

## **MINUTES**

### **MONTANA SENATE 55th LEGISLATURE - REGULAR SESSION**

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

**Call to Order:** By VICE CHAIRMAN WILLIAM CRISMORE in the absence of SEN. LORENTS GROSFIELD, on March 10, 1997, at 3:05 p.m., in Room 405.

#### **ROLL CALL**

**Members Present:**

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:** Sen. Lorents Grosfield (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:**

Hearing(s) & Date(s) Posted: HB 285, HB 283; Posted  
Executive Action: HB 506, HB 507, HB 486, HB 283

#### **HEARING ON HB 285**

**Sponsor:** REP. PAUL SLITER, HD 76, Kalispell

**Proponents:** Mike Volesky, Montana Association of Conservation Districts  
Cary Hegreberg, Montana Wood Products Association

**Opponents:** None

**Opening Statement by Sponsor:** REP. PAUL SLITER, HD 76, Kalispell, said HB 285 added two members to the Flathead Basin Commission, one from the Flathead County Board of Supervisors of the Conservation District and the other from the Board of Supervisors of the Lake County Conservation District. He stated

the Flathead Basin Commission was an advisory council attached to the Governor's Office which basically advised on water quality issues of the Flathead Basin. He said the Conservation Districts wanted to have some voice on this particular Commission because the approach to the Basin Commission would be more balanced through the agricultural interests represented from the Conservation Districts.

**Proponents' Testimony:** **Mike Volesky, Executive Vice President for Montana Association of Conservation Districts**, said they had a resolution process whereby the Conservation Districts passed a policy through their organization and HB 285 was a result of that. He urged the Committee to pass on HB 285.

**Cary Hegreberg, Montana Wood Products Association**, expressed support for HB 285, explaining the Flathead Basin Commission was going through a tremendous amount of scientific research and doing a lot of work to analyze and study necessary measures to improve water quality; it was at the Conservation District level where this was all put into place. He suggested it was a common sense approach which would have some bearing on land management practices, etc.

**Elna Darrow, Flathead Basin Commission**, could not attend but turned in her written testimony to the secretary. (EXHIBIT 1)

**Opponents' Testimony:** None.

{Tape: 1; Side: A; Approx. Time Count: 3:25 p.m.}

**Questions From Committee Members and Responses:** **SEN. DALE MAHLUM** asked why Flathead and Lake Counties never had anybody from their districts on there. **REP. PAUL SLITER** said he wasn't exactly sure, but suggested Conservation Districts would be represented and the Governor could appoint a Conservation District member at any given time when those appointments came around; however, it seemed a statutory representation of the Conservation Districts should have been there from the beginning, but wasn't.

**SEN. KEN MILLER** suggested every time a couple more members were added, it cost a little bit. He wondered from where the funds would come, since there was no fiscal note. **Mike Volesky** said a line item went through the Governor's Office, and was actually funded through the RIT trust proceeds or interest -- he wasn't sure exactly which.

**SEN. BEA MCCARTHY** wondered why, since both the Flathead and Lake County Commissioners had an appointed person on this Committee, they couldn't have used that appointment for what was requested. **Mike Volesky** said he thought they could have because when non-point sources of pollution were being discussed, and that's largely what Flathead Lake's problems were, the local entity designated Conservation Districts for dealing with non-point sources of pollution from whatever source, agriculture, timber.

**SEN. MCCARTHY** asked why the Conservation Districts could not have made a recommendation to the county commissioners; thereby, solving the problem without passing a statute. **Mike Volesky** said all those members were appointed through statute, and that's why a statutory change was sought. He remarked the Lake and the Flathead County Commissioners wanted some representation and suggested the reason Conservation Districts weren't included in the first place was because when the commission was created, those Conservation Districts may not have been all that active.

**SEN. KEN MILLER** wondered how often the Commission met, and what its history had been. **Mike Volesky** said they met at least quarterly, and sometimes monthly. He said the cost shouldn't be any more than previously, which was why there was no fiscal note, because the members served at their own expense in getting to the meeting, etc.

