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Policy Committee  
Report of the  
Water Policy  
Committee to the  
54th Legislature

# WATER POLICY COMMITTEE

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**REPORT OF  
THE WATER POLICY COMMITTEE  
TO THE 54TH LEGISLATURE  
OF THE STATE  
OF MONTANA**

March, 1995

Representative Hal Harper, Chair  
Senator Bob Hockett, Vice-Chair

Representative Russell Fagg  
Representative Vernon Keller  
Representative Angela Russell

Senator Don Bianchi  
Senator Ken Mesaros  
Senator Bernie Swift

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# WATER POLICY COMMITTEE

## Montana State Legislature



### SENATE MEMBERS

Bob Hockett  
Vice Chairman  
Don Bianchi  
Ken Mesaros  
Bernie Swift

### HOUSE MEMBERS

Hal Harper  
Chairman  
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December 27, 1994

President of the House  
Speaker of the House  
Montana Legislature

As chair of the Water Policy Committee, I am pleased to transmit the Committee's final report to the 54th Legislature, as required by Section 85-2-105, MCA.

The Committee has made policy recommendations regarding late claims, the state water plan, the water development programs, water research, and water data management. Additional information and policy recommendations regarding state drought response, wilderness dams, instream flows, state storage structure rehabilitation, and water quality nondegradation are also provided.

On behalf of the Water Policy Committee, I urge your consideration of this report.

Sincerely,

A handwritten signature in cursive script that reads "Hal Harper".

Representative Hal Harper  
Chair



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## Introduction

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This is the fifth biennial Water Policy Committee (WPC) report to the Montana Legislature. The Water Policy Committee is an eight member interim committee established by statute to advise the legislature and the public on important water issues.

This report summarizes the studies conducted by the WPC during the 1993-94 interim and presents the policy recommendations made to the 1995 Legislature as a result of these studies. The report is organized into four broad categories: legislative mandates, continuing oversight responsibilities, issues recommended for study by the 1991-1992 Water Policy Committee, and issues chosen for study by the 1993-94 Committee.

Of the numerous subjects reviewed by the WPC this interim, the Committee focused on three of these: late claims, instream flow--and in cooperation with the Environmental Quality Council--water quality nondegradation. The Committee conducted these studies by hosting several panel discussions and a series of public meetings outside of Helena--in Missoula, Glasgow, Dillon and the Big Hole Basin. The Committee believes these out of town meetings improved the information available for policymaking and helped foster the crucial connection between the legislature and the public it serves.



# Part I

## Legislative Mandates



# Section 1. Late Claims Study

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## Introduction

Historically, water rights in Montana, as in other states in the West, have been granted through the doctrine of prior appropriation, or "first in time, first in right." Prior to 1973, the right to use the state's water could be obtained by filing a claim with the county clerk and recorder or through substantiated use of the water.

During the 1970s, the Montana Legislature initiated a process for quantifying and recording these water rights. In 1973, the legislature passed 85-2-302, MCA requiring any new water user to obtain a water use permit from the Department of Natural Resources and Conservation (DNRC). In 1979, the legislature passed 85-2-226, MCA establishing a statewide water rights adjudication process<sup>1</sup> for water rights claimed before July 1, 1973, the date of the enactment of the statute requiring permits for new water use.

In addition to requiring all pre-July 1, 1973 water users to file a claim with the state, the 1979 statute accomplished the following:

- \* Required the Montana Supreme Court to establish a filing deadline--eventually established by the court at April 30, 1982
- \* Stated that someone who fails to file a claim before the April 30, 1982 deadline cannot dispute (i.e., establishes a conclusive presumption of) the abandonment of that claim in court

The Montana Supreme Court has upheld the constitutionality of the forfeiture language in section 85-2-226, MCA. In summary, as far as the courts are concerned, those water users who did not file a claim before the deadline have forfeited their water rights.

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<sup>1</sup> The adjudication process is conducted by the Montana Water Court, with technical and administrative assistance provided by the DNRC. Several steps are required to obtain an adjudicated right. First, a claim must be filed with the department. Next, the court issues a preliminary decree or temporary preliminary decree. After the decree is issued, a period of time is allowed for objections, and if applicable, to conduct a hearing. After objections and/or appeals are resolved, a certificate of water right is issued for every water right holder on the watercourse. This is the final decree. Water right claims are adjudicated basin by basin. To date, final decrees have been issued on six of the 85 basins in Montana.

## Senate Bill 310 Summary

Largely in response to the Montana Supreme Court ruling, the 1993 Legislature passed Senate Bill 310. In summary, SB 310 accomplishes the following:

- \* Defines "late claim" as a claim to an existing water right forfeited under 85-2-226, MCA
- \* Allows for the filing of a late claim with the DNRC until July 1, 1996 with the claim being then subject to adjudication by the district court as any other right
- \* Subordinates all late claims to any federal and Indian reserved water rights established by decree or compact, including future compacts
- \* Additionally subordinates late claims other than "postmark"<sup>2</sup> claims to rights represented in all valid, timely filed claims and also subordinates these late claims to rights represented in a permit or reservation only if the permit or reservation holder files an objection and proves that they reasonably relied to their detriment upon the failure of the late claimant to file a timely claim
- \* Establishes a late claim filing fee of \$150
- \* Allows the water court to assess all reasonable administrative costs and expenses against the late claimant

To date, the DNRC has received approximately 3,400 "late claims" for pre-July 1, 1973 water rights submitted after the filing deadline.

## Legislative Mandate

SB 310 stated:

*Section 10. Late claim interim study--water policy committee. (1) The water policy committee, in coordination with the department of justice, the department of natural resources and conservation, and the reserved water rights compact commission, shall conduct an interim study analyzing the need*

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<sup>2</sup> A "postmark" claim, as identified in SB 310, is one that contains a U.S. Postal Service postmark of April 30, 1982 or earlier, or a claim, where there is no evidence of mailing, where there is evidence of execution before April 30, 1982 and evidence of actual receipt by the DNRC before May 7, 1982.

*for and desirability and impacts of allowing the remission of forfeited water rights in addition to the remissions authorized under the provisions of [this act]. The study must analyze the impacts of additional forfeiture remission on:*

- (a) the general stream adjudication process, including but not limited to the issues of adequacy and Montana's and the federal government's concurrent water rights adjudication jurisdiction;*

- (b) the federal government and Indian tribes regarding existing and future negotiated water rights compacts, including but not limited to the issues of equal protection;*

- (c) timely claimants' water use;*

- (d) timely claimants' legal rights, including but not limited to constitutional requirements regarding the taking of property;*

- (e) the potential reduction in agricultural production resulting from not granting additional forfeiture remissions and the associated social and economic impacts;*

- (f) the issue of fairness to both late and timely claimants;*

- (g) the potential increased costs to the state and to late and timely claimants;*

- (h) potential losses in revenue to the state resulting from the state's failure to file claims to existing water rights on or before April 30, 1982;*

- (i) implications involving the state's trust responsibilities;*

- (j) potential litigation against the state by private parties; and*

- (k) impacts on municipal and county governments resulting from late claims.*

*(2) The study must include an analysis of the potential for identifying individuals or classes of individuals whose additional forfeiture remission could be authorized in a manner that would have an acceptable impact on those issues identified under subsection (1). The classes of late claimants include but are not limited to previously decreed water rights holders and classes established according to filing date.*

*(3) The study must be completed in consultation with other relevant state and federal agencies, relevant groups and organizations, and other interested and affected citizens.*

*(4) The water policy committee shall report the results of the study to the 54th legislature by October 1, 1994. The report must include any legislative or other policy options recommended by the water policy committee.*

## **Committee Activity**

The specific language from SB 310 was clear in stating what the Water Policy Committee was to accomplish regarding the issue of late claims. The Committee did however, have to determine how it would accomplish its task. Based on testimony from the

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SB 310 free conference committee, the WPC decided that rather than generate volumes of new information regarding this issue, it would instead listen to the affected parties, make requests for additional information as needed, and make a decision as to whether it would be in the best interests of the state to extend the forfeiture remission<sup>3</sup> beyond SB 310; and if so, under what conditions. The Committee identified this study as a major priority for the interim.

## Scoping Meeting

In June, 1993 the Committee held a public scoping meeting with representatives from all the affected parties. The participants of the scoping meeting identified the following objectives: (A list of scoping meeting participants is presented in **Appendix 1.**)

- \* to review SB 310 to ensure a basic understanding of the bill;
- \* to determine the general scope of the study, including issues such as priority study components and the amount of Committee resources available for the study;
- \* to determine the general study framework, including issues such as the use of subcommittees and statewide meetings, and a study time frame; and
- \* to determine and ensure the appropriate level of public involvement in the study.

To initiate the SB 310 study, the meeting participants and Committee members first reviewed the staff summary of the bill (see page 2 of this report), then examined in turn each of the components for analysis as stated in section 10. The Committee identified which components required additional information from other agencies or sources (i.e., the Committee recognized that it needed additional information from the Reserved Water Rights Compact commission to analyze the effect of additional forfeiture remission on federal and Indian water rights) and determined which should be targeted as priorities for the interim (i.e., the Committee identified the impact of further remission on the whole adjudication process and the issue of fairness to both the late claimants and the timely filers as important components of the study). The Committee also discussed whether the study should be as broad as examining the whole water rights adjudication process or as specific as looking only at what additional forfeiture remission should be granted to the late claimants. Meeting participants also discussed potential study frameworks, (i.e, whether these issues would be better addressed by subcommittees or by the WPC as a whole) and lastly, discussed the need to host late claims study meetings outside of Helena in various water basins as permitted by

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<sup>3</sup> By allowing additional forfeiture remission the legislature is extending the time or conditions under which late claims may be filed.



the resources of the Committee.

After reviewing and considering the comments from the scoping meeting, the Committee decided that in order to better frame the study issues identified in section 10 of Senate Bill 310, it would first identify all possible options for additional forfeiture remission apart from those included in the legislation. The broad issue of providing additional forfeiture remission to late claimants was broken down into two more specific questions:

1. What type of claim should be considered for additional remission?
2. To what would that claim be subordinated?

By assimilating the comments on these two questions, the Committee identified the following possibilities.

1. Types of late claims

- a. All late claims
- b. "Postmark" late claims as identified in SB 310 or some other definition of claims based on filing date
- c. Late claims in basins where the water court has issued a preliminary decree
- d. Late claims in basins where the water court has not issued a preliminary decree
- e. Late claims that meet a "good cause" standard. The specific criteria for showing good cause could include justifiable reliance on a third party, protracted ill health or property transfer during original filing period, etc. These criteria could be legislatively mandated or left to the courts to determine and apply.
- f. Late claims where the claimant can prove continuous use of the water right
- g. Late claims that have been decreed in an adjudication conducted prior to 1973
- h. Late claims held by the state or political subdivisions of the state, political subdivisions could include counties, municipalities, irrigation districts, etc.
- i. Late claims to which no one objects
- j. Other types of late claims

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2. Subordination Framework<sup>4</sup>

a. Complete forfeiture remission. A late claim would be placed back into the prior appropriation system with the original appropriation date and no subordination.

b. Allow the water court to subordinate a late claim to a valid timely claim or an existing federal or Indian reserved water right established through compact or decree if there is an objection to the late claim and the objector can prove that the objector reasonably relied to his or her detriment upon the failure of the late claimant to timely file. *This provision was contained in SB 310 as it passed the House. It was modified through amendment by the free conference committee.*

c. Subordinate a late claim to existing federal and Indian reserved water rights established through compact or decree

d. Subordinate a late claim to existing and future federal and Indian reserved water rights established through compact or decree. *Under SB 310, this is the status of all late claims, "postmark" and non-"postmark".*

e. Subordinate a late claim to all valid timely filed claims. *This is the current status for all non-"postmark" claims under SB 310.*

f. Subordinate a late claim to rights represented in a permit or reservation if the permit or reservation holder objects to a late claim and the objector can prove that the objector reasonably relied to his or her detriment upon the failure of the late claimant to timely file. *This is the current status for all non-"postmark" claims under SB 310.*

\* \* \* \* \*

Using the examples submitted through public comment, the Committee could, for example, determine that a late claimant who could prove continuous use is one type of claim that justifies additional forfeiture remission. The Committee would then analyze the subordination framework and could select, for example, allowing complete forfeiture remission for all continuous use claims. These options were identified only to facilitate public discussion and were not analyzed for legal or logistical validity.

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<sup>4</sup> Subordination, for the purposes of this report, is defined as placing one water right with a senior priority date beneath another, more junior, water right in the prior appropriation system of "first in time, first in right." Subordination is achieved by stating in law that a late claim is subordinate to another water right.

## Public Comment

After reviewing SB 310 and providing a context for the study by examining possible remission schemes, the Committee scheduled and held seven public meetings around the state to solicit oral and written public comment regarding the late claims study. Meeting locations included Helena, Missoula, Dillon, and Glasgow. A complete set of written comments and summary transcripts of oral testimony are available from Committee staff. A general summary of the statements of the affected parties is provided below.

### Late Claimants' Concerns

An overwhelming majority of public comment strongly supported additional forfeiture remission. The most common reason given for this opinion was that without additional forfeiture remission a senior water right holder, while not losing the water right, would be subordinated to every junior water right holder on the stream who filed on time. Therefore, while late claimants might not lose the water right, they might lose their water.

The solution to this situation most commonly suggested by the late claimants was to allow late claimants to go to the water court and show good cause why they should not be subordinated to timely filers. This they argued, would grant the late claimants their day in court, honor their continuous use of the water right, and prevent "bogus" water right claims.<sup>5</sup>

Late claimants also raised concerns about the financial and practical difficulties for municipalities, other entities of state government, and the practical and financial difficulties for the state itself--all of whom are late claimants.

### Timely Filers' Concerns

While only a few timely filers offered oral or written comments regarding the study, the Committee expressed serious concerns regarding the rights of timely filers if additional forfeiture remission was granted. In certain situations, the water rights of timely filers, while not changing in the amount of the water, were rendered more valuable by their being "moved up" in seniority due to a late claimant on the stream.

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<sup>5</sup> "Bogus" claims are false or inappropriate water right claims that have no historic basis of water use. This claim may become valuable when a late claimants valid water right is subordinated to the "bogus" claim.

## Federal Concerns

Federal government personnel also expressed concern with the devaluing of federal rights now made more valuable due to late water right claims. A U.S. Department of Interior field solicitor stated that, while his comments did not necessarily represent official U.S. policy, he believed there were "very serious" due process and potential takings problems with providing additional forfeiture remission.

Additionally, under the provisions of the McCarran Amendment, in order for Montana to include the federal government in its adjudication process, (the federal government being the single largest water right filer in the state), the process must be a general stream adjudication and it must be procedurally adequate to protect federal and Indian reserved water rights. If either of these two requirements are not met, the potential exists for the federal government to begin its own stream adjudication in Montana. This would require the water users in Montana to enter both the state and federal processes simultaneously.

The field solicitor said that both the U.S. and Montana Supreme Courts had decided that the state was the appropriate location for water adjudication, but noted that those decisions were based on the adjudication process at that time and that both courts assumed the law would be applied fairly. He stated that the more the Montana Legislature "tinkers" with the adjudication statute, the more likely that the U.S. would be compelled to seek further review either in the Montana or U.S. Supreme Courts. The field solicitor asked the question, If late claims were admitted back into the process in 1993, then why not in 1995 or later? He said that at some point the legislature must call an end to the process. The state, as represented by the Montana attorney general's office, agreed with these concerns.

