MINUTES

MONTANA SENATE
55TH LEGISLATURE - REGULAR SESSION

COMMITTEE ON NATURAL RESOURCES

Call to Order: By **VICE CHAIRMAN WILLIAM CRISMORE,** on January 17, 1997, at 1:00 P.M. 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. Mike Taylor (R)
Sen. Fred R. Van Valkenburg (D)

Members Excused: **Sen. Bea McCarthy (D)**
Sen. Ken Miller (R)

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:
Hearings(s) & Date(s) Posted: SB97 1/3/97

HEARING ON SENATE BILL 97

Sponsor: **SENATOR LORENTS GROSFIELD, SD 13, BIG TIMBER**

Proponents: **Bud Clinch, Director, Department of Natural Resources and Conservation**
Holly Franz, Montana Power Co.
Mike Murphy, Montana Water Resources Assoc.
John Bloomquist, Montana Stockgrowers
Jan Rehberg, Crowley Law Firm
Jon Metropolis, Flathead Joint Board of Control
Don McIntyre, Attorney, DNRC
John Youngberg, Montana Farm Bureau

Opponents: **None**

Opening Statement by Sponsor: **LORENTS GROSFIELD, SD 13, BIG TIMBER**, stated he was sponsoring this bill at the request of Department of Natural Resources and Conservation. SB 97 will reverse the decision made by the Supreme Court of Montana concerning permitting and the change of water rights within the boundaries of the Flathead Indian Reservation. He said it dealt with some very difficult issues and the best way to explain it was to discuss SB1, which had a clarification problem, because there was some question concerning the meaning of the statute. There has been other cases where the court thought the statute meant one thing when really the legislation meant another thing. He said that was the case in this bill and the Dept. and others, including himself, believed that the court just made a mistake in this case. He said SB97 will put the law back to a status quo. This case involved changes of water rights within the boundaries of the Flathead Indian Reservation where the tribe objected, and it went through the court systems. The bottom line was that the Supreme Court decision, August 22, 1996, basically said that nobody within the boundaries of the Flathead Indian Reservation could be granted a permit or a change of water rights under state law until the adjudication was final. The Court said that the tests required in the statute cannot be met, therefore the Department cannot issue any more permits. **SEN. GROSFIELD** said theoretically, the case only applies to that instance, the Flathead Reservation, however, **Chief Justice Turnage** warned that there was nothing to prevent the logic of this case from extending beyond the boundary of this particular reservation and could apply to other reservations. He said what we are dealing with are federal & Indian reserved rights. There is federal reserved rights on the Forest Service, BLM, etc., and he believed that the same logic could potentially apply to all Forest Service land, all BLM land in Montana. He said the case was about suspending our whole water rights's process for the indefinite future until the adjudication process is finalized, which may be decades from now. **SEN. GROSFIELD** referred to page 12, lines 28 & 29, and specifically the last word on line 29, "reserved". That was the word that the Court misunderstood as federal reserved water rights. He said that word has never referred to federal reserved water rights and was never intended to refer to federal reserved water rights. He understood why the Court might have gotten confused because if you look on page 14, lines 3 & 4, and look at the original language of the statute, it says "including requirements for reserved water rights held by the United States for federal reserved lands and...." On the bottom on page 12, line 29, it had said, "for which water has been reserved." The Court confused the concepts. "Reserved" on line 29 goes along with the water reservation process in Montana. The Water Use Act passed by the legislature in 1973, allowed state agencies to reserve water for future public use. That is what that language on the bottom of page 12 has always referred to. It is so much a part of our language, he believed that no one thought it was necessary to explain. **SEN. GROSFIELD** referred to page 19, line 15, where it says, "reallocation of reserved water... may be made by the Department," and felt the court interpreted that language

as giving the Department the authority to reallocate federal reserve water rights. He stated that the Dept. has no authority, and never would have the authority to reallocate reserved water rights. That would arise out of federal law and may be compacted through the Reserve Water Rights Compact process in a voluntary agreement between a tribe and the State of Montana.
SEN. GROSFIELD finished by emphasizing that the bill arose from a request by the Department out of concern directly from the Governor, and this bill needs to be passed. He reiterated that this bill does not affect the federal or the tribal reserve water rights. He added that if anything, it helps them because the language added, (page 8, lines 20 & 21,) where it says, "The term includes federal non-Indian and Indian reserved water rights created under federal law and water rights created under state law." For the first time, we statutorily recognize that those federal reserve rights are indeed existing rights under Montana law.

