Harris, Montana Power Company  
Susan Cottingham, DNRC, Reserved Water Rights  
Compact Commission, (RWRCC)  
Holly Franz, Montana Power Company  
Lorna Frank Karn, Montana Farm Bureau  
Barry Hedrich, Ringling, Mt.  
Carol Stolen, Women Involved In Farm Economics

**Opponents:**        **Sen. Lorents Grosfield**

{Tape: 1, Side: A; Approx. Time Count: :00 Comments: None.}

**Opening Statement by Sponsor:**

**SENATOR TOM BECK, SD 28, Deer Lodge,** summarized last session's comments of the adjudication process as being slow and cumbersome. He said a study was undergone as a response to this opinion. This bill contains the results of this study (Report Of The Montana Water Adjudication Advisory Committee). **(EXHIBIT 1)** He stated this bill allows the Water Court to get the job done in a more streamlined fashion. The bill allows the water court to: adjudicate abandoned water rights in a faster manner; have an opportunity to look at relevant evidence before and after July 1, 1973, ie., to look at all evidence; and limit objections.

**Proponents' Testimony**

**John Bloomquist, Montana Stockgrowers Association,** presented the Report Of The Montana Water Adjudication Advisory Committee. **(EXHIBIT 1)** The purpose of the advisory committee was to look at the adjudication process and to make recommendations on ways to improve and expedite the adjudication of this state's existing water rights.

**Mr. Bloomquist** explained the Committee's background, members involved, and assistance obtained from other credible entities. He stated that page 4 of the report identified the recommendations of the Committee, some of which are in SB 108. The Committee formulated the issues by seeking comments and response from various constituents. Next, these issues received were then formulated into four categories:

- 1) Adjudication procedures;
- 2) Interim and administration of water rights;
- 3) Accuracy and validity of adjudication decrees which are being produced;
- 4) Prioritization issues.

**Mr. Bloomquist,** explained the bill further by section. SB108 Section 1. (Recommendation No. 5 in report) deals with the authority of the water court to adjudicate post 1973 abandonment of water rights.

Section 2. Abandonment issue relating to the question of whether post 1973 evidence is admissible and is it relevant to the water court adjudication process.

Section 3. (Committee Recommendation No. 2) Allow water court to enter temporary preliminary decrees for any category of claims that may require adjudication.

Section 4. (Recommendation No. 1) This is a fairly significant change in terms of how many decrees the Water Court would issue in the adjudication process. Presently, the Court can issue a temporary preliminary decree which involves state based water rights, which were filed and examined by DNRC. A compact may come along that involves federal rights and tribal rights, that would be melded into the temporary preliminary decree and what would be

then issued would be called a preliminary decree and both would be subject again to objection. This bill proposes that when the water court issues a decree, that decree is subjected to objections only once, those objections will be handled, and the decree will be issued. **Mr. Bloomquist** conveyed that the bill basically eliminates a level or step in adjudication process, to a one-step objection process.

Recommendation No. 4 allows claimants an opportunity to file counter-objections to water rights of other objectors. (SB 108, page 5, line 4-8.)

There will be a counter-objection period allowed so water court can deal with the concern of the water rights.

Recommendation No. 7 allows increased use of alternative dispute resolution mechanisms. (referring to page 5, lines 21-23 of SB 108.)

Recommendation No. 3 allows claimants and objectors to amend their claims and objections as long as other potentially affected claimants are provided notice. (SB 108, Page 5, lines 24-30)

This attempts to put the water court procedures more in line with other civil procedures.

Recommendation No. 8 (Section 5 of the bill) clarifies the process for administering water rights during the pendency of the adjudication. These changes allow the district judge to certify those particular water rights to the Water Court, then the court has right to adjudicate those rights. **Mr. Bloomquist** felt that this provision could reduce multiplicity of litigation.

He again urged the passage of the bill, and stated this bill is an effort to streamline the adjudication process, so the job can get done.

**Mike Murphy, Montana Water Resources Association**, is in full support of the committee and the bill, and believes it expedites the process.

**Bud Clinch, Dept. of Natural Resources and Conservation, Director**, for all the reasons **John Bloomquist** has stated the Department supports the recommendations in the report and in the legislation and urges a do pass. (EXHIBIT 2)

**Harley Harris, Attorney General's Office**, supports the bill because of two major principles: 1.) Reduces duplication; and 2.) Frees the water court up to get the job done.

**Holly Franz, Montana Power Company**, supports the bill because it expedites the process and ensures accuracy of decrees.

**Lorna Frank-Karn, Montana Farm Bureau**, supports SB 108 and feels it will clarify and speed up the adjudication process.