Attorneys for the late claimants argued that the additional forfeiture remission they sought would not make the state process inadequate. Additionally, given the complex and costly nature of water right adjudication, it was unlikely that the federal government would begin its own adjudication in Montana. Finally, the late claimants' attorneys said that the Committee should also be concerned about the late claimants suing the state on due process and equal protection grounds for not providing additional forfeiture remission.

## **Committee Options for Providing Remission**

After the public meetings, the Committee requested a summary of the options for the next meeting. Ultimately, three broad options were identified:

### Option 1. No Additional Forfeiture Remission

Potential Impacts. The Committee has heard that this option could generate lawsuits

from late claimants on the grounds of due process, equal protection, uncompensated takings, and separation of powers issues.

### Option 2. Complete Forfeiture Remission.

Allowing complete forfeiture remission would include repealing SB 310 along with the 1982 filing deadline and opening the adjudication process to all filers with no subordination provision.

Potential Impacts. The Committee has heard that this option could generate lawsuits from timely filers (the federal government among them) on the grounds of due process, equal protection, and uncompensated takings issues. This option could also generate lawsuits from the federal government on McCarran Amendment grounds and on issues of "adequacy".

### Option 3. Rebuttable Presumption of Abandonment.

Most of the recommendations to the committee fit under this option--including the recommendation for additional, but not complete, forfeiture remission. This option could include establishing a good cause standard for additional forfeiture remission, considering continuous use, decreed status, no objections, etc. Choosing this option would require the water court to decide what additional forfeiture remission, if any, is due a particular late claimant.

Potential Impacts. The Committee has heard that this option has the same potential impacts as allowing complete forfeiture remission.

## **Preliminary Recommendation**

At its September, 1994 meeting, after seven public meetings and 15 months of study, the Committee made a preliminary decision to recommend no additional forfeiture remission. The vote was five to two in favor of the recommendation, one member being excused. A brief recap of the members' arguments for and against the recommendation is provided below.

\* Senator Swift said he had extensive personal experience with the adjudication process and the water courts and based on that experience he favored additional forfeiture remission. He would vote for option 3 that allowed the late claimants access to the water courts to show good cause as to why their water right should not be subordinated. He said he understood that this may place the state's adjudication process in jeopardy with the federal government but that equity and the reality of the situation argued for additional remission.

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\* Representative Fagg said that he had seven reasons why he did not favor additional forfeiture remission and why he favored option 1.

His first point was that late claimants were not likely to lose their water to permit holders due to dual restrictions in SB 310: a late claimant is subordinated to a water right permit holder only if 1) the permit or reservation holder files an objection and 2) proves they reasonably relied to their detriment on the failure of the late claimant to file a timely claim.

Second, the adjudication process, including the forfeiture provisions, had already been upheld as constitutional by the Montana Supreme Court. He said he did not think it likely that the court would alter that finding.

Third, the issue of granting the water courts the authority to decide the subordination issues, in essence whether the forfeiture is rebuttable or not, had been discussed thoroughly in the 1979 Legislative Session and again in the 1993 Session. Both legislatures decided to make the provision irrebuttable and he had heard nothing this interim to convince him otherwise.

Fourth, while it might be a hardship for some of the 3,000 to 6,000 late filers, he reminded the Committee that 98.8% of the water users did file on time.

Fifth, he shared the federal government's concerns regarding the general stream adjudication and adequacy requirements to maintain state jurisdiction over federal water right adjudication. He saw litigation from some side regardless of what the Committee recommends, but he said he felt that the federal government had the best argument.

Sixth, the water court judge had told the Committee that additional forfeiture remission would slow down the adjudication process. He questioned whether the state wanted to add another layer of bureaucracy and another layer of decisions on the water courts.

Seventh, he said that SB 310 was a good compromise reached in 1993. He said there were a lot of concessions on both sides. The legislature went as far as it should and it should go no further in recommending additional forfeiture remission.

\* Senator Hockett said that Senator Swift and Representative Fagg had provided a good summary of both arguments and he agreed with the argument set forth by Representative Fagg and would vote for option 1. He did have concerns regarding people losing historic water rights, but he was also concerned with ensuring a timely adjudication process.

\* Representative Harper said that he also favored option 1, and did not favor additional forfeiture remission at that point. He said his first term as a legislature was in

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1973 when the Water Use Act was discussed and passed. The legislature felt strongly that Montana needed to quantify, record, and protect its water rights not only for individuals but for the state as well.

He noted the state had invested millions of dollars and two decades worth of work and said he would vote to carry through with the adjudication process as is. He said he understood the importance of water and that it was a very difficult decision.

\* Senator Mesaros said that coming from a dryland farm he knew full well the importance of water. He said he represented many timely filers and some late claimants and while any option had the potential for litigation, he would vote in favor of option 3 and provide additional forfeiture remission. He said the most important issue was the protection of the livelihood of those who did not file on time. He agreed that additional forfeiture remission might slow the adjudication process but the potential benefits to the late claimants outweighed that concern. Finally, he said that the state should not be intimidated by the potential for federal litigation over this issue. He said it might be a real threat but individual rights outweighed that concern as well. The full impact of SB 310 and the subordination of the late claimants would not be known until the adjudication process was complete.

\* Senator Bianchi agreed with Representative Fagg that SB 310 was a compromise bill that addressed all the issues and was probably as far as the Committee could go. He said that under SB 310 no one lost their water right. He also thought that the potential for federal litigation was substantial. This could result in putting all water users, both late claimants and timely filers, through the entire process again. He said he appreciated the participation of the late claimants in the study but he did not favor additional remission and would vote for option 1.

\* Representative Keller said that from 1973 to 1979 it was widely publicized that water rights had to be filed. He expressed the concern that the U.S. Department of Interior would use the provision of additional remission as an excuse for the federal government to grab more water in Montana. He said he realized that many late claimants relied on someone else to file their water right but rather than jeopardize the interests of the timely filers he would vote for option 1--no additional remission.

\* \* \* \* \*

The Committee directed staff to contact all members of the late claims study mailing list as well as the standard Water Policy Committee mailing list and to notify them of the Committee's preliminary recommendation and to solicit comments on that recommendation. Written comments submitted to Committee members echoed and expanded upon many of the comments given during the public meetings conducted during the interim. Examples of these comments (paraphrased) are provided below. Complete copies of the written testimony are included as **Appendix 2**.

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## Public Comment on the Preliminary Recommendation

### Opposed to Preliminary Recommendation

In reviewing the comments from the WPC members, it is apparent that they have missed the distinction between permit holders and water rights claimants. Permit holders are individuals or entities who have applied for a water right after July 1, 1973 and are granted a permit to appropriate water conditioned upon not adversely affecting prior water rights. Water right claimants are individuals or entities who have claimed a right predating July 1, 1973 which right is then subject to adjudication. It is a mistake to assume that under SB 310, because the late filers can still file a claim, their water right is protected. In over-appropriated streams or tributaries and in intermittent streams with multiple claims, senior rights would obviate the late claimant from having any water.

The author of the bill establishing a process for statewide adjudication intended to use it as a vehicle for the state to gather information, not as a method for taking away existing rights.

The fact that not many timely filers have responded should be taken on its face--that they have no great objection to further remission.

The whole system of adjudication changed in 1979. Many people believe they are complying, but do not understand the law. Even those who are not late claimants are at risk of losing their right.

Re the McCarran Amendment--late claimants make up only 2 percent of the filers, it seems questionable that the federal government will see this as egregiously upsetting the adjudication process.

### In Favor of Preliminary Recommendation

Those of us with adjudicated rights paid significant money for them in areas where water is already over-appropriated. It would be unfair to grant additional rights to the late claimants.

Concerns for the late claimants have already been adequately addressed by SB 310 and any additional consideration would be unfair to the timely filers.

The whole adjudication process and the water courts are unfair.

\* \* \* \* \*

The Committee took additional public comment at its December meeting. A summary

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of the public comment and Committee discussion from the December meeting is included below.

Cliff Cox, water user from Winston, said that the original intent of the adjudication law was to validate the beneficial use of state waters and to quantify that use. It was not to devalue property or to restrict private property rights. Most Montana streams are over-appropriated and an accurate adjudication process would clarify that situation as well. The legislature assumed that water users would file on time but they did not foresee the legitimate reasons for missing the deadline. Late claims should be recorded at their original priority date. Subordinating late claims to timely filers would impact more than just that water user. It would also impact downstream users, the tax base, and the entire agricultural community. It was important that only the late claimants who could prove continuous use be allowed back in at the original priority date.

Sen. Mesaros asked the AG's office representative for a response to Ms. Rehberg's comments. [Janice Rehburg provided testimony at the Water Policy Committee's November meeting on statutes in Washington and Utah which provided remission for late claimants.]

Harley Harris, Attorney General's office, said that it was not the intent of the Attorney General to prepare an extensive and all inclusive response to Ms. Rehberg's unwritten comments from the November Committee meeting. He said that the AG's office was in an unusual position because it would be their duty to defend whatever late claims policy was adopted by the state.

Mr. Harris said that they had contacted the states in question for clarification and agreed with Ms. Rehberg's statement that there was no case law regarding the statutes. Mr. Harris briefly reviewed the history of Washington's water adjudication process and said that other states have been more strict with their late claimants than Montana. It was clear that simply because another state passed a late claimants remission law and had yet to experience a challenge from the federal government that did not mean that the same would apply to Montana. The situation in Montana was different. He was not saying that a McCarran Amendment challenge by the federal government would be upheld if Montana passed additional forfeiture remission but the AG's office believed that their duty was to inform the committee that there was a risk involved with that action.

Sen. Bianchi asked for details on how Montana went further in forfeiture remission than other states.

Mr. Harris said that the Washington statute says that no late claim may effect in any manner any timely filed claim. That language has not been interpreted by the courts but Washington officials say the intent was to create an absolute subordination for all late claims. Montana already exempts all postmarks claims from subordination to timely filers. Utah only allowed late claims for an additional six months, not 12 years as in Montana.

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Rep. Harper asked Mr. Kakuk [staff member to the Water Policy Committee] to review the committee's options regarding the Committee's preliminary recommendation.

Mr. Kakuk said that the Committee's options included recommending additional forfeiture without stating specifically what form that remission would take, recommending additional forfeiture remission and specifically stating the criteria for granting that remission, recommending no additional forfeiture remission, or recommending additional study on the issue.

Sen. Bianchi moved that the committee endorse its preliminary recommendation and recommend no additional forfeiture remission.

Sen. Mesaros said the private property rights issue was important in this situation and the water courts should be allowed to make the final decision regarding who gets additional forfeiture remission. He said that this may slow the adjudication process but in the cause of fairness and equity it was reasonable. He opposed the motion and encouraged additional remission through the water courts.

Sen. Swift agreed with Sen. Mesaros and said the courts should decide who loses property rights. Many people did not get notification that they had to file. There was much confusion and people deserve to have their day in court.

Sen. Bianchi closed by saying he agreed to some degree with Senators Mesaros and Swift but there was a real possibility that if Montana provides additional remission the federal government could challenge the adjudication process and start their own adjudication in federal court. The risk was too great because a majority of the people did file on time. The late filers did not lose their water right but he did understand that their right in time might be moved back.

The motion passed by a vote of 5 to 2 with Senators Mesaros and Swift voting no.

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The committee finalized its preliminary recommendation as stated below.

**Final Committee Recommendations**

The Water Policy Committee, for the reasons set forth in this report, recommends that the 1995 Legislature grant no additional forfeiture remission to late water right filers beyond that granted by SB 310, Chapter 629, Laws of 1993.

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Water Policy Committee

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## **Section 2. Weather Modification Study**

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### **Introduction**

Throughout the last decade, under the provisions of Title 85, chapter 3, MCA the state of North Dakota has received a permit to conduct weather modification activities in Montana. The activities have consisted of seeding clouds in Montana with silver iodide to reduce the potential for severe hail storms in North Dakota. In 1990, after receiving complaints from eastern Montana residents regarding reduced rainfall allegedly due to the cloud seeding by North Dakota, the Board of Natural Resources and Conservation, (BNRC) refused to grant North Dakota a weather modification permit. The BNRC also denied North Dakota's permit applications in 1991 and 1992. North Dakota appealed the BNRC denial in 1992 to the district court in Helena. The court found no evidence to support the BNRC denial and required the BNRC to grant the permit. The court decision had no effect for that year because it was issued very late in the cloud seeding season.

### **Legislative Mandate**

In response to the issues raised by the North Dakota cloud seeding program and the subsequent application denials, the 1993 Legislature passed Senate Bill 72. Among other provisions, SB 72: 1) prohibits the BNRC from approving any weather modification permits until April 30, 1995 if the primary benefit of the permit is outside of Montana, and 2) requires the DNRC and the Water Policy Committee to analyze any new or existing applications and to provide this analysis to the 1995 Legislature. Both these provisions were instituted with the intention of providing the legislature with the time and information to establish an appropriate weather modification policy during the 1995 Session.

In addition, SB 72 requires the WPC to submit a final report to the legislature on any request for a weather modification permit if the primary benefit of the weather modification activity is outside of Montana. If the DNRC does not receive a weather modification permit application, or if the DNRC fails to submit its report and an environmental impact statement regarding an application to the Committee by October 1, 1994, then a report is not required.

### **Committee Activity**

The Committee requested that if the DNRC received an application for a weather modification permit where the primary benefit of the permit was outside of Montana, the DNRC work with the Committee in preparing the DNRC report and environmental impact

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statement. While North Dakota had expressed an interest in applying for a permit for cloud seeding activities and continued to negotiate with the DNRC regarding environmental impact analysis fees, North Dakota had not applied for a weather modification permit as of the date of this report. Therefore the Committee did not undertake a further analysis of this issue. At its December meeting the Committee was informed that North Dakota was planning on pursuing a weather modification permit from Montana in 1996. A letter from the North Dakota Atmospheric Resource Board to the director of the DNRC is included as **Appendix 3**.

**Final Committee Recommendations**

Since the Committee did not complete a substantive analysis of this issue it makes no recommendation.

However, the Committee wants to notify the sponsors of SB 72, Chapter 611, Laws of 1993, and the 1995 Legislature, that the desired studies have not been completed and the legislature may wish to consider extending the current moratorium to ensure that Montana establishes and implements the best public policy on this issue.



## Part II

# Continuing Oversight Responsibilities

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Water Policy Committee

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## Section 3. Water Data Management

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### Introduction

As the controversy over water issues increases in Montana, the importance of reliable and accessible information regarding these issues increases as well. Effective and efficient water data management, which comprises the gathering, storage and dissemination of water data, is necessary for a valid long-term water policy that ultimately serves all Montanans. Water data management issues for this interim fall under two major areas:

1. Committee Oversight of the Montana Water Information System
2. Committee Involvement with the Ground Water Assessment Program

#### 1. Committee Oversight of the Montana Water Information System

Section 85-2-105(3)(d), MCA requires the Water Policy committee to:

. . . analyze, verify, and comment on the adequacy of and information contained in the water resources data management system maintained by the department [of natural resources and conservation] . . . .