{Tape: 1; Side: A; Approx. Time Count: 1:15; Comments: .}

Proponents' Testimony:

Bud Clinch, Director of DNRC, passed out his written testimony that went through the bill section by section, **(EXHIBIT 1).** As **SENATOR GROSFIELD** has stated, he has introduced this legislation on behalf of the Department and this bill was a response to Montana Supreme Court's majority decision in the case commonly referred to as the Pope Case. Since the time the Montana Supreme Court issued its opinion at the end of August 1996, the Department of Natural Resources has been working diligently to put together a bill that reflects sound water policy that strikes a balance between protection of existing rights including federal, Indian and non-Indian reserve water rights and the right to acquire new rights and change existing rights. He stated that this comprehensive legislation strikes that balance when it's considered in its totality with the other water resource tools contained in the Water Use Act, such as the administrative and legislative basin closures, the state water reservation provisions, and the water leasing provisions. This legislation restores Montana to the position the legislature and executive branch was in before the Supreme Court decision and the Dept. strongly urged the Committee's support.

Holly Franz, Montana Power Co, stated she was a proponent to this bill because she agreed that there needs to be a legislative response to the Pope decision. She explained that decision affected two processes, the permitting process and the change process. She clarified that a permit process is to a new water use, and a change process is to an existing water use. For a permit you have to prove than there was unappropriated water available and there would be no adverse impacts to senior water rights. In a change, the person already has a senior water, or an existing water right, they just want to do something different with it, such as changing the point of diversion, but it's

usually something fairly simple. She said changes are different that permits in that there's already water rights for those individuals and one is not putting a brand new use on the stream, but again, adverse impacts on senior water rights have to be looked at. What the Pope Decision did was they said that you cannot determine, until the adjudication is complete, whether there is any adverse impact on senior water right holders, therefore, so we can have no changes and no permits.
Ms Franz did not have any problems with the bill concerning existing water rights, but she was concerned when it addressed the permitting criteria, ie., (311 criteria), which is the criteria you have to prove before a permit is issued. She was concerned that the language in the bill possibly was not going back to status quo regarding permitting. The Water Use Act tries to balance between the new development and the senior water rights. She said as she read this bill, it appeared to her that we are making a switch quite a ways towards the development side.
Ms. Franz apologized for not having amendments for the bill but she believed that some changes should be looked at quite closely. The test in the past was always, "is there unappropriated water available." She retorted that just because there's water in a stream doesn't mean it's unappropriated. She referred to Page 12, lines 13-18, where a lot of things were crossed out about what has to be proved to get a permit for unappropriated water. The bill puts in the test, "water physically available," but when one goes down to B, it says, rather than having to prove unappropriated water, it's whether water reasonably can be considered "legally available." She was unclear if that meant unappropriated water. On line 23, they have to show that an applicant's plan for the permit demonstrates that the use of the water will be controlled so that the water right of a prior appropriator will be satisfied. Again, she said it was unclear what that meant, along with "legally available."

Ms. Franz wanted to comment on the deletions on lines 28 & 29. She did not know why that reference to interference with a permit was deleted. Regarding "for which water has been reserved," she understood why that was taken out, but suggested to just specify that it was a water reservation. She commented on page 13, line 17, that refers to big appropriations, and said that there were not any consideration concerning the impact on senior water rights. Overall, she did think **SEN. GROSFIELD** was right when he said we need to pass this bill. "We need to address the court decision but we have to make sure we don't throw the baby out with the bath water when we're doing it."

Mike Murphy, Montana Water Resources Association, wished to go on record in support of HB97, but the association did have some reservations. **Ms. Franz** identified some of those reservations in regards to the specifics of Section 311. He had some concerns also regarding the definitions of "physically available" and "legally available." Thirdly he had some question about the timing of the moratorium being proposed in regards to the reservations. He said that would extend a moratorium to the year

2003, and a bill was just heard extending the Compact Commission efforts to the year 2005. He suggested that the time frame be shortened to 1999 or 2001 because he felt that should be enough time to look at an additional extension of that moratorium or take some other action. He felt that the provision that allowed ground water to continue to be permitted was appropriate, along with the exclusion of the change of use within this moratorium.