**SEN. MILLER** maintained though it said commissioners shall serve without pay, they were reimbursed for traveling, meals and lodging while engaged in Commission business; therefore, if some were added, there would be additional meals, etc. **Mike Volesky** explained it would be pretty minimal because they usually met right there and didn't do a lot of traveling beyond that.

**SEN. MIKE TAYLOR** asked **REP. SLITER** if he had been to one of the meetings and was told he had been to one, a large gathering where all their members and the Governor got together in Big Fork. He said this was held during the fall of 1994.

**SEN. TAYLOR** related he had heard sometimes the meetings didn't have a quorum to make decisions; therefore, if more people were added, a larger number would be needed to make a quorum. **REP. SLITER** thought since the Conservation Districts expressed such a desire to be on the Commission it was more than likely they would get into the habit of regular attendance; therefore, it might not be as tough to get a quorum. He said if two members were added, and if they showed up, the quorum problems really wouldn't be an issue.

**SEN. MCCARTHY** asked if **REP. SLITER** considered putting these two members into section A of the bill, which were the seven appointees of the Governor, and making him involve more local people. **REP. SLITER** said in the short time he had been afforded the opportunity to serve in the legislature, he never once heard the Governor or anyone around the Governor's office proclaim a deep desire to have more appointments to make.

**SEN. MCCARTHY** said she meant the Governor had seven to make right now, and two of those seven could be the specific people. **REP. SLITER** said he guessed of the seven members which were appointed by the Governor, a portion of them were members of the general public, i.e. citizens. He further suggested if two of those appointments were eliminated in favor of making them conservation district appointments, it could be said the Conservation District

Board of Supervisors were citizens; however, they served in somewhat of a government subsidiary manner. **REP. SLITER** contended he would not be a proponent of eliminating citizenship membership in favor of government subsidiary membership; however, if the Committee thought it necessary to make some sort of an amendment to HB 285, he would not personally be opposed to that. He remarked, though, he would not like to create any turf battles anywhere along the line.

**SEN. MCCARTHY** expressed concern 23 was an unwieldy group and if the present group of 21 was having difficulty in getting a quorum of 11, getting a quorum of 12 or 13 would be much more difficult. **REP. SLITER** answered if the Committee would choose to amend HB 285, he would be more than happy to take those amendments back to the House and urge their concurrence because he would much rather see that than have the bill go down. **REP. SLITER** said it was not their intent to remove anyone from the Commission; however, there needed to be some representation from the districts. He related the issue came up in the House Committee, and they decided not to deal with it because the commission's executive director was there who let them know they were trying to come up with a way to reduce the membership because it was a little bit unwieldy. He reported they were working on that, so it could return in 2 years.

**SEN. TAYLOR** asked again about the size. **REP. SLITER** said the issue was it was not the desire to remove anybody from the Commission; however, even the executive director of the Commission agreed there needed to be a size reduction and they were working on that.

**SEN. TAYLOR** asked if there would be opposition to an amendment if the number was kept at 21, but allowing a couple of conservation members from the Flathead or the Lake County Basin. He said he understood about \$77,000 a year was spent on this committee right now; although he saw a benefit, he certainly didn't want to increase the spending. **REP. PAUL SLITER** answered if that was the desire of the Committee, he would be more than happy to work with **SEN. TAYLOR** or whoever had interest; in fact he would be more than happy to get with staff to see if they couldn't put together some amendments before the Committee took executive action.

Closing by Sponsor:

**REP. PAUL SLITER** reiterated the original intention was not to step on any toes and create any turf battles; however, if some amendments could be arrived at which would make HB 285 better, both he and the Conservation Districts would be more than willing to assist in that. He said if agreement on the bill could be reached, he thought **SEN. MIKE TAYLOR** would be happy to carry it.