The DNRC responsibility to "establish and maintain a centralized and efficient water resources data management system"<sup>6</sup> was delegated to the Montana Water Information System (MWIS) in 1986. The MWIS, created in 1986 as part of the Natural Resources Information System (NRIS), provides a central contact point for locating and obtaining all types of water data. The Water Policy Committee played an important role in the creation of MWIS and continues to monitor its implementation.

The following summary of the MWIS activity is excerpted from the *Montana Natural Resource Information System, Fiscal Year 1994 Annual Report*. Interested persons should contact NRIS for a complete copy of the report.

*About 520 individual requests for water information were received by MWIS during 1994. This represents an increase of about 75% over the number received in the previous year. Of the 520 requests, approximately 48 percent came from state agencies, 20 percent were from federal agencies followed by private-for-profit users at 14 percent. Private non-profit user requests represented 11 percent of the total requests. Among state agencies, DNRC*

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<sup>6</sup> Section 85-2-112, MCA.



*[Department of Natural Resources and Conservation] continues to use the system the most at 37 percent, followed by DHES [Department of Health and Environmental Sciences], DSL [Department of State Lands], FWP [Department of Fish, Wildlife & Parks], and DOT [Department of Transportation]. The patterns of private sector and agency use remain consistent with historical usage. The pattern indicates the Water System is fulfilling its original mandate to improve the management and accessibility of water information, especially for state data resources and users.*

*It is significant to note the Water System experienced a sizable increase in use every year it has been in operation. It is also significant to note that staffing for the Water System is at the same as in 1987. Efficient use of skilled staff and computer resources accounts for the programs ability to handle significantly increased request load. However, if the request load continues to increase, and a priority is placed on increasing use of the GIS as a tool for clearinghouse activities, staffing for the Water Information System will need to be increased.*

*Advising committees on water information policy continued to be an important and valuable activity. The committees are an effective forum for tracking statewide activities of other state and federal agencies and for keeping appraised (sic) of laws and policies effecting (sic) water resources. The committees also provide solid opportunities to inform staff from the Governor's Office, legislators, and state and federal agency personnel about the Water Information System status and services. The Water Information Coordinator is the lead NRIS staff for these activities.*

*The Legislative Water Policy Committee met nine times during 1994 and the Water Information Coordinator attended the majority of the meetings. The Coordinator also attended one of the field trips and public meetings sponsored by the Committee. The Coordinator provided updates on the Water Information activities, services, and refinements. Updates were also provided by the Coordinator on Drought Monitoring and its GIS map products, and on Ground Water Assessment Programs. The Water Coordinator is the Chairman of the Committee that oversees Montana Ground Water Assessment Program. GIS and Water Information staff provided maps of the Big Hole Basin showing general hydrologic features, and points of diversion and place of use from the DNRC Water Rights data base. These maps were used to help the Committee examine water use, instream flow, and other water availability issues in the basin. Maps were presented in a public meeting and field trip of the basin in June 1994. Their use represents an important initial step by the Water Policy Committee to employ GIS technology to address timely and difficult water policy issues.*

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#### Water Policy Committee

In addition to monitoring the activities of the MWIS, the Committee expressed concern regarding another water data management issue--the proposed reduction in the number of stream gauging stations in Montana supported by the U.S. Geological Survey. The Committee wrote a letter to the Montana Congressional delegation, the U.S. Secretary of the Interior, and the director of the U.S. Geological Survey (see **Appendix 4**) noting the importance of these data collection sites. The Department of Interior responded to these concerns and the Committee again wrote thanking the Department for preserving some gauging sites but reiterated its continuing concern regarding decreasing federal support for this important function.

## 2. Committee Involvement with the Ground Water Assessment Program

The Montana Ground Water Assessment Act, section 2-85-901 et seq., MCA, systematically funds efforts to evaluate Montana's ground water resource. Major legislative purposes are as follows:

- \* to coordinate Montana's ground water data collection and information distribution efforts,
- \* to develop an extensive and better planned statewide ambient water level and water quality monitoring network, and
- \* to create a 21 year program to systematically evaluate Montana's ground water resource.

The Assessment Act is administered by the Montana Bureau of Mines and Geology (MBMG) and a statewide steering committee. Membership on the steering committee is shared by state and federal water agencies, the university system, local governments, and water user groups. MBMG is developing the program under the policy guidance of the Water Policy Committee. The 1991-92 WPC endorsed the Ground Water Program, including continued stable program funding.

During the 1993 biennium, the Assessment Act was funded through several sources including increased licensing and renewal fees for water well developers, increased fees for certain wells, and a percentage of the hook-up fee for public water supply systems.

In the 1995 biennium, the Assessment Act was to be funded through a diversion of \$666,000 per year from the Resource Indemnity Trust (RIT) tax proceeds. However, Ground Water Assessment Act programs experienced a serious funding short-fall in 1994 due to lower than expected revenues to the Resource Indemnity Ground Water Assessment Trust (RIGWAT), formerly the RIT, and due to an error in the Metalliferous Mining Tax law. In short, the programs received \$262,000 less than was expected for the year. This resulted in personnel layoffs and a total stoppage of field work. To help end the funding crisis, the

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steering committee chair assisted the Montana Bureau of Mines and Geology (MBMG) staff in making a series of detailed presentations to the Water Policy Committee, Environmental Quality Council, Revenue Oversight Committee, and Legislative Finance Committee. These efforts resulted in the Governor signing a grant agreement to ensure the Assessment Act programs would receive full funding for FY 95, and to eliminate the deficit. Legislation has also been proposed to correct the error in the Metalliferous Mine Tax law and address funding for the ground water programs in the long-term. A copy of the Committee's letter to the Governor regarding this situation is attached as **Appendix 5**.

### *Final Committee Recommendations*

#### **Montana Water Information System (MWIS)**

The Committee thanks MWIS for its valuable assistance during the interim regarding the Big Hole Basin study, drought response, and the stream flow management symposium. The Committee strongly believes that stable funding for MWIS is crucial to ensure that the agency accomplishes its important mission of data storage and dissemination.

Additionally, the Committee understands the importance of reliable, long-term water flow data. The committee remains concerned regarding the decreasing federal funding for stream gauging stations in Montana and supports the important work of the U.S. Geological Survey in providing the needed information to allow the state and its citizens to make informed water management decisions.

#### **Ground Water Characterization Program**

The Committee strongly supports the important work of the Ground Water Characterization and Assessment Program and recommends that a secure and stable funding source be identified and implemented.

## Section 4. Water Development Program

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### Introduction

Section 85-2-105(3)(b), MCA requires the Water Policy Committee to:  
analyze and comment on the report of the status of the state's water development program required by 85-1-621, [MCA] when filed by the department; . . .

Montana's Water Development Program, established through statute in 1981, states:

The [DNRC] shall administer a water development program to accomplish projects and works, promotion of private, local government, and state water development; development of water-based recreation and the protection of water resources or the benefit of agriculture, flood control, and other uses; development of off-stream and tributary storage; and development of state-tribal, state-federal, and state-federal-tribal projects.

The DNRC is required to submit a water development program report to the legislature describing the status of the development program. A copy of the report must be submitted to the president of the senate, the speaker of the house, and to members of the Water Policy Committee. The Committee must analyze and comment on the report when filed by the DNRC.

The DNRC report has usually been filed just prior to legislative sessions, after the Committee has concluded its interim business. For this reason, the Committee has never analyzed or commented on the report.

The 1991-92 Water Policy Committee made the following final recommendation in its report to the 52nd Legislature:

*The Committee requests that the DNRC provide the Committee a copy of next interim's draft report by September 30, 1994 to allow the committee adequate opportunity for proper analysis and comment.*

*The Committee also recommends that the next interim Committee review and comment on the DNRC grant prioritization process.*

*Finally, the Committee is concerned by the continued and increasing use of*

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*Resource Indemnity Trust funds, through the Water Development and Renewable Resource Development Grant programs, to fund general operating expenses of state agencies. The Committee notes that this practice is in direct violation of section 15-38-203(2), MCA, enacted in 1985, that states:*

*"It is the intent of the legislature that future appropriations from the resource indemnity trust interest account not be made to fund general operating expenses of state agencies."*

*The Committee recommends that the next interim Committee examine this issue in detail.*

## **Committee Activity**

The Committee requested that the DNRC submit its draft report to the Committee at an earlier date. The DNRC complied with this request and submitted a draft report to the Committee at its October, 1994 meeting. The Committee reviewed the report and said that many of the projects high on the priority list involved issues the Committee had been involved with this interim including drought management, water research, and instream flow issues.

Additionally, the Committee requested additional information from Committee and DNRC staff regarding the use of Resource Indemnity Trust funds for state agency general operating budgets. This information was provided, (see **Appendix 6**) but due to time and resource constraints, the Committee did not enter into substantive discussions regarding this issue this interim.

### **Final Committee Recommendations**

The Committee appreciates the DNRC's cooperation in submitting the draft grant ranking report earlier in the interim. The Committee recommends that next interim's Committee continue to work towards efficient and earlier participation in the review and prioritization process.

Additionally, the Committee remains concerned about the continued use of trust funds, through the grant process, to fund general operating expenses of state agencies. The Committee recommends that next interim's Committee address this issue if the 1995 Legislature does not take substantive action.

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## Section 5. Water Research

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### Introduction

Section 85-2-105(3)(c), MCA requires the Water Policy Committee to:

. . . analyze and comment on water-related research undertaken by any state agency, institution, college, or university; . . .

Water Policy Committee efforts regarding water research have been framed by two major studies: the 1988 Environmental Quality Council (EQC) sponsored *Water Resources, Research Centers and Graduate Programs Study*; and the *1990 Interagency Water Research Policy Advisory Board Report*.

As a result of the 1988 study, the Water Policy Committee recommended that the university system restructure the Water Research Center at Montana State University to provide better services in water research, education on water issues and improve communication with water users.

### Committee Activity<sup>7</sup>

#### Water Resources Center Oversight

The Committee closely followed the Montana University System's restructuring of the Water Resources Center during the 1993-94 interim. The university increased its support for the Water Center in part by conducting a nationwide search for a new director and increasing the time allocated for the position from .4 FTE to 1 FTE.

The WPC remained involved throughout the interim, with the Water Center in general, and with the hiring of the new director in particular. Senator Bianchi, one of the members of the Water Policy Committee, and Deborah Schmidt, director of the EQC,<sup>8</sup> both served on the Water Center director selection committee.

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<sup>7</sup> In addition to Committee involvement in water research described here, Committee staff also serves on advisory committees for both the Water Resources Center and the Montana Watercourse.

<sup>8</sup> The Environmental Quality Council provides staff for the Water Policy Committee.

Shortly after being hired, Dorothy Bradley, the new Water Center director, briefed the Committee on her plans for continuing the Water Center's renewal. She said that the Water Center's mission demanded that the center focus on Montana priorities. A useful Water Center will be one that provides a valuable interface between academic and other elements of society and also acts as a "switchboard" for water related research. Ms. Bradley said her goal was "to help make Montana become a place where responsible citizens make decisions based on knowledge. This is the best way to ensure we remain stewards of our future."

Updating the Committee later in the interim, Ms. Bradley said she believed the Water Center had implemented all the Committee's previous recommendations and deserved additional legislative support.

The Committee expressed interest in a number of the Water Center's interim activities outlined below.

#### *Drought Mitigation Center*

The goal of a Drought Mitigation Center is to identify technological or educational efforts that could mitigate the impacts of drought. Types of issues the center would evaluate include: ditch lining; water use efficiency; improved and increased GIS mapping use; and general mitigation research. It is planned that the Mitigation Center would also act as a clearinghouse for mitigation information and have strong ties to federal agencies involved in drought mitigation. The Water Resources Center initially was able to get funding for this project included in federal legislation. The federal funding was dropped but the University System continues to pursue the idea.

#### *Ad Hoc Drinking Water Committee*

This Ad Hoc Committee will serve as the nucleus for a five-state regional approach to drinking water issues. The Water Resources Center, with the help of Montana Senators Baucus and Burns, was able to secure a \$375,000 federal appropriation directly to the Water Resources Center for this effort.

#### *Stream Flow Management Symposium*

Please see *Section 11. Instream Flow Study* for details on the symposium.

#### Montana Watercourse Oversight

The Montana Watercourse is a statewide water education program started in 1989 and centered at Montana State University. The goal of the Watercourse program is to promote and facilitate the awareness of Montana's water resources and related issues through the

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development of special workshops, learning materials, conferences, activities, and reference guides. Particular emphasis is given to strengthening public understanding of the importance of water to all user groups, and to the belief that Montana's future social and economic prosperity hinges on wise water management. The program scope is statewide and its delivery unbiased. Its mission is to build informed leadership in resource decisionmaking. The topics covered respond to the information needs of many diverse interest groups. The Watercourse program relies on cooperation with other resource agencies, water educators, and Montana citizens.

The Montana Watercourse has two major components, an Adult Water Awareness Program and a Water Education for Teachers Program, or Project WET Montana.

#### *Project WET*

Project Wet provides school teachers and natural resource educators with innovative lesson plans and teaching aides about Montana's water resources for Montana's youth. The project trains educators across the state during weekend training seminars and has reached over 900 teachers. This translates into an estimated 18,000 students each year who are taught concepts of water management, water conservation, and other related water issues.

#### *Adult and Community Water Awareness Program*

The Adult and Community Water Awareness Program provides citizens with background information on many topics needed for more effective involvement in water management decisionmaking. In addition to the Stream Flow Management Symposium referenced on the previous page, the adult program also completed several water rights workshops and a new "Know Your Watershed" project. These watershed projects were conducted in the Bitterroot and the Sun River watersheds and one is being planned for the Musselshell River.



### Final Committee Recommendations

#### **Water Resources Center**

The Committee appreciates the Water Center's successful restructuring efforts this interim and its increased focus on the search for public-oriented solutions to Montana's complex water issues. The Committee endorses legislative support for the center in recognition of these efforts.

The Committee also endorses the current Water Center projects, the Drought Mitigation Center and the Ad Hoc Drinking Water Committee and requests that the center keep the Committee informed on the progress of the efforts.

#### **Montana Watercourse**

The Committee finds that the Montana Watercourse is a valuable tool in increasing the public's understanding of Montana's complex water issues. Specific projects, such as "Know Your Watershed" and the water rights workshops should continue to be refined and implemented across the state.

Additionally, the Committee specifically endorses the Watercourse's water development grant application for its "Water Future" project.

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## Section 6. State Water Plan

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### Introduction

Section 85-2-105(3)(a), MCA requires the Water Policy Committee to:

. . . analyze and comment on the state water plan required by 85-1-203, [MCA] when filed by the department . . . .

For the past six years the DNRC has used a tightly structured planning process to develop sections of a statewide water plan. The process consists of a governor-appointed Water Plan Advisory Council (WPAC), public meetings to identify relevant issues for study, broad-based steering committees appointed by the WPAC to analyze the identified issues, public hearings on the steering committee and WPAC recommendations, and BNRC adoption of the final plan sections. During the last three interims the water planning process has looked at instream flow, water storage, and the connection between water quantity and water quality.