**Barry Hedrick, Ringling, Montana**, stated he was a committee member, representative of Montana Stockgrowers Association, and a private rancher who is in support of this legislation. The changes proposed by this measure will streamline process, promote

timely resolution, eliminate redundancy and costly litigation.  
(EXHIBIT 3)

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Carol Stolon, Women Involved In Farm Economics, (WIFE), stated they were in support of this bill, SB 108.

Susan Cottingham, Staff Director of the Reserved Water Rights Compact Commission, commented on the committee, reiterating what an outstanding job they had done, and that the commission supports the recommendations. She conveyed the changes would give the Water Court the flexibility to move forward and urged a do pass.

At this point, CHAIRMAN GROSFIELD turned the gavel over to VICE CHAIRMAN CRISMORE.

Opponents' Testimony:

SENATOR LORENTS GROSFIELD, Big Timber, first started off his testimony with an apology concerning his inability to serve on the advisory committee. He stated that this bill does some very serious things to our water right laws and wanted the committee to realize the extent, and judiciary issues. The first thing that this bill changes is with the determination of abandonment. If one has not used their right over an indefinite amount of time, then it can be abandoned, and our statutes allow for that. An example was a situation where there was a period of 40 years of non-use, and the case was determined abandoned. Our statutes after 1973 and after the adjudication on a stream is complete, a right can be declared abandoned after 10 years of non-use. For pre-1973 water rights, the water court would have jurisdiction in that area after 1973. The question arises, "what does that mean?" This is an important question that is not addressed in this bill. Another concern that this bill contains a "sour grape" provision saying that if somebody objects to you at the last minute, then your objection period is extended.

Questions From the Committee And Discussion:

SEN. COLE asked Mr. Harris about the effects of the expedient procedure, and will there be any effect on the compact negotiation?

Mr. Harris restated the question as what would be the relationship between the federal reserve rights in a given basin and state rights if this bill passed? He described the problem that exists today under the current law that we are dealing with respect to the relationship between state rights and federal reserve rights. All the state based rights have to go through DNRC to be verified before they can be adjudicated, before the Water Court can take a look at them and open them up to objections. The federal reserved rights under current law, with exception of the Blackfoot Tribe, are within the negotiation

process that is in the jurisdiction of the Compact Commission. The problem that has arisen is that the speed and processing of state based and reserved water rights has been at different rates. The two types of rights will never be on the same time track. Essentially, what we propose to do in this bill is to some extent allow those two types of claims to be adjudicated somewhat independently. Why wait for the reserved water rights to be adjudicated, or conversely, why wait for the state rights to be adjudicated, as was the case with the Northern Cheyenne reserved rights. **Mr. Harris** answered the second part of the question, how does this jive with the ongoing negotiations of the tribes, by referring to Recommendation No. 11, the increased communications. What the compact commission has found is that some tribes would feel that adjudication of even state claims near or on the reservation would hinder negotiations or adversely effect them. As a general matter regarding communications between the water court and the compact commission it would be best if it was dealt with on a case by case basis.

**SEN COLE** asked a question concerning the stage of decree.

**Mr. Harris** said the final decree, the absolute final word on the whole basin, isn't going to be entered until everything is ready. The problem under the current law is that one would have to wait for everything to be ready even to do a preliminary decree. The bill would carve out that one layer. Eventually, the final decree has to have everything in it, and in the process getting to that final decree, everybody in the basin gets one fair shot at everybody else.

**Sen. Cole** asked about pre and post 1973 situations.

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; Comments: .}

**Mr. Harris** responded to both **SEN. GROSFIELD'S** comments and to **SEN. COLE** by saying that when adjudication was initially set up, it was intended to adjudicate all existing rights, defined in statute- all water rights with the priority date of 1973 or before. After 1973, you had to get a permit from the Dept. of Natural Resources. What was set up in the water use act at that time, was that all the issues of abandonment had to be dealt with by DNRC. Everyone needs to recognize the fact that the adjudication will take time, before the bulk of the state of Montana is decreed. In this bill, the recommendations, with respect to abandonment, are essentially designed to be dealt with by the water court. While the water court is looking at the basin and doing decrees, let the court do it all at once. Let us decree things as they appear today, because it is hard to prove things what they looked like prior to 1973. A pre-1973 water right would still be subject to common law rules of abandonment. The number of years before it is declared abandoned is a question of fact. If it is a post 73 right you have the statutory abandonment. The intention of the pre and post 1973 issues is mostly looking at evidence.

**Mr. Bloomquist** added that, regarding the concern of **SEN. GROSFIELD** on changing the law of abandonment, it doesn't. **Mr. Bloomquist** stated the law of abandonment is a common law test. He cited several cases with varying number of years, (23 yrs., 40 yrs.) that raised the presumption of abandonment, requiring the water right holder to bring in evidence for the lack of intent. Abandonment is a question of fact. The court would set and weigh the facts. He did not believe that any saying in the jurisdiction statute changes the law of abandonment.