HEARING ON HB 283

Sponsor: **REP. EMILY SWANSON, HD 30, Bozeman**

**Proponents:** Chris Tweeten, Reserved Water Rights Compact  
Commission  
Barbara Cosens, Reserved Water Rights Compact  
Commission  
Joan Specking, Reserved Water Rights Compact  
Commission  
Bud Clinch, Department of Natural Resources and  
Conservation

**Opponents:** None

**Opening Statement by Sponsor:**

REP. EMILY SWANSON, HD 30, Bozeman, said HB 283 was the third in a series of compacts from the Reserved Water Rights Compact Commission; the first two had already passed the Senate Floor, i.e. the Chippewa Cree Tribes and the BLM Wild Scenic Portion of Missouri. She reminded the Committee bringing three compacts in one year required a lot of work and negotiating, and commended the staff for representing state water right holders and negotiating with the federal government. REP. SWANSON explained this compact covered only two of the wildlife reserves existing in the State of Montana, i.e. Benton Lake National Wildlife Refuge and Black Coulee National Wildlife Refuge (**EXHIBIT 2**) and still left several wildlife refuges in the state -- the Red Rock Lakes Refuge, the Bowdoin Refuge, The CM Russell UL Bend Refuge, and the National Bison Range at Moise -- yet to be negotiated.

She said there were really no conflicts on these two smaller refuges, even among area water right holders, so this compact was very much in consensus. REP. SWANSON reminded the Committee these compacts needed to be ratified unchanged, or else the whole process would have to start over. Therefore, she hoped the members could pass HB 283 unchanged. She said she was a member of the Reserved Water Rights Compact Commission.

**Proponents' Testimony:** Chris Tweeten, Chairman of Reserved Water Rights Compact Commission informed the Committee he served as the Chief Deputy Attorney General for the State of Montana, and since Attorney General Joe Mazurek was unable to be present to support HB 283, Mr. Tweeten conveyed his support for the compact and his urging for the Committee to give it a favorable recommendation.

He said this was a reserved water rights compact with respect to a federal agency; however, it did not involve the reserve water rights of an Indian Tribe, so it was a bit different from the Rocky Boy compact, which was heard last month by the Committee. He said the staff would give a more detailed explanation as to what the compact covered and what was left to do with respect to the reserved water rights claims of the U.S. Fish & Wildlife Service in Montana. Mr. Tweeten agreed with REP. SWANSON that HB 283 should be passed intact.

**Barbara Cosens, Legal Counsel for the Reserved Water Rights Compact Commission**, reiterated HB 283 sought ratification of the agreement between the state and U.S. Fish & Wildlife Service for two particular refuges, Benton Lake and Black Coulee National Wildlife Refuges. She referred to the first sheet of (**EXHIBIT 2**) and said Benton Lake National Wildlife Refuge was due north of Great Falls and was located in the Lake Creek watershed, which was actually a sink between the Sun and Teton river drainages. She explained there was water use upstream in the watershed but the watershed ended at the refuge, i.e. there was no outlet and it was thereby a sink. The only way water was lost to the system was by use, evaporation and seepage; in other words, there was nothing downstream from the refuge itself. **Ms. Cosens** said the whole watershed covered an area about 135 square miles.

She said in addition to their reserved water rights, the refuge contracted with the Greenfields Irrigation District and brought water over from the Muddy Creek drainage, which was not part of this agreement but was a separate contract; however, Greenfields Irrigation was involved to ensure nothing would interfere with that contract. **Ms. Cosens** stated national wildlife refuges were reserved as refuges and breeding grounds for migratory birds and wildlife; in particular, most of them were acquired as a reserve from the migratory bird conservation treaty, which was entered into with Canada in 1916. Therefore, waters necessary to maintain the habitat and the measure of the water right necessary for that purpose allowed the quantifying or tapping it. She said in both Benton Lake and Black Coulee, the actual use of water was as an impoundment for migratory birds; the measure of lost water was not actual consumption by the birds, which would be diminutive, but the evaporative loss from these impoundments would by far overwhelm any other water loss to the system. When the negotiations began, the U.S. Fish and Wildlife Service indicated they saw no conflict with existing water use; however, at the same time, if the evaporative loss from these areas was quantified, the remaining available water would be their reserved right. The Compact Commission's assessment essentially agreed with that.