The DNRC decided that, instead of analyzing a specific water issue, during the 1993-1994 interim it would be beneficial to analyze the process itself.

### Committee Activity

The Committee received periodic reports from the DNRC regarding the State Water Plan review process and progress on the program review. Additionally, the executive director of the Environmental Quality Council<sup>9</sup>, and the WPC Chair served on the State Water Plan Review Working Group.

The review working group completed four tasks:

- \* an assessment of the usefulness of the planning process,
- \* an evaluation of the success of the previous plan section recommendations and whether the planning process achieved products that met people's expectations,
- \* an evaluation of the planning process itself and whether it has included the right people, the best format and structure, and

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<sup>9</sup> The Environmental Quality Council provides staff for the Water Policy Committee.

\* a discussion of how the process or products can be improved if the need for the process is established.

Interviews with citizens involved in previous water planning cycles were conducted early in the interim. These interviews were compiled and used to initiate a dialogue within the working group and interested public. Additionally, the working group also inventoried all water planning activities in the state and surveyed other the planning efforts in other western states. A list of the working group's preliminary recommendations is included as Appendix 7.

**Final Committee Recommendations**

The Committee congratulates the DNRC for its work in reviewing the state water plan review process. The Committee endorses the working group's preliminary recommendations as implemented in the DNRC bill HB 192 attached as Appendix 8.

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## Section 7. Water Leasing

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### Introduction

Section 85-2-436, MCA, requires the Department of Fish, Wildlife, & Parks (DFWP) and the DNRC to conduct a Water Leasing Study in consultation with the Water Policy Committee. The Water Policy Committee has been actively involved in the water leasing study since the its inception in 1989.

### Committee Action Summary

The 1991-92 Committee made the following recommendation:

*While the Committee is encouraged by the progress made by the DFWP in securing water leases for instream flows, the Committee strongly recommends that the agency increase its efforts to utilize the water leasing process to improve Montana's fisheries.*

Notwithstanding the fact that a final Committee report is not due until 1998, the 1993-94 WPC decided to stay abreast of water leasing developments through periodic reports by the DFWP and the DNRC as well as reports and public comments by affected individuals and organizations.

The Committee was encouraged by the DFWP's continued progress in the Water Leasing Study. The Committee was pleased to see the department beginning to overcome the initial program problems including public uncertainty with the program, complex water rights issues involving many water rights holders, public relations issues involving the DFWP, and economic concerns.

The DFWP report required by section 85-2-436(3)(a) MCA, detailing major accomplishments and specific lease information, was submitted by the department and accepted by the Committee at its last interim meeting. For a copy of the report, please contact Committee or DFWP staff.

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*Final Committee Recommendation*

The Committee is pleased to see that the DFWP's efforts in obtaining water leases are returning benefits, and water, back to the stream. The Committee encourages the DFWP to continue its efforts in this study. The Committee realizes that the DFWP water leasing study is a but one tool needed to develop and implement the best policy regarding public stream flow management.

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## Part III

### "Recommended" Issues

Water Policy Committee

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## Section 8. State Drought Response

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### Issue Background

Drought has been a persistent problem in Montana. In response to prolonged drought over much of the state, the 1991 Legislature created the Drought Advisory Committee (DAC). Understanding its statutory responsibility to "oversee the policies and activities of . . . state agencies and . . . institutions as they affect the water resource," the 1991-92 Water Policy Committee closely followed the DAC's efforts over the interim.

The 1991-92 Committee's recommendation regarding state drought response was as follows:

*The Committee commends the Drought Advisory Committee for its efforts to improve Montana's drought response capabilities. The Committee understands the importance of drought impact monitoring and is therefore concerned with the loss of federally supported stream gauging stations. Additionally, the Committee understands the importance of drought impact mitigation and requests the DAC to do the following:*

- \* ensure that the relevant state agencies understand and fully comply with their responsibilities during periods of extreme drought;*
- \* increase DAC support to the crucial Local Drought Advisory Committees from the administration and its agencies;*
- \* develop and institute objective drought response triggers to increase the efficiency and effectiveness of drought response in Montana; and*
- \* develop a clear and functional statement of the DAC's mission and goals.*

*The Committee further recommends that the next interim Water Policy Committee review the DAC State Drought Plan expected to be completed in early 1993 as well as DAC progress implementing these recommendations.*

### Committee Activity

Due to the record precipitation in Montana in 1993, DAC related Committee activity was limited. However, 1994 was extremely dry, and the Committee spent considerable

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resources in analyzing and attempting to address the impacts of Montana's prolonged drought.

### DAC Oversight

The Committee received numerous updates from the DAC regarding drought conditions, drought impacts, local and state government response, and the implementation of the Committee's 1991-92 recommendations. Please see the DAC Drought Plan 1994, available from the DNRC, for details.

One Committee recommendation not implemented was the development of a specific mission statement. The DAC staff informed the Committee that it favored the flexibility of its current broadly defined mission statement.

### Big Hole Basin

The Committee also investigated the extent of, and encouraged cooperative responses to, the serious drought impacts of 1994. One of the more successful efforts occurred in the Big Hole Basin. The Committee sponsored two public meetings in the basin and completed an extensive two day tour of the area in an attempt to better understand the hydrology, biology, water management, and social issues of the area. Examples of the agency, legislative, and water user cooperation this interim in the basin included the largely successful DFWP arctic grayling drought mitigation plan, the expressed interest in developing a voluntary local watershed planning council, and the very successful April, 1994 Montana State University-University of Montana School of Law educational symposium on stream flow management. For more details on the Committee's involvement in the Big Hole Basin, please see section 11 of this report.

### *Final Committee Recommendations*

The Committee appreciates the work of the Drought Advisory Committee (DAC) in improving its drought response and mitigation efforts throughout the interim. The Committee recommends that next interim's Committee continue to work with the DAC in seeking ways to further improve Montana's drought mitigation capabilities.

The Committee also urges local DACs and relevant agencies to more fully involve citizens in the development of local drought response measures and to develop better communication between the state and local DACs.

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## Section 9. Wilderness Dam Maintenance and Repair

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### Introduction

There are numerous non-federally owned dams in federally designated wilderness areas. These dams require the same regular maintenance and repair as other dams, but in accordance with the current interpretation of the federal Wilderness Act, (with few exceptions), motorized equipment is prohibited in wilderness areas. Dam maintenance that would normally be accomplished with chainsaws and heavy equipment must be done in wilderness areas with handsaws and horses. This has increased the burden on those responsible for the proper functioning of the dam and its safety.

In response to public and DNRC concerns regarding the increased costs of wilderness dam maintenance and dam safety, the USFS adopted a wilderness dam maintenance and repair policy in June, 1992 with the following "management directions":

*1) decisions on the use and transport of motorized/mechanized equipment must be made on a case-by-case basis. . . . [E]ach site, situation, and action is different and must be treated as such . . . .*

*2) that each forest managing wilderness dams in the Region will approve maintenance activities for a five year period for each wilderness dam when permits are renewed. These activities will be reviewed annually, along with the dam operations plans, if there is no change in dam condition or activity, then no additional analysis need occur to continue implementation of the approved activities. . . .*

The DNRC stated that it was difficult to determine exactly how the USFS would implement the new policy, but that the DNRC Dam Safety Bureau would work with the USFS and water users to develop and implement the multi-year maintenance plans.

The 1991-92 Committee's final recommendation was as follows:

*The Committee is pleased that the USFS appears to be moving toward a reasonable solution to this issue. The Committee recommends that the next interim Committee continue to review the implementation of the new wilderness dam maintenance and repair policy for its impact on water users and the wilderness resource.*

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## Committee Activity

The Committee received updates from the U.S.D.A. Forest Service and DNRC personnel regarding federal wilderness dam policy implementation.

Testimony received from these agencies and the public indicated that the new federal policy was addressing, to a large degree, the concerns of the water users and the DNRC. See Committee staff for a summary transcript of the specific comments.

### *Final Committee Recommendations*

The Committee is pleased to see progress on this issue and encourages the U.S.D.A. Forest Service and the DNRC to continue their cooperation in implementing a reasonable wilderness dam maintenance and rehabilitation policy.

The Committee recommends that next interim's Committee stay informed on this issue and pay special attention to the issue of wilderness dam accessibility.

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## Section 10. Water User/Recreational User Fees Study

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### Introduction

The 1991 Legislature directed the DNRC and the DFWP to conduct studies assessing the feasibility of charging fees or increasing fees for diversionary and recreational water use and to submit a written study report to the Water Policy Committee. These studies, both recommended in the 1991 State Water Plan, ask--Are all the beneficiaries of state-owned water storage projects paying their fair share for the construction, maintenance and rehabilitation of those projects?

The 1991-92 Committee accepted both agency reports and requested comments and recommendations from the agencies. The Committee also held a public hearing on the issue.

In response to the Committee's request for comments and recommendations, the DNRC and DFWP submitted a joint letter setting out the following proposed approach:

*. . . Both DFWP and DNRC have dams which need rehabilitation. . . . Both agencies feel that a joint approach to rehabilitation of state-owned water projects would be beneficial. To facilitate the rehabilitation of state water projects it is proposed that the dams owned by the DNRC and . . . [DFWP] . . . be combined into a single list and prioritized based on need, cost, benefits and hazard rating. The top priority dams would then be considered for funding from a variety of sources from both agencies. DNRC would utilize traditional funding sources. . . . [DFWP] . . . would contribute Sport Fish Restoration dollars if the agencies determined the project warranted the expenditure of those funds and appropriate fishery benefits would be provided. . . . We propose to come to the 1995 legislature with the top priority projects identified and a cost share proposal for funding rehabilitation of these projects.*

The Committee was very interested in the joint approach proposal. The 1991-92 Committee's final recommendation was as follows:

*The Committee appreciates and commends the efforts of the DNRC and the DFWP in completing the studies and responding to Committee requests. However, the Committee remains uncertain of the exact impacts of the joint approach recommended by the agencies. Until these impacts are more fully understood the Committee will withhold an endorsement of the proposed joint approach for project rehabilitation. The Committee recommends that the next interim Water Policy Committee continue to evaluate this issue.*

Water Policy Committee

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## Committee Activity

Owing to limited Committee resources, the 1993-94 Committee decided to restrict its involvement in this issue to ensuring that the joint priorities list is completed before the 1995 Legislative Session.

Personnel from both the DFWP and DNRC stated that the departments have decided that Bear Paw Reservoir, Havre, should be the state's top priority rehabilitation project. This project will cost an estimated \$250,000. The funds will come jointly from both departments. Other top state dam rehabilitation priorities are the Tongue River Reservoir and the South Sandstone Reservoir. Rehabilitation of these structures is expected to consume DFWP resources for the next few years.

The Committee was very interested in the Tongue River Project. DFWP will contribute \$1.1 million to the project and Committee members asked how the DFWP would guarantee \$1.1 million in fish and wildlife enhancement. The agencies are still analyzing the various downstream, upstream, and reservoir enhancement options. They also stated that while the DFWP is looking at the serious dewatering problems in the Tongue River, most of the fisheries benefits would likely occur in the reservoir itself. DFWP personnel said that the proposed rehabilitation will significantly increase the flexibility of reservoir management.

The legislature will have the opportunity to review the environmental impact statement on the proposal before approval and implementation.

### *Final Committee Recommendations*

The Committee endorses the joint approach to state project rehabilitation as developed by the agencies and hopes this approach will maximize the efficient use of scarce state resources. The Committee recommends that next interim's Committee receive updates on the proposed state project rehabilitation as needed.

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# Part IV

## Other Interim Issues

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# Section 11. Instream Flow Study

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## Introduction

Few water issues have been as controversial in Montana as the issue of instream flow. At the risk of over simplifying, the instream flow issue can be paraphrased by asking--How can the flow of water in the watercourse be maintained or increased for fisheries, recreation, and the protection of public health, while also protecting existing water users and the stability of Montana's agricultural economy?

The legislature has dealt with instream flow issues periodically since at least 1969. In the 1989, 1991, and 1993 sessions, the legislature debated controversial legislation specifically designed to increase instream flows in Montana.

Despite this attention by the legislature as a whole, and related executive agency efforts, no legislative committee has yet specifically and directly analyzed the instream flow issue in Montana.

Understanding its unique and comprehensive responsibility to "advise" the legislature regarding state water policy, "oversee" the policies and activities of state executive agencies as they affect the Montana water resources, and to "communicate" with the public on water policy issues, the Committee decided to undertake an interim instream flow study.

## Committee Action Summary

### Committee Goals

The Committee's goals for the study were to educate the members of the Committee, the legislature, and members of the public regarding instream flow issues.

### Montana Water Law Review

The Committee decided that it must first gain a better understanding of Montana water law before attempting an analysis of instream flow issues. The Committee sponsored a three hour panel discussion on Montana water law with panelists Don MacIntyre, DNRC chief legal counsel; Holly Franz, private attorney, specializing in water rights; John Bloomquist, private attorney, Montana Stockgrowers Association; and Ted Doney, private attorney, also specializing in water rights.

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The panelists responded to the following questions:

*Who owns the water in Montana?*

Mr. Bloomquist said that the Montana Constitution, article 9, section 3, states that all water is the property of the state for the use of its people. But the section goes on to say that the water is subject to appropriation for beneficial uses as provided by law. Ms. Franz agreed.

Mr. Doney said that the question of who owns the water is meaningless; the real question is who controls the water or who has the right to use it.

Mr. MacIntyre said that he has concluded that for the purposes of managing and regulating the water in Montana the state owns the water. However the U.S. Supreme Court has stated that the idea of state ownership of water is a legal fiction. When states were created, the federal government disposed of the land but never the water. The states asked: "How do you dispose of something that the federal government owns?" The U.S. courts say that in the absence of Congress saying otherwise the states may act. Water is an article of commerce and cannot be regulated by the states unless Congress does not act. The bottom line is that without any action by Congress, Montana acts as the owner of the water--as trustee of the water for the people.

*How is a "pre-1973" water right different from other water rights? Is the answer to any of the following questions different for a "pre-1973" water right.*

Mr. Bloomquist said the concepts of beneficial use and other components of basic water law are the same for both pre-73 and post-73 water rights. Additionally, the change process treats both types of rights the same.

Ms. Franz said the priority date is obviously a big difference. Pre-73 rights included use rights, decreed rights, filed appropriation rights, etc. Now rights are only granted through a permit or reservation. One practical difference between them is that some pre-73 rights may be less defined than post-73. Another difference is that post-73 permits can be revoked by DNRC if the water use is not in accordance with the permit. The department can not do that to pre-73 rights. Also there is some difference in the abandonment statutes, but basically they are the same except for the method of accession.

Mr. Doney agreed that July 1, 1973 is the magic date. Otherwise, all the rights are treated the same except for subtle differences in abandonment and adjudication. They are all protected property rights.

Mr. MacIntyre agreed with the importance of the July 1, 1973 date. Pre-73 water rights are vested water rights. Post-73 permits are both provisional, meaning not vested until

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the adjudication is complete (in other words the water right can be decreased until adjudication) and conditional, meaning the state can put conditions and parameters on water use.

Mr. Burton asked how important development of water is in relation to pre and post-73 water rights. He always thought that a pre-73 right was a right to "developed" water and a post-73 right was a right to develop water.

