

MINUTES

MONTANA SENATE 55th LEGISLATURE - REGULAR SESSION

COMMITTEE ON AGRICULTURE, LIVESTOCK & IRRIGATION

Call to Order: By **CHAIRMAN KEN MESAROS**, on March 14, 1997, at
3:41 p.m., in Room 413/415.

ROLL CALL

Members Present:

Sen. Kenneth "Ken" Mesaros, Chairman (R)
Sen. Ric Holden, Vice Chairman (R)
Sen. Thomas A. "Tom" Beck (R)
Sen. Gerry Devlin (R)
Sen. Don Hargrove (R)
Sen. Reiny Jabs (R)
Sen. Walter L. McNutt (R)
Sen. Bill Wilson (D)

Members Excused: Sen. Greg Jergeson (D)
Sen. Linda J. Nelson (D)

Members Absent: None

Staff Present: Doug Sternberg, Legislative Services Division
Angie Koehler, Committee Secretary

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

Committee Business Summary:

Hearing(s) & Date(s) Posted: HB 390 - 03/10/97
Executive Action: HJR 27, HB 489, HB 224

HEARING ON HB 390

Sponsor: REPRESENTATIVE JOHN COBB, HD 50, AUGUSTA

Proponents: John Bloomquist, MT Stockgrowers Association
Mike Murphy, MT Water Resources Association
Larry Brown, Agricultural Preservation Association

Opponents: Holly Franz, Tee Bar Ranch

Opening Statement by Sponsor:

REP. JOHN COBB, HD 50, AUGUSTA: This is an act to allow
voluntary pooling of irrigation water between owners of
contiguous tracts on a water source. In Montana you're supposed
to use your water or lose it. You are not supposed to change the

point of diversion unless you go through a hearing process. Say, you and another person both have 100 minor inches and if you could pool them, you would have 200 minor inches or a little less. You both would be able to irrigate your area faster and if you get the water used, you might have a little bit more water in the instream flow. There are people working it that way, but right now they are basically doing it illegally. It's a very narrow bill. You can have a water point agreement where the lands are pertinent to each other and a Water Commission has to have been appointed there.

Page 1, lines 20-25 - the water pooling agreement is basically used for the purpose of using your rights more expediently and efficiently to irrigate the lands. It's not to increase the total amount of water that's used. Line 25 specifies what has to be in the agreement. It also describes how it's going to be used during the season.

Page 2, line 5 - you cannot have a water agreement that expands the number of acres irrigated. Line 9 - you cannot adversely affect anyone else's water right. Page 2, lines 21-22 - this pooling agreement must be filed in District Court no later than 30 days before the agreement is to take effect. Under existing law, you can already object to how the water is going to be divided. If someone objects, the court will set a hearing. This is also an existing proceeding regarding how Water Commissioners divide the water.

Page 3, lines 5-6 - clarifies that those who are pooling have to be able to show they are not affecting anybody else's water right or adversely affecting the water. Page 3, lines 12-14 - it must not affect anybody else's water rights or priority dates.

If you want to change your place of use or do something different, you have to have a hearing under current law. The DNRC has to be notified and other people get involved at these hearings. This is way, in a sense, to have a voluntary irrigation district between two people as long as you make it legal. This bill is drawn very narrow so it will only be where you can have these things now, where there's a Water Commissioner and an adjudicated stream. This bill gives people the chance to legally do what they're already doing.

{Tape: 1; Side: A; Approx. Time Count: 3:46 p.m.}

Proponents' Testimony:

John Bloomquist, MT Stockgrowers Association: The concept is a good idea, but we need to work out some details. Folks are doing this and are probably doing it somewhat illegally at times. Anybody familiar with water use knows that sometimes using larger pool heads of water is a way to have some irrigation efficiency. That aspect of this particular bill and the concepts he is attempting to reach have merit. Some clarification is needed in

Section, lines 16-17. It appears it would limit the pooling arrangements of riparian lands adjacent to a particular water course. Maybe that is **REP. COBB'S** intent to try to limit this, at least for this test period if you will. You can also envision contiguous tracts of land where the ditch goes through a couple pieces of property and the farthest parcel down the ditch may need a larger head of water to efficiently irrigate. If nobody is being affected by getting that larger head of water, perhaps those contiguous land owners could irrigate in a more efficient fashion.