**Ms. Cosens** addressed the issue of how that might affect water use off the reservation and said one of the basic attributes of a federal reserved water right was it was unquantified but got the priority date on which the reservation was established. One thing reserved water rights could result in was to give the potential for displacing junior water rights off the reservation, and one of the Commission's goals when they set out to negotiate was to protect those off-reservation water rights from displacement. She said the refuge was established on November 21, 1929, and the DNRC database showed there were 134 water rights upstream from the refuge, held by 17 individuals and used dominantly for stockwater. She stated there were about five irrigation claims and the rest were mainly domestic claims; however, no new permits had been issued in the last 15 years in the area. She said in order to arrive at an agreement that met

the concerns of water users in the area, they sent the 17 people information and followed up with phone calls; also, they attended one of the Lake Creek Improvement Association's meetings to try to identify the main landowners in the area, and held a public meeting in Power that was well attended. **Ms. Cosens** said this approach led to tailoring the agreement to meet local needs because water users said with the exception of new water development for stock and domestic purposes, they felt there was not additional water in the watershed for development; therefore, it was consistent with the assessment of both the Fish and Wildlife Service and the Compact Commission which they had done independently. Therefore the approach was taken to preserve the status quo, which would allow for development of new stockwater; however, despite the 1929 priority date, the Fish and Wildlife Service agreed to subordinate their water right to existing water uses and any new small stockwater with impoundments less than 15 acre feet, and small ground water developments, which were wells of less than 35 gallons per minute. She explained in order to maintain the status quo, no new permits could be issued in the basin except for those stockwater and small ground water uses and a basin closure was established for other uses. The water right for habitat was covered and there was also a small headquarters at the refuge which had a ground water well for very minimal needs; the water right for that in the compact was a maximum of 2 acre feet per year.

**Ms. Cosens** referred to the third and fourth sheets of (**EXHIBIT 2**) and said they were letters from people who could not be at the hearing in person.

She referred to the map in (**EXHIBIT 2**) and said Black Coulee was a very small refuge with a sort of glacial pothole-type terrain; in other words, very small basins. The impoundment at Black Coulee was in a subbasin that was roughly 14 square miles, and as with Benton Lake, the Fish and Wildlife Service indicated they saw no conflict with existing uses in this area. She said the drainage had very limited flow and again, quantification of the water right, based on evaporative loss from the impoundment, would take the remaining flow. The DNRC water data base showed there were 14 water rights in the subbasin, held by 7 individuals -- five were upstream from the impoundment at Black Coulee and two were downstream. They were mostly stockwater claims, with one irrigation claim; no new permits had been issued in the last 15 years. **Ms. Cosens** said as with Benton Lake, information was sent and followed up with phone calls; the result of which was agreement the water in the area was fully appropriated. So once again, the approach was taken to preserve the status quo. Black Coulee was established on January 28, 1938, and despite that early priority, Fish and Wildlife Service agreed to subordinate the water right to all existing uses; again, new small stockwater of 15 acre feet or less and small ground water could be developed. She said in order to maintain the status quo, the subbasin upstream from the impoundment was closed to new uses, except for small ground water and small stockwater, and as **REP.**

**SWANSON** indicated, there were four refuges remaining for which the Fish and Wildlife Service claims reserved water rights. She reported the compact contained an agreement between the Fish and Wildlife Service and the Commission to continue negotiating in good faith in those areas.

**Ms. Cosens** reiterated HB 283 sought ratification of a water right settlement for Benton Lake and Black Coulee National Wildlife Refuges with the Fish & Wildlife Service. The Commission believed water users were protected and the type of water use seen in those basins, stockwater and small ground water could still be developed; the agreement was arrived at through involvement of local citizens. She urged the Committee to accept HB 283 without amendment.