John Bloomquist, Montana Stockgrowers Association, believed this bill needed to be passed to address the ramifications of the Pope Decision. He believed recognition of post July 1, 1973 permits and changes is necessary and that this bill reaffirms those particular actions by DNRC. He thought the Pope Decision was erroneous as **SEN. GROSFIELD** pointed out, primarily for misreading of the words "reserved water" which he pointed out, and thought that the definition change for state water reservations is a good idea. He then talked about the state's rights and sovereignty regarding water resources. He thought the language on page 3 where the bill talks about the moratorium is not waiving the state's jurisdiction. He said this legislation is changing the criteria for new permits, and also did not know what "legal availability" meant. He thought it was unappropriated water, possibly water that would be available at the time when the applicant is proposing to use it, but felt that point should be made clear. The moratorium itself, raised a question primarily of what happens in the interim, he stressed. On Indian reservations, whether it's the Flathead or other ones now, do we go into a period of limbo for development of the water resource? He thought it appeared that way to him, so the question was if development was going to occur, who's going to allow it and what is the mechanism in this moratorium? Or do we just shut it off? He thought those questions needed to be discussed. He also did not understand the permits over 4,000 or more acre feet, why the adverse affect language was stricken. He said that might need some discussion as well. Again, He thought this bill needed to be passed, but a few questions needed to be answered regarding specifics. He added that maybe a coordination instruction is needed in Section 3 because Senate Bill 59., which extends the compact deadline.

Jan Rehberg, Crowley Law Firm, stated she engaged in water law, but she was not here in behalf of any particular client, although she had a number of clients whose interests would be affected by the provisions in this bill. She reiterated what the prior proponents have stated, that there was a reason to have legislation of this sort adopted. She did have a question as to why they have defined state reserve water rights and have not defined federal reserve water rights. She said it may help make the situation a little clearer if we actually had a definition of federal reserve water rights. **Ms. Rehberg** also brought up the moratorium and the fact that the compacting process has been extended time and time again, and questioned if there would be extensions on the moratorium. She concurred with the concern about the language which dealt with adverse affects, and about

defining adverse affects in a statute. She said that the concept of adverse affect to a prior appropriator has been developed over the course of the last 100 years through decisional law in the courts of this state. She believed every time you try to put that into statutory language, you lose something, and there may be other aspects of adverse affect that should be considered. She also stated that she did not know what "legally available" meant.

Ms. Rehberg referred to Page 15, which dealt with permitting, and said we get back to the concept of reasonable determination of legal availability, which she also thought was ambiguous. She felt that needed to be cleared up. The other concern she had was on changes in the appropriation rights, which she felt were significant, and therefore, more in-depth inquiries needed to be done. She did not suggest they were improper, but had some concerns.

Ms. Rehberg handed out her suggested amendments to SB97, attached as **(EXHIBIT 2).** She then gave a brief history of her suggestions concerning the Water Use Act to deal with the late claim issue. The Supreme Court issued a decision that said that if claims were not filed under the statutory deadline they were forfeited. She felt that the Supreme Court decision was also wrong and that it did not reflect Constitutional guarantees provided to the holders of existing water rights. She had suggested additional changes which were not passed in 1993 or 1995. She wanted to use this bill because she thought some important things were highlighted that were relevant to her late claim issue.

Jon Metropolis, Flathead Joint Board of Control, stated that this board was an umbrella organization for three irrigation districts on the Flathead reservation, which is composed of about 2,000 farmers and ranchers. They are in support of this bill because something needs to be done about the Pope Decision. He wanted to briefly state that in Section 101, subsection 6, page 3, line 14, where the legislation asserts that this bill does not limit, alter, or wave the state's jurisdiction, was very important to his organization, especially non-members living on the reservation. He gave a brief overview of the demographies. He said 50% of the land area on the reservation is owned by non-tribal members. The population of non-members is somewhere between 80% and 85%, meaning 15% to 20% are members of the tribe. Therefore, non-members having no rights to participate in tribal government, rely on the state government to control, regulate and represent them. It's very important to many residents on the Flathead reservation and other reservations in the state, that if the Legislature is going to place a moratorium on this. He said the Legislature needs to assure them that the state is not pulling out from these reservations altogether. He thought four years until 2001 is long enough. He said he agreed with ground being excluded from the scope of this moratorium should remain excluded, along with changes of use. He said the major concern of his clients is the unknown when the moratorium is put in place. There is regulatory vacuum that would arise. In the case