Page 2, Subsection 5 - we need to require that, should a pooling agreement be done, it is not just to be given to the Water Commissioner and DNRC, but there certainly needs to be some notice requirement to the other water users that somebody is contemplating one of these pooling agreements.

This idea certainly deserves some consideration. There are some aspects that have merit and some details need to be worked out to clarify things. He does sunset it and that's a good idea. With that, we lend our support and will work with the Committee and the sponsor.

Mike Murphy, MT Water Resources Association: We support HB 390. We did have some concerns initially about the impact it could have on the senior water rights. We feel those concerns have been addressed with the amendments that have been included. We see this as an opportunity to try this approach as it is an activity that does happen. As **Mr. Bloomquist** indicated, perhaps there could be some additional discussion when we look at the opportunity to utilize this same process amongst the irrigators that are along the same ditch. As it stands now, under contiguous land, it minimizes the potential for conflicts and the problems associated with senior rights.

Larry Brown, Agricultural Preservation Association: We had the same concerns with this bill. We were specifically concerned about whether or not this would open up the permitting process for the Department to take a look at additional permits on a ditch system whether or not the existing permits say it was held by an irrigation district would pass through to the various diversions down through the system or through the adjacent landowners. We worked with the sponsor as well as the Department to make sure the language in this was specific to the concerns being addressed by **REP. COBB**. It's very important what we do with our water rights and that they are legal in light of the adjudication processes that are going on in the state and between the interstates. It is important that the pooling agreement should be notified to a reasonable number of parties on a ditch or stream. As the bill indicates, this is more applicable to the smaller streams, not necessarily the larger irrigation districts or the adjudicated streams that are specifically worked out through agreements and irrigation contracts and so forth.

The sunseting agreement is also a good idea. There have been a lot of folks utilizing this particular concept. The area where I live is subdivided and there are 140 inches divvied out in 32nd's. This is a way for those folks to utilize a legal process to get the job done in terms of irrigating the land and developing their assets. We urge you to pass this bill.

{Tape: 1; Side: A; Approx. Time Count: 3:53 p.m.}

Opponents' Testimony:

Holly Franz, Tee Bar Ranch Company: It is a fairly large ranch located outside of Augusta on a tributary to the Sun River. They are in REP. COBB'S district. Nonetheless, they oppose this bill for a number of reasons. What this bill is trying to accomplish, the ability to take one person's water right and move it to another person's water right on a sharing basis, can already be done through the DNRC change process. In fact, DNRC has a temporary change process for changes in duration of less than 10 years which would specifically envision changes like this. This bill allows these pooling agreements to last only one season so we're talking temporary changes. The DNRC change process has a number of protections for existing water rights that the pooling agreement bill in front you does not appear to have. This bill only applies to streams that have been adjudicated and have a Water Commissioner and that is because water is tight. So it's only going to apply to streams where there are problems with existing water rights, otherwise you wouldn't have a Water Commissioner.

One of the things this bill does differently than the change process that causes my client's concerns is there is no required notice to third parties. This takes us back to where we were before 1973 where someone can make a change without giving any of the other water right users notice. Basically, it is the other water user's duty to find out and then file a dissatisfied water user petition with the District Court. Under the DNRC change process, you have to let everybody know what you're going to do before you do it. You also have to give public notice in the newspaper as well as written notice to all the neighboring ranches.

The other thing this bill does, as amended, is it says if you file a pooling agreement and nobody objects or if nobody has found out about it, you go ahead and pool your water. There is no up-front determination whether or not this is going to affect anybody else. So nobody gets a notice and it goes into effect without any review unless there is objection, but you haven't had notice so how do you know to object. If you do object, it's not clear whether they can pool until the Court says otherwise. One other advantage to the DNRC change process is they have an independent duty to look at an application to see if there is an adverse effect. In a case like this, if there's no objection,

the District Court has no duty to look at it and see if there is an effect.