**Joan Specking, Technical Team Leader for Reserved Water Rights Compact Commission**, read the written testimony of Cheryl Williss, Chief of the Division of Water Resources for the Fish & Wildlife Service, Mountain-Prairie Region in Denver, who could not attend in person. (EXHIBIT 3)

**Bud Clinch, Director, Department of Natural Resources and Conservation (DNRC)**, said he appeared on behalf of both the Department and the Racicot administration. He said the Department was intimately involved in the permitting, the development and adjudication of water statewide; therefore, they, as well as others, had been very involved in the process with this compact. He urged the Committee's support of HB 283.

Opponents' Testimony: None.

{Tape: 1; Side: A; Approx. Time Count: 3:40 p.m.}

Questions From Committee Members and Responses: **SEN. MACK COLE** asked about the progression of the resolving of the negotiations with the other Fish and Wildlife Service areas on ponds or reserves. **Barbara Cosens** said they hoped to bring them to the legislature in 1999; in fact, they had hoped to have Red Rock Lake done by now, but winter was coming by the time a lot of the technical work was done. Many people who lived in that area were part time residents and there was no way to effectively involve them in it; therefore, that one was put off. As for the others, there still was more a little more technical work to do.

**SEN. TOM KEATING** commented there was a 12,000 acre drainage and wondered how much area was the water pond, lake or reservoir. **Barbara Cosens** said Benton Lake was actually a 135-square-mile watershed and the capacity of the impoundment itself was just a little bit under 12,000 acre ft. Benton Lake was actually a very shallow, a little bit more than just a wetland, pond or lake that had dikes which separated it out into six impoundments, and the refuge rotated water between those. There really wasn't enough water in the watershed to fill them all at once; however, they



also had a problem, identified with avian botulism, which could be removed if an impoundment was allowed to dry up completely.

**SEN. KEATING** commented if 3,500 acre feet of water per year was supplied, and if the water was 2 feet deep, there would be about 1,700 acres of land. He wondered how deep the water was. **Ms. Cosens** said it ranged from nothing to only a few feet deep.

**SEN. KEATING** wondered about Black Coulee, since it was even smaller. **Barbara Cosens** said it had a capacity of about 550 acre feet and about 10 acres in surface area.

**SEN. KEATING** wondered if either went dry entirely at times. **Barbara Cosens** said she imagined Black Coulee went dry at times because it was a very small watershed and if there were several dry years in a row it could possibly go dry; on the other hand, certain portions of Benton Lake were dried out on a rotating basis, but they tried to keep water in some of it at all times.

**SEN. KEATING** asked for clarification of his understanding all the water flowing down to the pond belonged to the United States except that which might be captured in reservoirs for stock ponds; also, if any water went underground and somebody drilled a water well they could have up to 35 gallons per minute when they pumped the water out. **Barbara Cosens** said the water right for the refuge actually started at the refuge boundaries, so until it reached that refuge boundary it was there for the other uses. There were a number of existing uses which included some irrigation, though it was mostly stockwater and groundwater. All those uses could take place and the refuge got what was left after those uses took place; therefore, they got return flows and then any water which wasn't diverted for those purposes. In addition, new stockwater and new groundwater could be developed and the amount of water they would receive would be diminished by these small developments.

*{Tape: 1; Side: B; Approx. Time Count: 4:00 p.m.}*

**SEN. FRED VAN VALKENBURG** said he realized obviously this just included the two wildlife refuges that were the subject of this compact; furthermore, the Commission was just negotiating with respect to water rights which were claimed with respect to wildlife refuges. He suggested there was something on the order of three or four wildlife refuges in the state where no water rights had been claimed, one being the Metcalf Wildlife Refuge in the Bitterroot Drainage. He wondered why no claims with respect to water rights had been made there and asked for explanation of the way in which water was protected for future use. **Barbara Cosens** said there were a number of wildlife refuges in the state which did not contain reserved land, explaining when authority was given to the Fish & Wildlife Service to acquire or reserve land for refuges, there were appropriations set aside; however, a lot of the lands actually acquired were marginal lands for farming and wetlands. She said when land was acquired for a