of the Flathead reservation, the population is growing very quickly and they need to be able to use water. They were concerned over the ability to acquire new use permits, and suggested a mechanism to issue interim permits in such a way that the rights of the non-members there are preserved as well as the rights of the tribes to have their reserve water rights fully adjudicated prior to having other permits issued.

{Tape: 1; Side: B; Approx. Time Count: 1:50; Comments: None.}

Don McIntyre, Legal Council, DNRC, said he was one of the attorneys involved in this litigation. He distributed five handouts: **(EXHIBIT 3)**, the Montana Adjudication Program Expenditures Since 1974; **(EXHIBIT 4)**, Post June 1973 Water Rights on Indian Reservation; **(EXHIBIT 5)**, the definition of Legal Availability; **(EXHIBIT 6)**, a map of Montana General Adjudication; and **(EXHIBIT 7)**, a letter from the Dept. of Interior. He said he would try to clear up some of the questions that have been raised. This case rose as one of jurisdiction. Does the State of Montana have the authority to issue water rights permits changes within the exterior boundaries of the Flathead reservation. He explained when the Supreme Court of Montana decided it, they did not decide it on a jurisdictional issue. What the Supreme Court did was issue a decision that was limited to the exterior boundaries of Flathead Indian Reservation. The problem with it, as Chief Justice Turnage pointed out, there's nothing to prevent the logic of this case from extending beyond the boundaries of this particular reservation to the other reservations, whether it be Indian or non-Indian federal right. A number of years before, there was another case known as the Don Brown case, which involved state based rights and the rights of the federal government that were state-based at Canyon Ferry, as well as Montana Power Co. In a nutshell, basically what Judge Bennett said in that particular case, was that the department shouldn't be issuing permits to Don Brown and others out there because until the adjudication was complete, they couldn't prove their case. The case was not appealed with the Montana Supreme Court but an agreement was made with the federal government and Montana Power Co. as to how water right management would take place throughout the years.
Essentially, his opinion of what the court would be saying was- if we don't go back and make the changes, specifically now to 311, that we can't go to court, we're done. He said most likely, we would be going back to court, especially with groundwater issues, and they might fault to Justice Nelson's concurrent opinion.
Mr. McIntyre said the reason they have not defined federal reserved right is that the State of Montana can't define the scope of federal reserve rights because the federal courts are the ones that do that.
He said there were some concerns about 311 criteria and the moratorium. He said the moratorium within the bill is strictly on surface water and strictly on permitting, not changes. He said as we tried to point out in our re-hearing, regarding

changes, it was possible for someone who has an existing right to show that it will not affect even a reserve right even if it is not quantified. They left ground water out because the Dept. felt that ground water is not necessarily subject to reserve water rights. So can developments still take place in the reservation even though there is a moratorium? The answer is yes. It can take place in terms of changes, and sales of water and changes of ground water usage. As to surface water, it would not.

He said one of the benefits of the moratorium, is that it encourages the Tribes to negotiate towards settlements of their water rights. In terms of the time frames points that were made, he agreed with **Mr. Metropoulos** that the sentence in paragraph 6.3 is very important to them because people have to know that this is not jurisdictional. He stated we are not diminishing the jurisdictional rights of the State of Montana nor do we intend to expand them.

Regarding the moratorium as a practical matter, he distributed a handout on post June 1973 water rights on Indian reservation, which was a quick breakdown with respect to surface water and ground water, **(EXHIBIT 3)**. In terms of this bill it's practical affect is on three reservations, the Flathead, the Blackfeet and the Crow. Ft. Peck and the Northern Cheyenne have compacts signed so this moratorium wouldn't apply. When we have compacts on these others, they shouldn't apply. He said the Flathead Reservation was clearly the most active, with 287 surface water and 82 ground water permits since 1973. The Blackfeet had 48 issued, and the Crow had 93 permits issued since 1973.