Mr. MacIntyre said that after 1973, before you can develop a water right a plan has to be submitted and approved by the DNRC. A pre-73 right starts when first used even if not fully developed. A water user is entitled to the maximum historical use, not continual use, but highest historical use. This historical use can be developed over a period of time with the same priority date.

*What is the difference between owning the water and having a right to use the water?*

Mr. Bloomquist said that water right holders have a property right to use the water for a beneficial purpose. This right to use the water is much more important than the ownership.

Ms. Franz said there is a big difference between the right to use and outright ownership. The concept of beneficial use defines water law and impacts what you can do with your water. Early water case law in Montana established a requirement for actual water use. And if the owner doesn't use it, the next person can.

Mr. MacIntyre said that most lay people see ownership as meaning complete control. The water is a resource that must be put to use. There is more than one user that can exercise control over that resource. This complicates the distinction between ownership and right to use.

Alan Rollo, Medicine River Canoe Club, asked what is considered beneficial use in Montana.

Mr. MacIntyre said it depends on context, but in water law it means those uses established by law, both statutory law and common law. There is also a difference between actual and legal beneficial uses.

Mr. Rollo asked if instream flow is a beneficial use in Montana.

Mr. Doney said the statute defining beneficial use was broadly worded and it includes water use for recreation. But that does not mean you can necessarily get a water right for it. Using water to flood and kill gophers may have a benefit and therefore be a beneficial use to someone, but the law does not recognize it as such.

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*Is a right to use water a protected property right in Montana?*

Mr. MacIntyre said yes, while the Montana Constitution does not create the property right (that is created through common law and statutes, etc.), it does protect that property interest. The right to use water is not ownership, but it does include some important aspects of ownership.

Mr. Doney agreed. A water right is also a protected property interest by the due process clause of the U.S. and Montana constitutions. Due process of law and compensation may be required.

Mr. Bloomquist agreed with Mr. Doney regarding the compensation issue.

Mr. MacIntyre said that the right to use water, while a protected property right, is separate and distinct from surface ownership. Due process protection includes protection from irrational state action. There are valid exercises of the police power of the state that will not infringe upon due process requirements.

*How does a water right holder change the use of that water?*

Mr. MacIntyre said under Montana water law, for both pre and post-73 water rights, if the change involves a change in point of diversion (POD), a change in place of use (POU), a change in place of storage, or a change in the purpose of use, the change requires a permit from DNRC. Temporary changes also require a DNRC permit. This also puts all potential new users on notice that the water right will revert back to the original user at some point. The water leasing process, with the DFWP, also requires change approval by the DNRC. Salvaged water is also a change and requires DNRC approval. Any change requires a showing of no adverse impact. He said all changes are governed by section 85-2-402, MCA.

Senator Bianchi asked if the required showing of no adverse impact included no adverse impact to both junior and senior users.

Mr. MacIntyre said yes, that was clear in the statute. With getting a new water right the permitting statute requires a showing of no adverse impact on prior existing rights, but the change statute includes both juniors and seniors.

*What does that water right holder have to prove before the change is approved?*

Mr. MacIntyre said that probably the most important criteria was no adverse impact on junior or senior water users. Again this is required for all changes.

Mr. Doney said that certain criteria only had to be proved if there was a valid objection filed with the DNRC. The other criteria have to be proved by the applicant

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regardless of objectors.

*Who can object to the changes in water use?*

Mr. MacIntyre said that basically any objections can be made except for objections based on water classification. These objections are limited to the DHES or local water quality districts. Otherwise anyone can object and attempt to show that one of the ten criteria cannot be met.

Mr. Bloomquist said that legal standing would require an initial showing of interest that would be adversely affected. Also, DNRC jurisdiction is an issue. If there is an adverse effect on something other than a water right, the DNRC has determined that it is out of its jurisdiction.

Ms. Franz said Mr. Bloomquist made an important distinction. Someone's property value that was affected by a water right change that had no adverse impact on a water right was not considered by the DNRC.

*What does the objector have to prove?*

Mr. MacIntyre said the ultimate burden of proof rests on the applicant to prove that they meet the criteria in the statutes. Then the burden of production shifts to the objector.

Mr. Bloomquist said that as a practical matter, you have to persuade the hearings examiner that you are right regardless of if you are an objector or applicant.

Mr. Doney said before 1973, the burden used to be squarely on the objector; that has shifted and the burden is now in the applicant.

Ms. Franz said that the DNRC is supposed to look at the statutory criteria to ensure that it all has been met, but in reality you have a much better chance of getting the permit or the change if there is no objector.

Mr. Bloomquist agreed and said that a water right holder has a burden to protect his water rights. They should not rely on the DNRC to do it for them.

Mr. Kakuk said that over the past 3 years there have been 505 applications for changes in water rights: 74 of those applications had received objections, 12 of the those 74 applications went through the hearings process, and 3 applications were denied.

*Are subsurface return flows from irrigation considered in the change process?*

Mr. Doney said yes, subsurface return flows are considered, but less often than

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surface return flows. Subsurface return flows are very hard to analyze. If the return flow is not obvious and not quick, i.e., within a few days, it will not be considered. Surface return flows are clearly part of the calculation.

Ms. Brunner asked why the question only related to subsurface return flows.

Mr. Kakuk said from staff's perspective, when speaking about instream flows, there has never been a question about surface return flows not being adequately protected under the change process. This concern does exist however with subsurface return flows.

Mr. Doney said if there is evidence of subsurface return flows, they will be considered.

Ms. Franz said that field location (proximity to stream), technical testimony, and timing (placer mining may not consumptively use much water, but it can delay its return for a month) is important.

Senator Bianchi asked if changing from flood to sprinkler irrigation, even if the irrigator continues to use his 100 inches but irrigates more land, requires a change application.

Mr. MacIntyre said the DNRC does not issue change permits for changes from flood to sprinkler irrigation. However, if more land is being irrigated, then that will require a change application.

Senator Bianchi asked why the DNRC does not issue change permits for a change from flood to sprinkler irrigation when this could reduce return flows and adversely impact someone else's water right.

Mr. MacIntyre said it was a traditional interpretation of DNRC policy. You have a protected interest in your water right to go to sprinkler irrigation without going through the change process. But you do not have a protected right to the salvaged water. (Changing from flood to sprinkler, without increasing irrigated acres, will leave more water in the stream.) This cannot be used for another purpose or in another place without a change application and approval from the DNRC. If you want a protected right for the salvaged water you must put it to beneficial use.

Senator Bianchi asked if he changed from flood to sprinkler irrigation and salvaged 30 cfs of water, and he then sold this water to someone for instream use, assuming that the law was changed to allow that, and 3 months later Senator Swift suffered an adverse impact from the lack of return flows, what would happen.

Mr. MacIntyre said that the water cannot be salvaged water if there is an adverse

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impact. If Senator Swift could prove an adverse impact he could prevent you from gaining a protected right to use the salvaged water, but he cannot prevent you from changing to sprinkler irrigation. Mr. MacIntyre added that you can protect instream flows now by policing the flows, i.e., putting a call on the river. What it would take would be finding a rancher with an early water right willing to sell water and then changing the point of diversion downstream. Putting a call on the river will then protect that water down to the new point of diversion.

Mr. Burton said he always viewed the primary control of pre-73 water is by the judicial branch and the control of post-73 is by the executive branch.

Mr. MacIntyre agreed and said that until 1973 the courts were the only recourse. Access to the courts is still available for post-73.

Mr. Bloomquist said that the bottom line is the reliance on the physical mechanics of a stream. Return flows are very site and fact specific.

*Can water be maintained instream? If so, how?*

Mr. Bloomquist said yes, there are legal mechanisms to protect instream flows. Pre-73 methods, commonly known as Murphy rights, water reservations, water leasing, federal reserved rights, and hydropower rights, in a practical way protect instream flows above the dams. The real question is are we capable of maintaining instream flows. On some sources yes, on other sources, feeder streams etc., it may be impossible. Some physical restrictions will apply to any method of increasing or protecting instream flows.

Ms. Franz said some stream will go dry with or without diversions. Using the ability to put a call on the river will maintain instream flows. The DFWP has bought storage water, and even basin closure will prevent additional diversions.

Senator Bianchi asked how the DFWP can protect stored water rights instream.

Mr. MacIntyre said the state can protect the "contract water" down to the point of diversion for irrigation contract water.

Senator Bianchi asked if he could purchase water for instream flow from a state reservoir.

Ms. Brunner said the state can only sell the water for irrigation or other statutory uses.

Liter Spence, DFWP, said the DFWP purchases water from the dam to the point of delivery. There is an understanding and agreement among all the other water users. A

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water commissioner will protect the contracted amount of water down to the point of measurement.

Senator Bianchi asked if that protection was found by agreement or by law.

Mr. MacIntyre said it was protected by contract, i.e., by law.

Senator Bianchi asked how can you protect instream flow when its not a beneficial use instream.

Mr. Doney said it goes back to the distinction between a beneficial use and water right.

Mr. Gilbert said there was also a distinction between a reservoir right and water right from a watercourse. You can buy the water if it is from a reservoir.

Mr. MacIntyre said the water that the state diverts is protected under the state's water right.

Mr. Doney said there are obviously many ways to protect instream flows including instream stock water rights. These rights require no man-made diversion, basically these are instream flow water rights recognized by the water courts. Also, with some creativity, people can put water in the stream with water rights protection. As stated earlier you can go upstream, find some one with an early right, and change the point of diversion downstream and then it is protected. Conservation groups could pay for rancher A to buy the water right from B. However these schemes are not guaranteed. Rancher A could then do with the right as he wishes, so some other mechanism is needed to cover those situations.

Senator Bianchi asked if you could do that without a rancher A.

Mr. MacIntyre said no, rancher A would have to put it to beneficial use or the change would not be approved or protected.

Rep. Russell asked about the special situation with tribal water rights.

Mr. MacIntyre said tribal members can use water under federal reserved rights or under state law and these are handled differently. Compacts will answer some of these questions. If a tribal member has a right under state law that can be protected under state law. If an upstream user is using reserved water then that is probably a better right, even if the right has never been used before. The exact nature and scope of federal reserved rights, until either compacted or litigated, will remain unclear.

Mr. Burton asked if everyone with a reserved water right would claim the same priority date regardless of when the water was put to use.

Mr. MacIntyre said that was correct. The exact dates for the rights would best be determined through the negotiation process during compacting.

Mr. Doney said that there were also Walton rights that went to non-tribal members who purchase deeded land from a reservation with reserved water rights.

*Can water rights be severed from the land? If so, how?*

Mr. MacIntyre said yes. It can be voluntary severed through sale or abandonment, or involuntary through forfeiture, but if you want to use it someplace else, it must go through the proper process. There are obviously water rights that are not attached to the land.

Mr. Bloomquist said that under Montana law, water was seen as an appurtenance to the land but not as an unseverable appurtenance.

Rep. Harper asked Mr. Spence update on leasing program.

Mr. Spence briefly reviewed the history of the leasing program. He noted that it came as a response to the 1988 drought and the first cycle of the state water planning process. The program was very controversial in the 1989 session and is still controversial, but it is becoming more accepted.

Mr. Spence said that the Fish, Wildlife, and Parks Commission has approved 7 streams for the leasing program. Three are in the Yellowstone Basin, one in the Big Hole, one on the Blackfoot, one in the Bitterroot, and one on the Jefferson. Water is leased on a strictly voluntary basis. All the impacts of the lease are analyzed prior to entering the lease. Additionally, the lease must also go through the change process that has been discussed earlier. If there is an adverse impact to someone's water right, the lease will not be approved. The amount of water that can be leased is the amount of water historically consumed. This provision will protect water users and return flows. There is a time limit of 10 years on the initial lease and a 10 years onetime renewal. Some leases involving salvaged water can initially be granted for a 20 year period. The DFWP must proceed through a 12 step process before any lease can be entered. Half of these steps are in the leasing statute. Mr. Spence said the required Water Leasing Report would be delivered by its due date - December 1, 1993.

Mr. Spence said most of the leases and potential leases are on tributary streams to larger watercourses. The DFWP currently has two signed leases, both on a tributary to the Yellowstone River, Mill Creek. One is with a private individual for the duration of the irrigation season. It is a continuous flow to improve the base flow of the stream itself. Mill

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Creek is a spawning tributary to the Yellowstone. But when the fish are ready to migrate back into the main river the stream is often too dry to allow them to back into the Yellowstone. The other lease is with the irrigation district for 40 cfs for a brief period of time, 48 to 60 hours, and it will allow the DFWP to generate a flushing flow to get the fish from Mill Creek back into the Yellowstone sometime in August. Mr. Spence said some of the irrigation district's leased water was salvaged water.

Senator Swift asked about the priority dates of the leased water rights.

Mr. Spence said the lease with the individual was the first right on Mill Creek, and the priority dates were mixed with the district's lease.

Jim McDermott, MWF, asked how many miles of streams have been improved so far through the leasing program and what is the total cost.

Mr. Spence said the Mill Creek leases involved 6.5 miles and cost \$7,500 a year for the individual and \$12,750 a year for the district.

Ms. Franz asked if the leases wouldn't improve the fisheries for a much larger area.

Mr. Spence said that was correct. Mr. Spence said that he did not think that the leasing program would be much help in rewatering larger river systems, but it would help in improving the fisheries in these systems.

Mr. Gilbert responding to an earlier statement by Mr. MacIntyre said he disagreed with Mr. MacIntyre regarding the state's ownership of water absent some disposition of water by the federal government. This issue was unclear due to other federal legislation and action.

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The Committee said that the discussion greatly increased its understanding of Montana water law as it related to instream flow and decided that it should next look at basic hydrology and the mechanics of water use.

#### Basin Selection

In order to make this next study component as efficient and relevant to the issues as possible, the Committee decided to identify a specific basin for in-depth analysis. The

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Committee asked various water user groups<sup>10</sup> and state agencies to identify areas of the state that experienced dewatering problems and to recommend basins for further analysis of instream flow issues.

Many water user groups responded with specific watercourses identified as significantly or moderately dewatered.

In selecting a basin, the Committee considered these recommendations as well as other criteria including reservoir capacity, clearly identifiable return flows, a history of water measuring data, the presence of important fisheries resources, the presence of important recreational resources, and a high level of water appropriation.

After a lengthy presentation from interested organizations and individuals, the Committee determined that the Big Hole River Basin would be appropriate for further study.

### The Big Hole River Basin

The goals of this study component were to better understand basin hydrology and water use and to foster improved communication among water users and between water users and the Committee. The Committee was clear that its intent was not to "solve" any dewatering problems in the basin.

The Committee traveled twice to the Big Hole Basin for a series of public meetings and tours of the upper and lower basin. The Committee was invited to the basin by the water users early in the spring, during high flow, and late in summer, during low flow, so they could experience both extremes of flow conditions. The Committee also received presentations by the Montana College of Mines and Technology on basin hydrology; the Department of Fish, Wildlife, & Parks on the fisheries resource, including the impacts of dewatering on the arctic grayling; and on general agricultural and recreational water use by members of those respective communities.