When you're doing a change like this, the biggest question is volume. Your flow rate is established, but are you taking, for instance, two 100 inch rights that were maybe only used 75 days out of a season and by sharing it, using 200 inches all season long. For instance, while I'm haying, I'm not using that water so it's available for other people. If I'm pooling, my neighbor is using my water right. Are you expanding the volume used? That is not something determined by the Water Court because we passed a bill about a decade ago that says the Water Court doesn't determine volume. So someone will have to determine the volume and what the impact is on other appropriators. That is DNRC's expertise. If you want to challenge this in front of a district judge, I suppose you'll have to bring in an expert and talk about how much water alfalfa uses and limit how many days you can do it. Pooling can be a very good idea and it can be an efficient use of water, but there is an existing process you can go through to do it and the existing process gives you more protection than this bill. I urge a DO NOT PASS.

Questions From Committee Members and Responses:

SEN. REINY JABS: With the present system, if the DNRC approves a permit to pool, is it permanent or is it yearly?

Jack Stults, Regional Offices Supervisor, Water Resources Division of DNRC: That depends on what is requested. A time frame can be set on the temporary change.

SEN. JABS: Evidently it's temporary.

Mr. Stults: You can do either.

SEN. JABS: There is a sunset on this. You stated this is working now and that people are doing it more or less illegally. If it's working, why do you have to sunset it?

REP. COBB: This is trying to put into the law what they're doing out there already and make it legal. Right now, somebody could say you can't be doing this and there are ranchers and farmers doing that. The sunset is so if it's not working, it dies by itself and whatever happens, they have to come back and prove it. I want to make sure everybody is protected as much as possible. That's why I did the adjudicated streams of the Water Commissioner; because if there are objections, there is already a system that works right now.

SEN. JABS: Do you foresee a lot of people doing this if it passes?

REP. COBB: Not right away because it's written very narrow. There are a lot of streams that aren't adjudicated and there is

no Water Commissioner on them. It makes it easier because they don't use the change process where you have the hearings and everything else and spend the money or the time. It will gradually become more so. This is where we have to go in the future, having people work together instead of use it or lose it.

SEN. JABS: It was mentioned that a third party doesn't have to be notified. Is that true?

REP. COBB: I have two amendments that would affect this concern. Page 2, lines 15-19 - prior to filing a water pooling agreement, a copy shall be sent to each appropriator who's right or resource is being regulated by the Water Commissioner. If we put that language back in, then you would have to give notice to everybody.

VICE CHAIRMAN RIC HOLDEN: Are you identifying some problem in our existing water laws where if we don't use our water right, we're losing it?

REP. COBB: If you're not using 100 minor inches, somebody else can use it. Right now, if you try to work together it's illegal unless you go through this change process.

VICE CHAIRMAN HOLDEN: What would be the compelling argument to want the bill and not go through the DNRC to set up that arrangement?

REP. COBB: There are people that aren't going through the DNRC who don't want to go through the process and deal with hearings or take the time to do it. How do you get people like ranchers and farmers to work together when they don't want to spend all their time in court? Do we have to have the Department in on every little thing of people working together? If you have a Water Commission already set up, it's already a local thing anyway. It's just a matter of people working it out between themselves on a local level and not having to come to the state.

{Tape: 1; Side: A; Approx. Time Count: 4:05 p.m.}

CHAIRMAN MESAROS: Would you frame the time line and expense of a temporary change in use when you go through the DNRC?

Ms. Franz: If you go through DNRC, you file a change application for \$50.00. DNRC will look at the application, see if it's okay, it goes out to public notice and objectors are typically given 15 days to file their objections. If they don't object, DNRC looks at it and might suggest a condition or two, but it's usually issued at that point with perhaps some kind of a condition typically concerning the volume question. If there is an objection, then you have a hearing in front of a Hearings Officer. The expense of that depends on how complicated the issue is. Under **REP. COBB'S** bill, if I file a pooling agreement and either nobody knows about it or nobody objects to it, I can

do it. The difference there is \$50.00. If someone files an objection, then you have a hearing in front of District Court. To that extent, if you have a lawyer in front of DNRC or District Court, you're looking at about the same thing as far as expense. I think it's true that folks are doing pooling now. If a person is not going to DNRC, I don't know if a person is going to go to District Court. Will **REP. COBB'S** bill make folks get legal or will they have to be forced anyway?