He went over Section 311. **Mr. McIntyre** pointed out that prior to 1973 you could get a water right virtually any way you wanted and just went the courthouse and filed it. The most predominate of all mechanisms for getting a water right was a use right and if the water was there you took it and then you were put on the ladder of priorities. But one had to honor the call of people higher up the ladder. In 1973, the Water Use Act was adopted and there was a new permitting process established to put some parameters on before a right was given. As a result, the term of adverse affect was brought into permitting. He explained that the term came from the water law in Montana dealing with people who change their water rights and who already have an existing right. The law was you had an absolute right to change your water right, but could not adversely affect any other prior or junior water user.

Adverse affects were always tested in the court, and the person who was affected had to bring it to court and had the burden of proving the situation. He said that was where the term started to come into the statute, and how the statute reads it like a negative, "Do I have to prove lack of adverse affect." How does a new person respond trying to prove that. Over the years, the department has tried to develop tests that would allow a water development to go on and to use this adverse affect test and to use the concept of unappropriated water along with it. We have now developed guidelines under the law as it's now written that

basically incorporate exactly how we're asking the statute to change.
The criteria in subsection 1 has always included this term adverse affect. Once you proved A, you were actually proving B as well. He said they left the term adverse affect in the bill because it is in the statute and decided to define it for purposes of permitting only, not for the changes. There in no change in the language to the change process other than to clarify the rights that can be affected. He said there is an adverse affect test, but the adverse affect test has to be taken in the context of how a person gets a water right.
How do they get it? Physical availability and legal availability of water. Physical availability goes back to the historical notion that the water there, or flowing by. Legal availability does not have a definition, but he said he can provide the Committee with the document or guideline used by the Dept.'s field office which is looked at to assess unappropriated water and adverse affect. He said in implementing this language it will then say that an applicant can prove this criteria before the adjudication is complete. Once the adjudication is complete, you then go back to 311, which basically says we can then use all of the information from the adjudication and either revoke, modify, affirm, or reduce those particular permits. He said they were trying to come up with a comprehensive piece of legislation that allows development, and protects existing water rights and takes us out of the state law question that was before the Supreme Court and will leave it purely jurisdictional.

John Youngberg, Montana Farm Bureau, stated that the water community of the Montana Farm Bureau supported this bill, and felt it was important to pass this piece of legislation. However, they were somewhat embarrassed about not understanding several sections of it. He said the bill is here because of the misunderstanding of the statutes in the courts, therefore felt it was important to have the terms in Section 311 statutorily defined so they will not continue to be subject to the interpretation of the Supreme Court.

{Tape: 1; Side: B; Approx. Time Count: 2:10; Comments: None.}

Questions From Committee Members and Responses:

SEN. MIKE TAYLOR made a comment it was important to get the language correct the first time. He recommended a subcommittee to make sure that this language is correct. He stated he supported the bill but did not want to support something that doesn't explain the rules correctly.

SEN. THOMAS KEATING asked **Mr. McIntyre** if this bill is needed to overcome the improper decision of the Supreme Court and this is at the request of the department, is every change in here related to that decision that needs to be changed?

Mr. McIntyre said when this bill was originally started through the process it was at the request of the Governor. At that time, he specifically directed that no change take place in this bill that was not somehow directly related to the issues that were presented in this case. He said that was why he referred to the Don Brown case because that was the incurring opinion. That point was brought to his attention and he said to go forward with this.

SENATOR KEATING asked everything in this bill deals directly with that decision? **Mr. McIntyre** answered yes. **SEN. KEATING** asked to explain the terms Federal non-Indian and Indian, does this mean Federal non-Indian and Federal Indian. **Mr. McIntyre** said basically Federal Reserve Rights are broken into two categories; Indian and then Non-Indian, meaning all those others.

SEN. KEATING said when we talk about federal water rights and Indian water rights, are the Indian water rights Federal Indian water rights or are they just plain Indian water rights?

Mr. McIntyre answered it depends on whether you're talking about aboriginal Indian rights, then that would be a different category because they are not created by the reservation.

SEN. DALE MAHLUM asked **Mr. McIntyre** if this bill was to pass along with the proposed amendments to it, if someone wanted to bring it to the Supreme Court again, could they throw it out like they did the last one?