The public meetings were well-attended and provided a forum for lively discussions on instream flow issues. The Committee believes that their work in the basin contributed

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<sup>10</sup> Organizations contacted included: Floating and Outfitters Association of Montana; Fisheries Division, Montana Department of Fish, Wildlife, and Parks; Water Quality Bureau, Montana Department of Health and Environmental Sciences; Water Resources Division, Montana Department of Natural Resources and Conservation; Montana Wildlife Federation; Montana Stock Growers Association; Montana Power Company; Washington Water and Power; Montana Water Resources Association; Montana Council Trout Unlimited; and Montana Farm Bureau Federation.

significantly to the success of executive branch drought mitigation measures taken in the basin during the extended 1994 drought. (See Section 8. State Drought Response for additional information on this issue.)

The Committee was also encouraged by the fact that after its last public meeting in the basin a group of irrigators wrote to Governor Racicot requesting assistance and expressing their interest in forming a broad-based local working group to search for long-term practical solutions to water allocation problems in the basin.

### Stream Flow Symposium--Montana Rivers: Conflict or Confluence?

Additionally, the Committee, at the request of *The Public Land Law Review* of the University of Montana School of Law, endorsed and co-sponsored an education symposium on stream flow issues entitled *Montana Rivers: Conflict or Confluence?* The two-day symposium paralleled, to a large degree, the Committee's own interim study by including sections on *River Law; River Science; and River People/River Problems*. This last section was a panel discussion by various water users from the Big Hole River Basin and was moderated by the Water Policy Committee chair, Representative Hal Harper.

The symposium was well-attended by a large cross section of water users, water law attorneys, state legislators, and state and federal agency personnel. The Committee strongly believes that this type of broad based educational approach will be crucial to resolving instream flow issues. A symposium agenda is included as **Appendix 9**.

## **Study Conclusions**

### Instream Flow Issues

The Committee identified the following broad issues that must be addressed when developing an instream flow management program. They believe that only by adequately addressing these issues can progress be made towards resolving instream flow conflicts in Montana.

#### *Protecting Existing Water Rights.*

The Committee understands that water rights are fully protected property rights under the Montana and federal constitutions. The Committee strongly believes that no solution to instream flow problems can be achieved without adequate protection of existing water rights. The Committee also believes that instream flow solutions can be designed which protect the fisheries and recreational resources, public health, and the interests of water right holders.

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### *Return Flow Measurement.*

One of the most crucial aspects of water right protection involves the proper measurement and consideration of return flow impacts to a watercourse. Inadequate measurement and consideration of return flows, i.e., those waters that are removed from a watercourse for irrigation and eventually return to the stream after irrigation, could lead to long term adverse impacts to water rights holders and increased dewatering of the watercourse later in the season. Unfortunately, return flows are very site-specific and can be difficult to accurately quantify without extensive data collection.

### *Instream Flow Measurement.*

Another measurement issue involves the measurement and protection of instream flows themselves. When solutions are designed to maintain or increase instream flows it will be important to accurately measure the amount of water protected for instream use. This issue has been noted by members of the recreational community as an obstacle to their increased funding of water storage projects.

### *Economic Impacts.*

The agricultural community has largely opposed previously proposed legislative instream flow solutions. One reason for this opposition are the perceived economic impacts associated with increasing instream flows. Members of the agricultural community have expressed concern over increased instream flows resulting in less agricultural activity.

This could lead to economic stress for many rural communities that rely heavily on primary and secondary agricultural markets. It could also lead to a lowering of the tax base as agricultural land is taken out of production because the water formerly used for irrigation has been dedicated to instream use.

While the Committee understands and shares these concerns, they also believes that a properly designed instream flow program could increase the recreational potential of specific communities.

This could boost local economies and increase community stability by diversifying the economic base. The Committee is also convinced that a properly designed instream flow program would dramatically increase the value of existing water rights and allow the agricultural community more flexibility in financial, estate, and agricultural operation planning.

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### *Social Impacts.*

Another, and perhaps more important, reason for agricultural opposition to previous proposals are the perceived social impacts associated with increasing instream flows. Testimony before the Committee indicates a strong belief that "watering the stream means dewatering the land". "Dewatering" the land carries with it perceived undesired consequences including further social disruption of already stressed agricultural based communities, the accelerated erosion of an entire culture and way of life, and the increased presence and power of newcomers who do not share the community's values.

The Committee sees these social impacts, correctly perceived or otherwise, as one of the most difficult issues associated with instream flow issues. However, the Committee also sees a unique opportunity for communities to come together in attempting to solve instream flow and other water allocation issues. Sincere efforts to achieve consensus solutions to these problems could develop or enhance a "sense of place" for many Montana communities.

### *Water Availability.*

Another valid response to Montana's varied and complex dewatering problem is simply to increase water availability. Again in testimony, the Committee heard that the problem is not water use--it is the lack of water. While the Committee understands the various environmental, technological, and economic, obstacles facing new traditional storage projects, it believes the potential for new storage is not exhausted.

Additionally, the potential for other non-traditional storage projects, e.g. aquifer storage and high flow storage, must continue to be explored.

The Committee understands that projects of this type will require extensive commitment and a strong expression of political will from the communities involved, but it believes that the potential for increased storage does exist in many areas around the state.

### *Education.*

The Committee was pleased by the increased understanding of instream flow issues exhibited by all groups involved. Most of the rhetoric that dominated instream flow debates of the past has been replaced with better reasoned discourse focusing on the issues. The informal education provided by, and to, the Committee during its instream flow discussions and the formal education offered through other various entities have been valuable. The Committee sees a need for this educational process to continue. (See **Section 5. Water Research**, for additional information on water related education.)

The Committee strongly believes that continued and increased education on water law, basic hydrology, and the mechanics of water use, will be the single most important factor in

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the eventual resolution of instream flow issues in Montana.

### Basin Planning

The Committee is convinced that the proper forum for addressing instream flow issues is at the local level. The Committee's experience in the Big Hole Basin solidified the belief that the water users themselves want better solutions to stream flow management issues and can contribute to solving instream flow problems rather than simply rely on the courts, the legislature, or federal or state agencies.

The Committee pointed to the ongoing efforts in the Upper Clark Fork Basin and the interest, referenced above, expressed in a basin-wide approach in the Big Hole Basin as evidence that the potential for using this strategy should be fully explored.

The Committee was particularly impressed with the DNRC proposed draft legislation HB 372 regarding basin planning (see **Appendix 8**). This proposal would allow local groups to create watershed planning councils to address local problems. The DNRC would contribute technical assistance when requested and as their budget allows. Additionally, the DNRC may provide funds to the councils for specific projects.

## Section 12. Water Quality Nondegradation Study

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### Introduction

Montana is fortunate to have substantial amounts of clean water--water cleaner in fact than the minimum federal standards. In an effort to protect these high quality waters, section 75-5-301, MCA,<sup>11</sup> passed in 1971, required that water cleaner than the statutory and administrative standards be maintained at its original quality. In other words, the state did not allow the degradation of high-quality waters.

The only exception to this requirement was if the Board of Health and Environmental Sciences (BHES) determined that a lessening of the water quality (degradation) was justified due to necessary economic or social development.

Throughout the past few years, the correct interpretation of the nondegradation statute and its implementation became an increasing source of controversy for the BHES, DHES, the regulated community, and public interest groups involved in water quality issues.

There were eight bill draft requests dealing with the nondegradation issue submitted for the 1993 Legislative Session. Of these, three were introduced and two, Senate Bill 401 and Senate Joint Resolution 29, were passed and approved. Both pieces of legislation are summarized below.

**Chapter 595, Laws of 1993 (SB 401)**, initially drafted at the request of the DHES, changes existing water quality nondegradation laws as follows:

- \* defines "high-quality waters" as state waters whose quality for a parameter is better than standards;
- \* defines "degradation" as a change in water quality that lowers the quality of high-quality water for a parameter;
- \* provides an exemption to the definition of degradation for changes determined by the BHES to be nonsignificant;
- \* establishes criteria and a requirement for the BHES to adopt rules to determine activities or classes of activities that result in nonsignificant changes to high-quality waters;

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<sup>11</sup> This section was amended by Chapter 595, Laws of 1993 (SB 401).

\* modifies the nondegradation administrative process by placing the initial responsibility for granting an authorization to degrade high-quality state waters with the DHES and providing an appeal of that decision to the BHES;

\* requires the least degrading water quality protection practices that are technically, environmentally, and economically feasible, to be fully implemented by the applicant prior to and during the proposed activity;

\* defines a "mixing zone" as an area where water quality standards may be exceeded; and

\* establishes criteria for and requires the BHES to adopt rules governing the use of mixing zones.

**Senate Joint Resolution 29, Laws of 1993**, recognizing the long involvement of the Environmental Quality Council (EQC) in water quality issues, requested the EQC to give priority to a study of the nondegradation issue.

It was determined the study should include a review of the following:

- (a) the definitions of "nondegradation" and "high-quality waters";*
- (b) the social and economic development factors and the public interest in maintaining high-quality waters;*
- (c) the procedures for the review of proposed exemptions from the nondegradation provisions;*
- (d) the designation of mixing zones;*
- (e) the appropriateness of the application of nondegradation provisions to all point and nonpoint sources of pollution to both ground water and surface water;*
- (f) the environmental, economic, and social effects of allowing any degradation or specific levels of degradation to high-quality ground waters and surface waters;*
- (g) the relationship between the nondegradation policy provisions contained in Montana water quality laws and the various interpretations of applicable sections of the Montana Constitution;*
- (h) the capabilities of and the cost to state agencies to implement the nondegradation policy and to assess the resources that will be needed to implement the policy equitably for all segments of society;*
- (i) the social and economic costs of nondegradation compliance or noncompliance to individuals and entities in various industries and endeavors that would be affected;*
- (j) the potential utilization, in response to exceptions from nondegradation provisions, of mitigation measures to improve overall water quality in the*

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Water Policy Committee

Final Report to the 54th Montana Legislature



*state, in the source, or in a specific affected portion of the source; and (k) the identification of possible statutory and regulatory changes that would help clarify the nondegradation policy and provide for a more effective and efficient implementation and enforcement of the policy.*

SJR 29 further requested the EQC to consult with federal, state, and local officials, industries, citizens, and other persons or groups with expertise or interest in water quality protection and to report its findings and recommendations to the 54th Legislature.

The EQC accepted the study request and identified four of the identified issues, (b), (e), (g), and (j) for analysis.

### **Water Policy Committee Involvement**

At its first meeting, again recognizing its unique statutory mandate regarding important water issues, the Water Policy Committee expressed an interest in looking at water quality issues this interim. The Committee decided that the most efficient use of Committee, EQC, and staff resources would be for the Committee to participate in the EQC nondegradation interim study. The Committee therefore offered its assistance to the EQC in its interim study. The EQC accepted the Committee's offer and formed a ten-person joint EQC-WPC subcommittee to further study the selected issues. Interested persons are advised to see the Environmental Quality Council's *Water Quality Nondegradation Report to the 54th Legislature* for details.

#### **Final Committee Recommendations**

The Committee believes that the SJR 29 study was a success. It allowed for greater public involvement, a broader discussion of the issue, and better-informed legislators and the interested public. The substantive EQC policy recommendations resulting from the study were overall accepted and implemented by the DHES. The Committee believes that this study should serve as a model for future cooperation between the EQC and Committee. The Committee recommends that next interim's Committee stay involved in all important water issue, including water quality and water quantity.

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Water Policy Committee

Final Report to the 54th Montana Legislature

## **Conclusion**

The Committee laid the groundwork this interim to achieve substantive improvements in cooperation and communication among agencies, the legislature and the public. The WPC is convinced that its efforts will have lasting benefits for Montana, its water policy, and its citizens.

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Water Policy Committee

Final Report to the 54th Montana Legislature

## Appendix 1

### SB 310 "Late Claims" Study Scoping Meeting - June 9, 1993

Janice Rehberg, Atty  
Crowley, Haughey, Hanson, Toole, &  
Dietrich  
Helena, MT

Jo Brunner  
Montana Water Resources Association  
Helena, MT

Ted Doney, Atty  
Doney, Crowley, & Shontz  
Helena, MT

Holly Franz, Atty  
Gough, Shanahan, Johnson, & Waterman  
Helena, MT

Mons Teigen  
Helena, MT

Pat McNamee  
Helena, MT

James T. Paugh  
Bozeman, MT

Cliff Cox, CX Ranch,  
Winston, MT

Pete Wipf  
Martinsdale, MT

W.G. Gilbert III, Atty.  
Dillon, MT

Paul J. Wipf  
Martinsdale, MT

Bruce R. Toole, Atty  
Billings, MT

James W. Spangelo, Atty  
Havre, MT

Mike P. Hofer  
Martinsdale, MT

Ed J. Wipf  
Martinsdale, MT

Lyle Richards  
Power, MT

Victor W. Krueger  
Augusta, MT

Sen. Don Bianchi  
Belgrade, MT

Sen. Ken Mesaros  
Cascade, MT

Rep. Hal Harper  
Helena, MT

Chris Tweeten  
Chief Deputy Attorney General

Susan Cottingham  
Program Director, Reserved Water Rights  
Compact Commission

Bob Arrington, Water Right Bureau,  
DNRC

Don MacIntyre, Chief Legal Council,  
DNRC

Mark Simonich, Director  
DNRC

Staff

Deborah B. Schmidt  
Executive Director, EQC

Michael S. Kakuk  
EQC/WPC Staff

August 29, 1994

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To: Water Policy Committee

SEP 08 1994

ENVIRONMENTAL  
QUALITY COUNCIL

It was my privilege to attend the most recent Water Policy Committee of the Montana legislature on August 18, 1994, in Helena. At this Meeting the Committee after hearing the testimony, voted to recommend to the 1995 Legislature no additional relief beyond that accorded by SB 310 to late filers of Water Right Claims. This letter will serve to respectfully disagree with this preliminary recommendation.

I would like to raise the following points, even though some of which the committee has already heard and we feel that they have not been properly considered.

#1. It was brought up at your hearing that the original author of the legislative bill to require re-filing of all water rights in the State stated that his bill was never meant to take away existing rights but was a vehicle to gather information for State use.

#2. Late filings all have one thing in common. It would be hard to find a late claim that was done deliberately. Late filings can be the result of many different circumstances. We hear of lawyers who were charged with filing for clients and for some reason did not fulfill their mission. Failure of the U. S. Mail in some cases were the cause. Some land transactions in which the purchaser bought stated water rights in the contract included by the sellers who had, for one reason or another, neglected to refile their water rights. In our own case, rights that are in possible jeopardy, date back to 1891 - - - a number of our water rights were filed on time, but two were inadvertently overlooked. Also, many of the old-time possessors of water rights assumed that their water rights would always be in effect.

#3. It was brought up several times at the hearing that a fear of Federal intervention in Montana water policies was reason to continue on our present course and recommend no additional relief to late claimants. We feel that the Water Policy Board should consider the right of Montana Water Claimants above all else.

It is understood that the Water Policy Committee has a great responsibility to make the proper recommendation concerning additional relief, but we think that the morally

right decision would be to grant additional relief to all late filers, many of whom have water rights that are in jeopardy which date back to the 1800's.

Therefore, we would appreciate your final recommendation to the 1995 Legislature to recommend additional relief to late filers.