**SEN. GROSFIELD** asked **Don McIntyre, DNRC**, about the jurisdiction process involving the different basins and the stages of adjudications and if this process were to be speeded up to some degree, would this effect or bring up an equal protection issue?

**Mr. McIntyre** responded that the changes made here are not of the nature that rise to an equal protection such that it would endanger the entire adjudication process. However, there may be a possibility that an equal protection issue could appear in the process of objections. Generally, equal protection arguments would not survive.

**SEN. GROSFIELD** asked **Mr. Harris** about the "sour grape" amendment, located on Page 5, lines 4-8 of the bill concerning the time for filing objections, and asked if that was a typical provision? **Mr. Harris** responded that it was and all that they were trying to accomplish in that provision was to attempt to mirror the normal civil process of procedure, where there is a period built in the rules for filing a counterclaim. The intention there was two-fold: 1) to reduce the opportunities for neighbor versus neighbor disputes from two to one; 2) To install an element of fairness in the process due to the tendency that the current "drop dead" objection deadline results in the person who filed the objection having the advantage.

**SEN. VAN VALKENBURG** requested **Mr. Clinch, DNRC**, to summarize the money spent and review budget for water adjudication for the coming biennium.

**Mr. Clinch** replied that he could not provide that to the committee at this time.

**SEN. VAN VALKENBURG** requested the information for the next meeting.

**SEN. GROSFIELD** followed up on that point and asked **Judge Bruce Loble, Chief Water Judge, Montana Water Court**, if he perceived a fiscal impact or timeliness problem of getting this whole thing done.

**Judge Loble** commented that he did not see a fiscal impact because he saw this bill as shortening the whole outcome of the adjudication and making it much quicker to get over with. He believed that it will focus the water court where there are actual on-stream disputes, and that will in turn, get the court working in that area. It will have a positive impact on the adjudication. In respect to the abandonment, **Judge Loble** asked a

question, "do you think the 40 years is not long enough or the 10 is years too short."

**SEN. GROSFIELD** replied that wasn't his point, it was directed at equal protection and the lack of clarity with respect to that. He agreed that abandonment is a fact of the situation but he was unclear about how the ten year provision in the statutes would address this.

**Judge Loble** said, one of the reasons that he thought the abandonment issue the way its been structured and proposed in the bill is a good idea is because of an argument concerning that there is no abandonment of water rights after 1973. He cited an example of a hundred acre ranch that was subdivided into one acre parcels, and the deed would say the owner had a water right of 0.64 of a 200 inch right, meanwhile no ditch existed in the whole subdivision. Someone could raise that as an issue. **Judge Loble** explained that if this bill passed then the water court could hear argument on the abandonment of those water rights, and the bill in general would be a positive impact.

Closing by Sponsor:

**SEN. BECK** closed by saying that this bill expedites the process and emphasized that somehow these water rights have to come to a conclusion. He believed that today there is little reason for abandoned water rights to become an issue anymore. Leasing of in-stream flow is an option today that did not exist 50 years ago. Regarding the objection process, it appeared to him that objections in any court have to come to a conclusion also. This bill is just trying to put objections in the same scenario as other objections are. He estimated that all courts will have some fiscal impact, the water court and all district courts. The whole intent of this bill is to come to a conclusion, or a decree of water in the State of Montana, at least a temporary decree. He asked the committee to give this some serious consideration.

{Tape: 1; Side: B; Approx. Time Count: 2:00; Comments: .}

EXECUTIVE ACTION ON SB 50

Amendments: None

Motion/Vote: SEN. THOMAS KEATING MOVED A DO PASS FOR SB50.  
MOTION CARRIED UNANIMOUSLY.

EXECUTIVE ACTION ON SB 59

Amendments: None

Motion/Vote: SEN. VIVIAN BROOKE MOVED A DO PASS FOR SB59.  
MOTION CARRIED UNANIMOUSLY

EXECUTIVE ACTION ON SB 72

Amendments: None

Motion/Vote: SEN. VIVIAN BROOKE MOVED A DO PASS FOR SB 72.  
MOTION CARRIED UNANIMOUSLY.

COMMITTEE BUSINESS

Motion/Vote: SEN. MILLER MOVED TO ADOPT COMMITTEE RULES. MOTION  
PASSED UNANIMOUSLY.



ADJOURNMENT

Adjournment: 2:13 P.M.



SEN. LORENTS GROSFIELD, Chairman



GAYLE HAYLEY, Secretary

LG/GH