Mr. McIntyre said the intent of this bill is to put state law in the position that they cannot issue the same decision they did before, and the anticipation is that it is going back up to the Supreme Court, most likely with respect to ground water, initially.

SEN. FRED VAN VALKENBURG asked **Mr. McIntyre** if the Dept. had a position on **Ms. Rehberg's** proposal to open this up to late claims.
Mr. McIntyre said we only directed to deal strictly with that case.

SEN. VAN VALKENBURG asked **Director Clinch, DNRC,** if he had any comment on the department's position on whether we should be providing an opportunity for people who file late claims to now have those adjudicated by the water court.

Director Clinch said the proposal of the amendments came as a surprise to me but he thought bringing that issue of late claims would bring a whole other layer of players to this bill, often pitting proponents against opponents in a most complex way, which may ultimately result in a tabling of the bill. They would oppose that.

SEN. VAL VALKENBURG asked **Mr. McIntyre** about the issue raised regarding the changes with the very large water users, those with more than 4,000 acre feet per year. He said he understood that one of the changes here is the burden of proof under 311-1, the preponderance of the evidence, where the burden of proof in 311-3 is by clear and convincing evidence. Are we changing the burden of proof on that.

Mr. McIntyre said he thought he might be misunderstanding this. Subsection 3 requires a B, by clear & convincing evidence. All it means is that you go back and look at the criteria in subsection 1, but you apply the standard of review which is clear and convincing when you're looking at the larger water. He said he did not think that anything in this bill changes how the standard of proof is being looked at.

SEN. VAN VALKENBURG asked **Mr. McIntyre** to comment on the objection that some of the proponents had to having the moratorium extend as far as the 2003 as opposed to 2001?

Mr. McIntyre said originally how long the moratorium should go was just tied to the compacting itself. In the last meeting, the issue then came up of wanting a shorter time period. He said it was decided it should be shorter, but we didn't reach any conclusion. The agency thought four years might be too short a period of time to allow those negotiations to go forward. He said they didn't want to use an even number year because the Legislature wasn't meeting, therefore the year 2003 was adopted by the agency.

SEN. VAN VALKENBURG asked **Mr. McIntyre** if the Confederated Salish & Kootenai Reservation were a party to this Pope Case and were they the prevailing party? **Mr. McIntyre:** Yes.

SEN. VAN VALKENBURG asked why they were not here today.

Mr. McIntyre said when the communication was directed to the tribes
concerning this bill, the Flathead did not respond.
He said he did not know what their input would be on this bill but he suspected they would oppose it simply because right now, if the law were to stand, the State of Montana would not be doing any permitting or changing within their boundaries.

SENATOR MACK COLE asked **Director Bud Clinch** if the negotiations were going to continue.

Director Clinch said absolutely not. Negotiations will continue, and we have not interrupted any negotiations as a result of this.

SEN. COLE asked **Director Clinch** if we going to allow the permitees to become part of the negotiations as far as the water right is concerned?

Director Clinch answered that holders of state rights can now take a more active role in the negotiations.

SEN. VAN VALKENBURG asked **Director Clinch** to clarify that these are all state water right permits and these have nothing to do with tribal water rights. **Bud Clinch** said he believed that was correct.

SEN. VAN VALKENBURG asked **Mr. McIntyre** about Indian reserved water rights, and if they all came out of the same decision as far as reserved water rights are concerned?

Mr. McIntyre said the issue of Federal Reserved Water Rights initially came out of a case called the "Winters Case." This was in Montana where Federal Reserved Rights or Indian Reserved Rights were first recognized. It was thought of as a special rule of Indian law for almost 50 years. Then subsequent cases applied the Federal Reserved Doctrine to not only tribes but to the federal government as well.
Mr. McIntyre said the only distinction between the Federal Reserve Water Rights, Indian/non-Indian is that Indian are as a result of the trust responsibility in the United States whereas other Federal Reserved Rights are simply within the United States Government.

SENATOR VIVIAN BROOKE asked **Mr. McIntyre** about the definition that he passed out, **(EXHIBIT 5)**, on legal availability. She thought water would be over appropriated by using this definition.