Cordially yours,



Lillian Norman Moses  
P.O. Box 459  
Whitehall, Montana 59759

representing Norman Ranch  
north of Lewistown, Mont.

DOYLE D. PATTERSON  
2151 ALDER SPRINGS LN.  
VICTOR, MT. 59875  
(406) 642-3171

**RECEIVED**  
SEP 13 1994  
ENVIRONMENTAL  
QUALITY COUNCIL

Dear Committee members,

I agree with your vote against late water rights claims, but I should be retroactive to 1982!

When I purchased my property 18 years ago I paid top dollar because of the adjudicated water rights that went with it. Although my ditch runs through the wooded subdivision about me they have no water rights. There is no ground water in our area, thus no wells. I get my domestic and stock water from my ditch. In the winter I have to keep the ditch open for over a mile. An mill ventures I can keep a trickle of water flowing to my place by chopping ice daily. As the properties above me sell and they drill their dry holes they just go to the D.V.C.C. and get permission to tap into my ditch for domestic and livestock. Now I can't get that "trickle" of water because these people get it first without any "rights". There are now 8 properties above me. Two are occupied and have topped the ditch and a third is about to. I can't afford to take these people to court, get my rights were adjudicated in 1881. My only option now

is to get physical and get arrested.

In 1981 I did all the research, paid my fees and filled my papers with the D.V.C.C. on my adjudicated water rights.

Since that time nothing has happened except more water rights have been given out and the whole situation has just worsened.

Everyone knows that these streams are all over adjudicated and have been for many years. So why in hell would anyone keep giving more rights out, especially here in the Bitterroot Valley?

The real estate people know there is no ground water up here and yet they sell the property and the people see my ditch which I maintain and there's the regulation to "their problem". Some one should be held accountable, the sheriff will do nothing and I can't blame them, but where does one go when you can't afford to go to court on all these people?

Thank you,

Doyle D. Patterson





ROBERT STEINER  
218 NICOLS DR.  
HAMILTON, MT. 59840

RECEIVED  
OCT 03 1994  
ENVIRONMENTAL  
"QUALITY COUNCIL"

Sept. 28, 1994

Mr. Michael S. Kakuk  
Water Policy Committee  
Environmental Quality Council  
Capitol Station  
Helena, MT 59620

Dear Mr. Kakuk,

Enclosed you will find copies of correspondence regarding my water right claims.

In summary, the five parcels which I filed on in April 1982, had decreed rights dated June 1865. The claims were notarized by Charles Taylor who apparently missed notarizing the Irrigation right on the piece in question, but did notarize the stock right which was attached to this piece. (I do not know if this had anything to do with the fact that this claim was ignored.) In any case, four rights were confirmed and the other ignored. I immediately wrote to Judge Wheelis. (letter enclosed.)

After the exchange of letters (enclosed) I filed a late claim in April 1986.

I do not feel this should be regarded as a late claim. I have copies showing that I filed in a timely manner and apparently the stock water and irrigation water claims on my one piece were lost or discarded.

Your committee is my last hope for getting a satisfactory solution to this problem and your help would be greatly appreciated.

Sincerely,

*Robert Steiner*

218 Nicol  
Hamilton, Montana  
59340

Feb. 21, 1986

Honorable Judge James B. Wheelis  
District Court, 4th Judicial District  
State of Montana, Ravalli County  
Hamilton, Montana

Dear Judge Wheelis,

In response to your order of 1/24/86 relative to the Exchange Water Users Case and specifically the water rights on one parcel of property, I am requesting you to consider the addition of this parcel which for some unknown reason was not properly recorded when everyone had to "re-claim" their water.

In accordance with the law, I refiled on my water. I own five parcels of land in the Nicol Addition which has first rights. Four of the parcels are contiguous while one is separated from the other four by another ownership.

After your order of 1/24/86., I checked what the court said was my water and found the largest parcel I own (5.66 acres) was missing. This parcel is one of the contiguous units of the four.

I have taken all of the copies of the the forms I sent to the Department of Natural Resources Board when I refiled on the water to the Department of Natural Resources office in Missoula and explained the problem to Mr. John Westenberg. A copy of his letter is attached.

It appears that the paper work on my one parcel of land was lost somewhere along the line, or maybe tossed out because I evidently missed having the claim for irrigation water notarized.

Attached are also copies of the forms on the parcel involved.

please give me consideration on this problem until the proper authorities determine if I may be able to keep my claim to the water on the above land.

Thank you for your consideration.

Sincerely,

  
Robert W. Steiner

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION  
WATER RIGHTS BUREAU/MISSOULA



TED SCHWINDEN, GOVERNOR

2101 BOW STREET  
P.O. BOX 5004

STATE OF MONTANA

(406) 721-4284

MISSOULA, MONTANA 59806

February 21, 1986

Mr. Steiner:

The Skalkaho Creek water rights on your property in the W1/2 of Lot 4, and Lots 5, 6, 7, 8, 9, 10 and the W1/2 of Lot 11 of Nicol Addition do not appear in our records. Based on the copy of the Statement of Claim for these water rights that you reviewed with me on February 21, I think this problem might be correctable. I will contact the water courts about generating "implied claims" to document the existence of stock and irrigation water rights on this property.

"Implied claims" might be justified in this instance because you established your intent by filing claims on contiguous property, and by the presence of a notary's seal dated April 12, 1982 on your copy of a water right claim for this property.

If the water court allows you to submit an "implied claim", this water right will not be considered to have been filed after the April 30, 1982 deadline for filing of claims, and is more likely to be recognized by the water courts as a legitimate water right.

I will contact you as soon as the court lets me know whether an "implied claim" is allowable. In the meantime, you may wish to inform Margaret Stelling that you may have additional water rights that are subject to Judge Wheelis' orders regarding the "exchange user status" of Skalkaho Creek water right owners.

A handwritten signature in cursive script that reads "John Westenberg".

JOHN WESTENBERG  
Water Rights Specialist  
Missoula Field Office

JW:sll

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION  
WATER RIGHTS BUREAU/MISSOULA



TED SCHWINDEN, GOVERNOR

2101 BOW STREET  
P.O. BOX 500

STATE OF MONTANA

(406) 721-4284

MISSOULA, MONTANA 59801

March 31, 1986

Robert Steiner  
218 Nicol Drive  
Hamilton, Montana 59840

Dear Mr. Steiner:

We have contacted the Water Courts to determine if "implied claims" could be generated to document historic water use on the property you own in Lots 4 through 11 of Block #3, Nicol Addition #2. As the enclosed reply from water master Kathryn Lambert indicates, the Water Court does not feel implied claims are appropriate. Instead, Ms. Lambert feels that you should file "late claims" if you wish to protect your water rights to this property.

As we discussed during your visit to our offices, the long-term legal status of late claims is uncertain. However, at this point, the court is still accepting them. I've enclosed copies of claim forms for your completion. Please attach supporting documentation and maps.

If you have any questions, please feel free to contact me.

Sincerely,

A handwritten signature in cursive script, appearing to read "John Westenberg".

JOHN WESTENBERG  
Water Rights Analyst  
Missoula Field Office.

JW:sll  
Enclosures

**RECEIVED**

SEP 13 1994

**ENVIRONMENTAL  
QUALITY COUNCIL**

Date: Sept. 11, 1994  
To: Water Policy Committee  
c/o Committee Staff  
Environmental Policy Council  
From: Prof. Albert W. Stone *A.W. Stone*  
Re: Response to Committee's Request for Comments on the  
Preliminary Recommendation on Late Claims under SB 310.

To me the focal point of the Committee Minutes of its August meeting was the statement of Repr. Russell Fagg. His statement exhibited serious thought, that he had given serious consideration to the various arguments, and thought them through. He was therefore able to present his considerations and conclusions in a well organized, point by point statement.

His fourth point was a well taken concern for the consequences that further remissions would have on the 98.8% of timely filers. His fifth point was the best expression of concern over the federal and Indian issues.

Earlier, he points out that the Montana Supreme Court has already settled the principal constitutional issues of due process and equal protection, and by necessary inference the so-called "takings" issue; and the legislature considered these problems in 1979 and 1993.

Chrmn. Harper concurs, and reminds us of the purposes of the 1973 Water Use Act. (I too participated in that session as Counsel to the E.Q.C., and a principal draftsman of that Act.) He wants "to carry through with this decades old plan" to quantify, record, and protect Montana's water rights.

Sen. Bianchi and Repr. Keller also concur, the latter in his opening sentence referring to the degree of "notice" - - "that from 1973 to 1979 it was repeatedly publicized that a water right had to be filed..." etc.

At p. 12, Attorney Rehberg reiterates her concern for the burden on late claimants, again without concern for the burden on holders of permits (and water reservations) who must detect what late claims affect them, enter the Water Court proceedings, and prove that they obtained their permits (or reservations) in reliance upon the abandonment of late claims, and prove that they would be damaged. (But persons with permits dating between 1973 and April 30, 1982 cannot succeed, so their priorities are deferred already.) That problem exists in greater measure with the "postmark claims" and would be greatly exacerbated by any further remissions.

In conclusion, Repr. Fagg has expressed most of my thoughts for me. Thank you for the opportunity to Comment.



# MONTANA STATE SENATE

SENATOR BERNIE A. SWIFT  
SENATE DISTRICT 32  
HOME ADDRESS:  
236 ROSE LANE  
HAMILTON, MONTANA 59840

COMMITTEES:  
LOCAL GOVERNMENT  
NATURAL RESOURCES  
STATE ADMINISTRATION

CAPITOL STATION  
HELENA, MONTANA 59620  
MESSAGE PHONE (406) 444-4800  
OFFICE PHONE (406) 444-4360  
HOME PHONE (406) 363-2172

Hamilton, Mt.  
Oct. 2, 1994

To: Chairman Harper  
From: Senator Bernie Swift *Bernie Swift ic/2-174*  
Re: October 7 meeting, my proxy on SB 310

Upon arriving home on September 19, after visiting my son and family in Ohio, I called staff person Micheal Kakuk concerning the planned Water Policy Committee meeting of October 7, 1994. I pointed out to Mr. Kukuk that I was to be in Florida the week of the planned meeting and was informed the date of the meeting was firm. Consequently, I submit the following recommendation and comments on SB 310.

I would like my comments made at the August 1994 meeting be a part of the final vote at the October 7 meeting with these additional comments. My main concern is that rights holders (late filers) be given an opportunity to prove their rights via the rebuttable presumption or other means. In essence, have their day in court. I say this because without this opportunity, they will lose any water they were entitled to under the Appropriation Doctrine, "First in time, First in right". As stated by Judge Lobel and others during the August meeting, none of the late filers, rights holders would be entitled to a priority date earlier than July 1973. As all of us realize, this means the rights holders would get no water as senior rights would obviate their getting any water (most all streams of Montana are over allocated 2 to 3 times available water volume).

Further, if these people are given the opportunity to prove their rights, it will not impact timely filers or reserved rights as these people should not be awarded a higher priority or water volume greater than filed on and proven. All we have in this situation is parties being penalized by another government rule. It might be appropriate for late filings to be subordinated to Native Americans and reserved rights that are already consumated, but not to all individual filings. I again reiterate that we should not make decisions based on Federal Governments edicts (mandates) and decide this case on fairness and equity. These late filers should be afforded their day in court to prove upon their rights. The Adjudication process was to determine how much, for what purposes and who was entitled to use Montana's water.

RECEIVED

OCT 06 1994

ENVIRONMENTAL  
QUALITY COUNCIL

October 5, 1994

Mr. Michael S. Kakuk

Capitol Station

Helena MT 59620

RECEIVED

OCT 06 1994

ENVIRONMENTAL  
QUALITY COUNCIL

Dear Mr. Kakuk

My husband and I are writing in regards to the water adjudication process the State of Montana has burdened their water users with.

We bought our ranch in the fall of 1984. All of the water right claims on our ranch were filed correctly when they were first appropriated, were also listed on the 1955 Engineers reports and timely filed again in 1982. During the summer of 1985 we learned of the objection process that the state had implemented. We then called Judge Lesslies water court inquiring about whether or not it was necessary to object to other's claims in order to protect our own water rights. Because our claims were well documented, one in 1866 - 1876 - 1902 and 1903, the water master Marjorie Black stated that it was not necessary to object if we had good documentation.

When we had our hearings we were completely overwhelmed by the vigorous and viciousness of the attack on our water rights. We produced the documentation and proof of our water rights which included copies of the correctly filed appropriations, the homestead patents from the National Archives in Washington DC showing proof of ditches, the 1955 engineers reports and the timely filings in 1982 along with affidavits over 50 years old stating use of the water. We also had the 1947 and 1955 aerial photographs showing the ditches and irrigation done on our ranch. The water master chose to ignore all of our documents and evidence along with the testimony of two witnesses who testified to the irrigation on our ranch in 1955 and the 1960s. He then took the word of the objector as to the irrigation on our ranch. We lost our priority dates and our water. It was apparent the water master and opposing council were acquainted and we later found out their offices were across the hall from each other.

These same objectors were just awarded over 10 inches of water to the acre on all of their claims, a grand total of 8600 inches of water. The State standard is 1-1/2 inches of water to the acre. They were also allowed to change untimely appropriations to use rights to get earlier priority dates. The same law firm across from the water court was instrumental in this settlement also.

It is virtually impossible for fair and equitable decisions to be made in the Hall of Justice when the water courts and the oppositions law firm are across the hall from each other.

We feel like the documentation and the proof we had of our water rights should have been enough to satisfy the State of Montana. The hearings were financially devastating and the loss of our water and priority dates puts the value and future of our ranch in jeopardy. We feel this process is a terrible burden and an injustice to us and all other water users.

We feel the State of Montana should turn this water adjudication process back to the DNRC. They had already made a good start on it with the 1955 engineers reports and again in 1982 with the refilings and it didn't pit neighbor against neighbor.

We feel like this situation commands the immediate attention of all state law makers. Some comment regarding this situation is expected from you or your office. Thank you for your attention.

Sincerely,

Harold & Claudette Shervin  
PO Box 614  
Boulder, MT 59632-0614  
406-225-3566

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SEP 16 1994

ENVIRONMENTAL  
"QUALITY COUNCIL"

Mons L. Teigen, Sr  
19 Cloverview  
Helena, MT 59601

September 14, 1994

Water Policy Committee:

After listening to the August 18th discussion of the late claims issue when your committee decided preliminarily to allow no additional forfeiture remission to late filers, I feel called upon to comment on several erroneous assumptions held by some members of the committee.


1) Apparently there is a belief held by Representative Fagg and Senator Bianchi that nothing is lost so long as you get your claim filed some time during the process. That idea runs counter to the long held basis of western water law that "first in time is first in right". Under that policy the Teigen Ranch has been able to utilize water from an intermittent stream, McDonald Creek, for over a century. As a result of the passage of SB 310, our judicial decrees as well as our historic use are destroyed and we will now find ourselves at the end of the line of other applicants. This represents a tremendous loss to our ranch and those others so situated and no amount of posturing by your committee can change it.