CHAIRMAN MESAROS: Mr. Bloomquist indicated that the language on page 1, lines 16-17 may need some clarification. Is that in your amendments?

REP. COBB: If you strike the words "along the watercourses" on lines 16 and 17, that would be okay. Page 2, lines 15-19 - put the sentence back in "prior to filing" you have to send everything out.

SEN. GERRY DEVLIN: You say if there's no objection, they should have it in 30 days?

Ms. Franz: Under DNRC? Generally. They are supposed to put them through in six months.

SEN. DEVLIN: Six months now.

Ms. Franz: If there's an objection, they are supposed to put them through in six months. That's under statute. Some of the really complicated ones will take longer than six months. What usually happens, if nobody objects, is you get your permit in, DNRC looks at it and may suggest conditions to you, they'll put it out for notice and then, if there are no objections, it's issued to you with the conditions of DNRC.

SEN. DEVLIN: How many people do you have going through this process now? Have you ever had any?

Mr. Stoltz: For a temporary change? I don't know specifically for a short, temporary change such as contemplated in this bill. I couldn't even guess.

SEN. DEVLIN: Do you have any?

Mr. Stoltz: I can't say for certain at this time whether we have any. It would be a very, very small number statewide.

SEN. DEVLIN: The ones that you know of, have all of them carried a protest?

Mr. Stoltz: For temporary changes or changes generally, no. As a matter of fact, the majority of them do not raise an objection.

SEN. DEVLIN: **REP. COBB**, do you think you could get together with the two principles here, **Ms. Franz** and **Mr. Bloomquist**, and maybe put together something that might make this bill palatable?

REP. COBB: I didn't know Mrs. Mosher of the Tee Bar was going to be upset until about two days ago. In trying to fix the bill, some of the people wanted it wide open and others wanted it very narrow so I left the bill where it was to see what kind of objection there was today. **Ms. Franz** came in representing Tee Bar and she made legitimate points about this bill, but we're not going to solve Mrs. Mosher's concerns about this bill. She wants it dead. The two amendments I just gave would fix **Mr. Bloomquist's** concerns. This is just another option for those who have a Water Commissioner and adjudicated streams. They could still go the old way with DNRC. If you're not adjudicated or there is no Water Commissioner, you can still use the existing law and go that route.

SEN. DEVLIN: You mentioned a notice and that's one of the amendments they're going to put in. What was the other thing, besides wanting it dead?

Ms. Franz: If the Committee was inclined to pass this bill, the other piece taken out in the House that causes some concern is on page 2, line 28 and onto page 3. As originally drafted, if an objection was filed, you had to hold a hearing on that objection and determine if there were adverse effects before a pooling agreement could go forward. They took that out so you're pooling agreement can go on in the meantime before anybody figures out whether or not my water rights are hurt.

SEN. JABS: Are most of these organized districts?

REP. COBB: No. I'm talking about two individual landowners, not organized irrigation districts.

SEN. JABS: Our irrigation district has a three-man panel that looks at these disputes and settles them, but here, if they're not organized, they would go through the Water Commissioner first if there was a dispute.

REP. COBB: Under my bill, if someone objects, it goes to District Court.

SEN. JABS: Isn't there a way you can go somewhere before District Court? In other words, if you and I are going to set up a district and someone objects, can we go to the Water Commissioner first and if they can't resolve it, then District Court. I don't like to see it go straight to District Court.

REP. COBB: I was just using existing law where, if I object to what our Water Commissioner is doing right now, I go right to District Court. If they want to work it out between themselves, that's up to them.

SEN. JABS: How is your bill going to handle this?

REP. COBB: We use existing law which says go to District Court.

SEN. JABS: We should have a Board or something where you can settle the dispute before you go to District Court.

SEN. DON HARGROVE: I think what SEN. JABS is saying is in your bill otherwise, what does the Water Commissioner do? He is the first step between the users.

REP. COBB: Yes, but they allocate the water. When they're allocating, if you don't like the way they allocate the resolution, then you go to District Court. The question is, on this pooling agreement, the Water Commissioner doesn't have the authority. Someone has to be able to say it's okay if someone objects and sometimes people object to who the Water Commissioner is and such. I used the existing mechanism that says if you don't like how they're moving their water around, go right to District Court and that's the same judge that appointed the Water Commissioner.