Mr. McIntyre explained that there are two tests, physical availability and legal availability. Physical availability actual water existing in the stream and is flowing by. He said legal availability makes you go farther to see whether there is any left to claim by checking all available records. If there's more water physically available as a result of your measurement than there are claims, then water is legally available. This gives the applicant the ability to come in and show his case and prove under legal available.

{Tape: 2; Side: A; Approx. Time Count: 2:25; Comments: Start of Tape 2.}

SEN. BROOKE said the letter from the Dept. of Interior argues from the federal point of view, and asked if there were other letters that came in?
Mr. McIntyre said he had not read that letter and he just saw a copy as well. The Federal Government was asked to comment as well as the Indian Tribes and most of the correspondence that the Governor had received and passed on to us was that they were still looking at the bill. His assumption was that this was sent in contemplation of the hearing.

SEN. BROOKE: When you sent out for opinions, what other responses did you get. **Mr. McIntyre** replied that he thought they only received one response from the Blackfeet and the Crow sent in letters that were not supportive. He said most of the comments they received came from water attorneys and users of water such as those who have appeared today.

SEN. BROOKE asked **Mr. McIntyre** about the positive language rather than the negative language regarding Section 311.

Mr. McIntyre said going back to what he said in terms of what is it when you get a permit- you get the right to come onto the stream with your priority date. Your priority date is junior to all water rights before, whether they are existing water rights, reserved water rights, or any other. This language is really redundant language and in their opinion was not needed anymore.

SEN. BROOKE asked **Holly Franz** if that satisfied her concern.

Ms. Franz said that probably stated pretty clearly what my concern was. She summarized what **Mr. McIntyre** had said. These amendments take us back somewhat to where we were before 1973, in that you just go out, you get a water right, and then it's the duty of a senior water user to enforce their priority against that new water right. In the Water Use Act of 1973 we set up a system so the individual would have to come into the department and prove that water was not adverse affect before they were given the water right. She stated the theory as, our whole water right system works on priorities. She said it was a good theory but we really have a fairly ineffective method of enforcement, until the adjudication is complete. She felt that the burden was being shifted to the senior user.

{Tape: 2; Side: A; Approx. Time Count: 2:35; Comments: None.}

<u>Closing by Sponsor:</u> **SEN. GROSFIELD** wanted to thank everyone, and said it was a great education on our water rights process. He made a few closing point, one being that words can be very important in legislation. This whole problem came about because of a misunderstanding by the court of a word, the word "reserved." If it rather said, for which water has been reserved under state law, the court would never have come to that conclusion. He said this was a classic example of how important little words here and there are and why it's so important for us all to pay close attention when we're drafting legislation that's going to be reviewed by people, maybe in distant years, distant towns or in the Supreme Court.

SEN. GROSFIELD said there were some concern about the moratorium, if we have to do that and how long do we have. Presently, the law is the Pope Decision, which puts a permanent status on the moratorium. He added that could be an oxymoron because a

moratorium means there's always an end to it. The Pope Decision is permanent. He said he was uncomfortable having a moratorium extend until compacting is done because it might take a long time, but he did not want to leave it open-ended either, so that was why 2003 was chosen. He said one of the advantages to a moratorium is that it does give the tribe some impetus to negotiate, since the time frame of the compact is limited. He said to remember that the Pope Decision is in place, and as **SEN. VAN VALKENBURG** pointed out, the tribes prevailed in that case.

He pointed out on page 3, the declaration of policy and purpose section, sub 5. He said he was pleased with that new language in sub 5, because it describes the history of water right law in this state and it serves to clarify water claims that end up in misunderstanding. He said it was very important language and very important concepts to have in our policy section of our water permitting statute.

He said groundwater is not in this bill, and agreed it is important to keep that out. The question of shifting the burden to senior users, he did not totally agree. He said in our water law, a senior water right is a great thing to have but with that comes a little bit of responsibility to protect that. In that sentence he was not sure if it shifted the burden to the senior water right holders, so it was something that needed to be discussed further. **SENATOR GROSFIELD** said this bill needs to pass, it is just a matter of putting it into a final form.

VICE CHAIRMAN CRISMORE closed the hearing on SB 97 and adjourned.

ADJOURNMENT

Adjournment: 2:45 PM

WILLIAM CRISMORE, Vice Chairman

GAYLE HAYLEY, Secretary
by Shirley Herrin

LG/GH