refuge the normal process was to go through their adjudication and look at the water right they acquired with the land. So if there was an impoundment already on it for stock purposes or something like that and if there was a water right associated with it, Fish Wildlife Service would seek to perfect that through the normal state process as a state-based right rather than a federal reserved water right. She said it was not necessary to file the adjudication for most small impoundments; therefore, not having a claim didn't mean that water right was not perfected because it was still a water right protected under state law.

**Ms. Cosens** said if the Metcalf Refuge would have instream flow rights or something like that associated with it, the Fish and Wildlife Service would have to be seeking those through the adjudication process, and in many of those areas, they acquired older water rights than if it was simply reserved land.

**SEN. VAN VALKENBURG** asked for and received (**EXHIBIT 3A**) additional information on the Metcalf.

**SEN. MIKE TAYLOR** commented he had been reading from the "Rancher Farmer" that in the Lake Creek forest watershed, saline seep was a major problem in a lot of areas where the water was neither deep nor fast. He said he was curious if whatever was done here helped solve their problem. **Barbara Cosens** said when they began negotiations up there they were aware that people up there were beginning the process of trying to form an association to deal with this salinity problem, and they were concerned something might be done which would interfere with that process. They also had to work very closely with Fish and Wildlife Service because the refuge manager up there was a member of the association and they worked with him. However, from a water use standpoint, **Ms. Cosens** asked if they would do something that would affect it adversely, and from a political standpoint would they create a wedge between the water users and Fish and Wildlife Service? She said this water rights agreement didn't solve their problem, but neither did it make it worse.

**Closing by Sponsor:**

**REP. EMILY SWANSON** said these were, as all water rights were, very complex issues and she expressed pride in Montana for having gone this route and negotiating these, rather than having the state involved in endless litigation; also, for making progress and solving some of these very difficult issues with regard to state and federal water rights.

**EXECUTIVE ACTION ON HB 506**

**Motion:** **SEN. KEN MILLER** MOVED THAT HB 506 BE CONCURRED IN.

**Discussion:** **SEN. VIVIAN BROOKE** said there had been a lot of concern in her area in regard to real estate agents having to require mandated water rights information.

Vote: Motion HB 506 BE CONCURRED IN CARRIED UNANIMOUSLY 9-0.

EXECUTIVE ACTION ON HB 507

Motion/Vote: SEN. MIKE TAYLOR MOVED HB 507 BE CONCURRED IN.  
Motion CARRIED UNANIMOUSLY 9-0.

EXECUTIVE ACTION ON HB 486

Motion: SEN. TOM KEATING MOVED HB 486 BE CONCURRED IN.

Discussion: SEN. MIKE TAYLOR asked for clarification of the refinery in Great Falls being responsible for checking the lines but not being able to tear it up and putting it above ground.

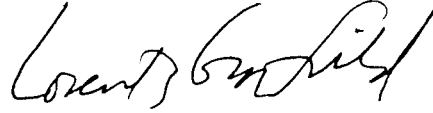
Vote: Motion HB 486 BE CONCURRED IN CARRIED UNANIMOUSLY 9-0.

EXECUTIVE ACTION ON HB 283

Motion/Vote: SEN. FRED VAN VALKENBURG MOVED HB 283 BE CONCURRED IN. Motion CARRIED UNANIMOUSLY 9-0.

ADJOURNMENT

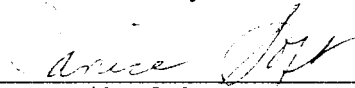
**Adjournment:** The meeting adjourned at 4:10.



SEN. LORENTS GROSFIELD, Chairman



GAYLE HAYLEY, Secretary



Transcribed by: JANICE SOFT

LG/GH