SEN. JABS: Under your bill, can they use the Water Commissioner?

REP. COBB: To resolve a dispute?

SEN. JABS: Yeah, as the first step. Under existing law, you say the Water Commissioner can. Why can't they under your bill if they can do it in existing law?

REP. COBB: I just wanted a mechanism where, if those two file to pool, if somebody objects you need someone to okay it. That's the District Judge. The Water Commissioner is only supposed to allocate the water. He doesn't have authority to let you pool unless someone says he can or if there is no objection.

Closing by Sponsor:

REP. COBB: I can work on some amendments if the Committee wants to and if they want to give some guidance.

CHAIRMAN MESAROS: If you could work on some amendments, we'd appreciate that. We will close the hearing on HB 390. We will take Executive Action on a couple items.

{Tape: 1; Side: A; Approx. Time Count: 4:20 p.m.}

EXECUTIVE ACTION ON HJR 27

Amendments:

Doug Sternberg: Following the hearing on the Resolution, VICE CHAIRMAN HOLDEN, SEN. JABS and SEN. JERGESON approached me with suggested changes.

CHAIRMAN MESAROS: Are they compatible?

Doug Sternberg: Yes.

SEN. TOM BECK: Are they all the same?

Doug Sternberg: They all address slightly different things.

CHAIRMAN MESAROS: I didn't realize SEN. JERGESON was going to submit an amendment. He's absent today.

SEN. BECK: Let's look it over. If nothing else, I'll move his amendments for him if I can agree.

Doug Sternberg: By way of clarification, the amendments by VICE CHAIRMAN HOLDEN and SEN. JABS both deal with the whereas clauses. SEN. JERGESON'S proposal actually gets into the resolution aspect of the bill on page 2. In the way he presented it to me, his concern was that the legislature support the Governor's efforts to address the problem. In order to clarify that, he suggested that the language on page 2, beginning on line 6 would read that the legislature supports the Governor's efforts to "contain" the problem "to the geographic boundaries of Yellowstone National Park". That is all his amendment does.

Motion:

SEN. BECK: MOTION TO ADOPT SEN. JERGESON'S AMENDMENT
HJ002701.ADS. (EXHIBIT 1)

Discussion:

SEN. HARGROVE: I don't know that I would agree with that. It's kind of wordsmithing. We might want to say "contain the buffalo to the boundaries of Yellowstone Park" and I think that's getting more specific than you want. Everybody recognizes the problem comes out of Yellowstone Park otherwise we wouldn't have any. I don't think we want to say either the Governor or the legislature considers it just a Yellowstone Park problem. That's kind of a stonewalling position.

VICE CHAIRMAN HOLDEN: Did the Stockgrowers have a chance to look at this amendment?

Mr. Bloomquist: No.

VICE CHAIRMAN HOLDEN: I would have some reservations about putting that sort of language in because of what SEN. HARGROVE pointed out.

Vote:

MOTION TO ADOPT AMENDMENTS HJ002701.ADS FAILS.

Discussion:

SEN. JABS: My amendment and VICE CHAIRMAN HOLDEN'S are the same except for wording. He says "overgrazing inside Yellowstone National Park has resulted in increased winter migration". I used "numbers of park bison have grown beyond the natural carrying capacity". The reason I used carrying capacity is that is what the range management people use. I would suggest we add to mine "thus resulting in increased winter migration of bison into Montana" or just "migration". Let's take winter out. If we add that to mine I think we'll cover both. Is that all right with you VICE CHAIRMAN HOLDEN?

VICE CHAIRMAN HOLDEN: Should we have two whereas clauses there? Mr. Bloomquist, did you and the Woolgrowers work on one of these two?

Mr. Bloomquist: I was asked to check on the language. Mr. Sternberg showed me both of your amendments. Quite frankly, I think you could have two whereas.

SEN. BECK: I think you could, too.

Motion/Vote:

SEN. HARGROVE: MOTION TO ADOPT VICE CHAIRMAN HOLDEN'S AMENDMENT HJ002703.ADS. MOTION CARRIES. (EXHIBIT 2)

Motion/Vote:

SEN. BECK: MOTION TO ADOPT SEN. JAB'S AMENDMENT HJ002702.ADS. MOTION CARRIES. (EXHIBIT 3)

Motion/Vote:

SEN. HARGROVE: MOTION TO CONCUR ON HJR 27 AS AMENDED. MOTION CARRIES.

{Tape: 1; Side: B; Approx. Time Count: 4:29 p.m.}

EXECUTIVE ACTION ON HB 489

Motion/Vote:

VICE CHAIRMAN HOLDEN: MOTION TO CONCUR ON HB 489. MOTION CARRIES.

EXECUTIVE ACTION ON HB 224

Amendments:

Doug Sternberg: SEN. WILSON requested that I prepare an amendment.

Motion:

SEN. BILL WILSON: MOTION TO ADOPT AMENDMENTS HB022401.ADS.
(EXHIBIT 4)

Discussion:

SEN. WILSON: In hearing the testimony, it sounded like the biggest objection was the diked areas and the concrete and workability of having a concrete diked area given our weather conditions. The expense was also objected to. I really didn't hear too many complaints on safety valves, shut-off devices for storage tanks. All I'm trying to do with this amendment is allow them to not have the dikes required, but then the heat actuated or other shut-off devices would still be intact. It didn't seem like that was a huge expense, yet it would be a good safety measure.

SEN. HARGROVE: Was the size of tank indicated any place? I don't see it. This only affects 12,000 or more?

SEN. WALT MCNUTT: No. It doesn't make a difference.

SEN. HARGROVE: Is there a minimum size?

SEN. MCNUTT: No.

VICE CHAIRMAN HOLDEN: I would stand in objection to this amendment. We had testimony that there are roughly 69,000 farm fuel tanks in Montana. At some point, it's not inconceivable that the Department may require heat actuated or shut-off valves for all of these tanks. Current price levels run from \$150.00 to \$300.00. We're not even sure shut-off valves work on low gravity flow fuel tanks. If you take the number of tanks we think we've got in the state and multiply it times \$200.00, you will be charging farmers and ranchers across the state about \$13 Million to put this amendment into effect. It is a big thing for those of us that are currently getting about \$.60 a pound on our calves.

SEN. BECK: The rules promulgated by the Department may not require all these things, but what you're trying to say, SEN. WILSON, is that you want it required to have heat actuated or other shut-off devices? That could be the expensive part to the farmers or whomever couldn't do it?

SEN. WILSON: I'm not sure. It's just a judgement from the testimony. What I heard, as far as cost being burdensome, was the dike. I'm just reading here about the requirements. Applicable federal regulations require diking for all tanks that hold 660 gallons or more, thus even if diking is exempted under state law, the tank owner will not be eligible for cost reimbursement if the tank is not diked. You folks who have these tanks could tell me what the implications of that are. It says

here, remember the State Fire Marshall's rules require diking only for new tank installations. Existing tanks are exempt from the state rules. To make all tanks exempt, we believe, actually hurts the farmers' and ranchers' interests. In other words, you can't get reimbursed if the tank is not diked. I sympathize with the cost of the dike. The other thing I question is the safety of having a pool of fuel outside of a tank.

VICE CHAIRMAN HOLDEN: In your amendment, you talk about the safety issue. In the last 10 years, we had one recorded death and it wasn't because of a heat actuated valve. It was because of a torn hose and static electricity which is a whole different issue. If you take that out, we're talking about zero deaths in 10 years. The other point is, of these 69,000 tanks we think we have, we've had zero tanks explode. Of course, if you live several miles from town as I do, what if it explodes. Basically, there is nobody around. It's not a big hazard to those of us that live in rural areas in that respect. It ends up being a rule and regulation that has no real reasons behind it why we should go out and do all these things.

Vote:

MOTION FAILS. SEN. WILSON VOTES YES.

Motion/Vote:

VICE CHAIRMAN HOLDEN: MOTION TO CONCUR ON HB 224. MOTION CARRIES. SEN. WILSON VOTES NO.

ADJOURNMENT

Adjournment: 4:41 p.m.


SEN. KEN MESAROS, Chairman


ANGIE KOEHLER, Secretary

KM/AK