2) This issue would not be before you now had SB 76 been enacted in the form it was considered during most of the 1979 session. At that time I was representing the Montana Stockgrowers Association as its lobbyist and followed this particular bill as well as the interim study sessions that were held prior to its introduction. Needless to say, this entire issue was of great importance to those of us in agriculture and was supported by our group as well as many others. One of the protective features contained in the proposal was the "rebuttable presumption" wording that was contained throughout the deliberations until on or about April 5, 1979, apparently after a conference committee had made the change. This action was taken just a few days before adjournment and neither I nor other agricultural lobbyists were aware or given an opportunity to comment on the issue. Contrary to Representative Fagg's belief, the conclusive presumption provision did not see the light of day until about April 5th. With the session rapidly drawing to a close, any discussion of this particular feature of a large and complicated bill would have to have been minuscule at that time. I have researched all available files as to the history of SB 76, the Legislative Council, the Law Library, the



Historical Society and the EQC and can find no record of any discussion suggesting that the rebuttable language be replaced and the conclusive presumption inserted. In fact, the record shows that the last recorded discussion was held on April 2nd and this particular amendment was never brought up, yet three days later it was reported out with conclusive language inserted. This leads me to believe that few legislators, save those on the conference committee, were aware of it.

When I did learn of the different language, I was unaware that our ranch would be one of those whose irrigation would be lost. We turned this matter over to one of the leading law firms in the state and expected them to process and file them. While that firm's failure to perform leads to a cause of malpractice, any settlement does not return the water. It was for situations such as this that made the rebuttal presumption so vital.

  
Mons L. Teigen, Sr.  
Director, Teigen Land  
& Livestock Company

c: Water Policy Committee Members  
Janice L. Rehberg

CROWLEY, HAUGHEY, HANSON, TOOLE & DIETRICH

ATTORNEYS AT LAW

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HELENA, MONTANA 59601

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RONALD M. LODDERS  
CHARLES R. CASHMORE  
LAWRENCE B. COLLENS  
STEVEN RUFFATTO  
ALLAN L. EARRELL  
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LORI S. HARPER

RETIRED  
CALE CROWLEY  
STUART W. CONNER

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OCT 05 1994  
ENVIRONMENTAL  
QUALITY COUNCIL

Janice L. Rehberg

Helena Office

October 4, 1994

Water Policy Committee  
Montana State Legislature

Dear Members of the Committee:

I write today with deep concern over the action taken on August 18, 1994 with respect to the late water right claim issue. For the most part, I have tried to allow the affected water users to articulate their concerns individually rather than engage you in legal arguments which are far more appropriate for a court. It was with a sense of disappointment that I saw the efforts of these people negated by what I feel are some very fundamental misconceptions on the part of the committee. I would like, therefore, to address several points which were raised at the meeting on August 18th.

First. Perhaps the most significant error found expression by Rep. Fagg, who remarked that few late claimants would lose their water rights because a permit holder would have to enter the proceeding and object to the late claim. This sentiment was echoed by Rep. Bianchi and Rep. Harper. Unfortunately, Rep. Fagg's comment misses the distinction between permit holders and water right claimants. Permit holders are people or entities who have applied for a water right after July 1, 1973, and were granted a permit to appropriate water conditioned upon not adversely affecting prior water rights. Water right claimants are people or entities who have claimed a right predating July 1, 1973, which right is subject to adjudication. This distinction is critical for an understanding of the impacts of SB310.

If a water claim was received more than seven days after the April 30, 1982, deadline, the right claimed is automatically subordinated to every timely filed claim eventually adjudicated to be valid. Hence, as has been explained on numerous occasions, the ranch with an 1880 right which was decreed in 1921 would be put at the end of the priority list. This would effectively change the priority date

of the right from 1880 to 1973, which in many basins and on intermittent streams essentially extinguishes the right.

Rep. Fagg's impression of the current late claim status, though erroneous, does reflect the end result that the late claimants have been seeking. Provide for objection based upon detrimental reliance and/or good cause and both the late claimants and the timely filed claimants will have an opportunity to state their case. The other provisions of SB 310 protect the state and timely filed claimants from excessive costs.

As for holders of permits acquired after 1973, these people must allege and prove detrimental reliance on the late filing in order to be granted subordination. For instance: A, knowing that B's 1885 right to 50 cfs from Willow Creek was forfeited under §85-2-226, believes that there will be excess water in the stream, obtains a permit to appropriate water and invests money in developing his use. A could seek to have B's earlier water right subordinated to his permit. B then could not use water under the late claimed right if it adversely affects A. It is this situation which Judge Loble referred to in response to Rep. Fagg's question. I concur with the Judge's assessment that there will be few, if any, post-1973 permit holders who have detrimentally relied upon the forfeiture provisions of §85-2-226 because (1) most water users are continuing to use their water rights, (2) not even the late claimants were notified that their claims were subject to forfeiture, and (3) the impact of §85-2-226 was, and in many respects is, still uncertain. It is doubtful, therefore, that many people made investment backed decisions on the assumption that someone else on the stream was going to lose their water rights. Similarly, it is unlikely that many pre-1973 claimants have relied upon their neighbor's "forfeiture" to develop new uses.

Although Rep. Fagg's assessment of the impact of SB 310 was incorrect, it would be inaccurate to state that all of the late claimed water rights are destroyed. In fact, many of the late claims were for instream or groundwater stockwater and/or domestic uses. These rights were not subject to the filing requirement, so should not be forfeited on the timeliness issues. This is not specified in the statute, but seems to be a logical assumption. Furthermore, some late claims may be on streams with no other claimants or for groundwater where the impact of the shift in priorities is minimal. The real - impact is on those people who have claims in over-appropriated streams (or their tributaries) or on intermittent streams with multiple claims. Unfortunately, most of the surface water in the state falls into one of these categories. Even some groundwater sources could be considered over-appropriated. How many people will be harmed and to what extent cannot be quantified without substantial research. We know, however, that some of the late claimants face significant losses.

Second. Rep. Fagg suggests that the courts would decide that the late claimants have lost their opportunity to raise any further issues in a second hearing. Rep. Fagg is referring to the doctrine of res judicata and collateral estoppel. These doctrines prohibit parties in a case from relitigating issues or claims which court has already ruled upon. Rep. Fagg's comments, however, reflect a lack of knowledge about the posture of the case which was heard by the Supreme Court. This case involved claimants from one basin. The only notice that went out to other late claimants was notice in the newspapers which did not conform with the notice requirements of the rules of civil procedure. Teigen Land and Livestock specifically requested intervention as a party, and it's request was denied. It is doubtful, therefore, that non-parties to the initial case will be foreclosed from raising legal challenges. In addition, the Supreme Court specifically declined to consider several issues which were brought to its attention because these had not been ruled on by the Water Court. Nor would a federal court be bound by a state court's interpretation of the U.S. Constitution. Consequently, there are issues which can be raised in the future in both state and federal courts. Finally, there have been significant changes occurring in the "takings" analysis in recent U.S. Supreme Court decisions which give rise to arguments that a different standard should be applied to the constitutional takings issue. Given that there are different parties, different issues and new precedent, Rep. Fagg's presumption is at least premature.

Third. Rep. Fagg suggests that the decision to impose a conclusive presumption on the failure to file a timely claim was thoroughly discussed in 1979. As noted by Mons Teigen in his letter to the committee, however, the decision to insert a conclusive presumption came in the waning days of the session in a conference committee. There was absolutely no public hearing on the change. Furthermore, as the committee knows, the last week of the session does not allow for thorough discussion of anything, particularly one word changes in major pieces of legislation.

Fourth. Rep. Fagg refers to the silent majority as requiring consideration, a concern also articulated by Sen. Hockett and Rep. Keller. The proponents of the late claim litigation have never suggested that the timely filed claimants should be ignored. The purpose of the proposed changes is to insure that all people with legitimate pre-1973 rights are protected. As the bill now stands, late claimants asserting false or inappropriate claims will have to pay the costs of any party objecting to the claim. If this is not sufficient, then I suggest a remedy be put forth which penalizes those who misuse the process rather penalizing honest Montana citizens who are merely seeking to protect their rights.

The fact that the committee has not heard considerable comment from timely filers should not be construed as reason to oppose further remission. Rather it should be accepted on its face. It cannot be argued that timely filers with legitimate interests were not aware of these proceedings. The regular mailing by the staff reached to representatives of the United States Government and the Tribal Governments in the state. The U.S. appeared only after specific invitation and did not have a formal position to articulate. No representative from any tribe or federal entity in the state appeared. Every farm and ranch association in the state has had adequate opportunity to inform its members and participate. The water court is constantly sending notices to claimants that the filing period has been extended. Has this resulted in a public outcry against the late claimants? No!

In addition, I believe it is quite significant that there were no attorneys in private practice who appeared in opposition to further remission. While Professor Stone is opposed to change, Professor Stone has not been in the trenches trying to deal with the day to day issues which arise in the practice as we try to sort out the thousands of water rights that exist in this state. Furthermore, a certain amount of pride of authorship is to be expected. This comment is not intended to be critical because I believe Professor Stone worked diligently to develop a system that would work and naturally wants to see it work as he envisioned it.

For those of us on the ground, however, the inclusion of late claims is not perceived as an insurmountable problem and many feel that it is the only way in which we can make the system do what it was intended to do. And, quite frankly there are many thornier issues in the adjudication to deal with.

Furthermore, it cannot be forgotten that in 1979 the Montana legislature created a completely new judicial system, imposed new procedures, completely altered traditional water law concepts and imposed new terminology and classifications which no one in this state had ever considered. It then asked people to file claims based upon this new law and told them they could do it without legal assistance. I have said on numerous occasions and I will say it again, there are many people who assume that their filings in 1982 are sufficient. In the course of this adjudication, errors will be found and those errors in filing may result in the loss of valuable priorities: not because people did not try to comply with the law, but because they did not understand it.

For instance, if I asked each member on the committee whether an instream stock reservoir is an instream stockwater use, would you all give the same answer? Would each of you know the difference between a filed appropriation and a flood use right? Would you know whether one

or two filings were required? Would you know whether the irrigation of a twenty acre single family development parcel falls under an irrigation or domestic claim? Would you know that filed appropriations could be contained in three or four different places within the clerk and recorders office and a completely different office? Would you know that your county might have been part of a larger county in the 1800's and that you would have to search records in two or more counties? Would your community know that it should file claim to the water it uses for water treatment purposes? Would it have thought in 1982 that it might need to claim a right to instream flows to protect its ability to discharge from its treatment system back to the stream? Did it preserve its recreational claims? Would it have considered its claim as domestic and not felt compelled to file? The people who had to answer these questions in 1982, are part of that silent majority, the silent majority that does not even know whether they made a mistake that could lead to the loss of their historic right.

Perhaps Professor Stone could answer all those questions correctly, and perhaps I could devise a wonderful exam question for a law school water law class using these examples. The ordinary person, however, should not be expected to pass Water Law 101 in order to protect his or her water rights. I submit that the silent majority has not passed Water Law 101 and that it, too, is at risk.

Fifth. The ever present McCarran amendment argument. This issue has probably been beaten to death, so I will try to restrict my comments. (A) Some of you may have noted the concern expressed by the federal courts upon passage of the crime bill that the federal dockets were too full to handle the expected caseload generated by the bill. This reaction emphasizes the point I made on April 8, 1994 in Dillon: i.e., the federal courts do not have the resources to undertake a major water rights adjudication. Consequently, it is reasonable to predict that they will hold to former precedent and will continue to give deference to the state court unless the flaws are extremely egregious. You must ask yourself whether granting recognition to vested property rights representing less than 2% of the total claims filed will be viewed as egregious. (B) Every federal court in the country allows a party to petition to vacate default judgments and allows pleadings to be amended to conform to the evidence produced at trial. We have suggested that the state adopt procedures similar to those contained in both the Montana and federal rules of civil procedure with respect to default judgments and pleading amendments. To accept the argument that further remission may threaten state jurisdiction under the McCarran Amendment, therefore, you must accept the premise that an adjudication conducted under the federal rules of civil procedure would not be considered a general adjudication or would not be considered a general adjudication or would not be considered "adequate" to determine federal reserved water rights. (C)

Please refer to the memorandum submitted by the Attorney General's Office and the DNRC in which the departments concede that subordination is not required to preserve McCarran Amendment jurisdiction and that arguments that the remission of forfeiture makes Montana's system inadequate are "without merit". See Attorney General memorandum dated August 31, 1993, pp. 2 and 5. (Relevant excerpts attached).

Sixth. Rep. Fagg expressed his concern that further remission will slow down the adjudication process. No one has an accurate count of how many late claims would require adjudication. Judge Loble's response was based upon the DNRC's assumption that there would be 6000 late claims. This assumption is complete guesswork. Furthermore, based upon the hard information we do have, we know that of the 3181 late claims filed as of February, 1993, there were 1330 stockwater claims, 450 domestic claims, 1167 irrigation claims and 234 other non-exempt claims including municipal, recreation, mining and fish and wildlife. 1321 claims were received between May 1 and May 7, 1992. (See, attached Late Claim List)

While I have no way of ascertaining exactly how many of the stockwater claims fall into the exempt category, we can safely assume that at least 50% of the claims now on file are exempt. We also know that of the 6000 predicted claims, 1321 will not require automatic review under SB 310 as it now reads. If the same filing trends continue and even accepting the DNRC prediction of 6000 claims, only 2500 would require review. Thus, the time element should be much less than two years.

In addition, given the potential for attorney fee awards and the significant fee imposed on late claims, it would be reasonable to conclude that the late claims will be filed with more care and precision than the regular claims so as to minimize the cost to the claimant. Pure self-interest should result in better, more accurate filings, thus minimizing the court's time. If a default process is adopted, hearings would be required on motion only, which would also minimize the impact on the court. I submit, therefore, that the assessment given by Judge Loble is excessive, not due to miscalculation on his part, but due to the fact that the assumptions on which it is based and which were provided to him are in error.

No one can deny that the adjudication has been more costly and taken much longer than originally intended for a multitude of reasons. After 12 years we are not close to completing the process. We have four final decrees, (two additional final decrees were issued under the previous law), seven preliminary decrees, 37 temporary decrees and 39 basins with no temporary decree issued. Over the last five years the system has generated an average of 1.8 temporary decrees a year. Even if it does take two more years to adjudicate the late claims,

that two years could be saved by implementing other changes in the system to streamline its processes. More importantly, however is the fact that one or two years out of a process that will take a half a century or more to complete is not significant. The objective of the adjudication was to protect historical Montana Water rights. Unless that objective has changed, the additional time seems to be time well spent.

Seventh. Rep. Fagg and Sen. Bianchi suggest that a compromise was reached in 1993 during the regular session. Obviously that was an uneasy compromise or the legislature would not have instructed the interim committee to consider "additional remission." To base a decision on the result reached in 1993, therefore, ignores the whole premise of the interim study.

Eighth. As to concerns that we are giving Secretary Babbit an opportunity to steal Montana water if we grant further remission - - voting against further remission only ensures that historic water rights will be lost. Secretary Babbit will not have to take the rights, the State of Montana will do it for him. Just because its Montana rather than the United States, does not make it right. State governments can be just as guilty of overreaching as the federal government.

In addition, the argument reminds me of the old story about the German who did not protest when the Nazi's took the Jews, and did not protest when the Nazi's took the Blacks or the Catholics or the Polish, or the Russians. When the Nazi's got to the German's house, there was no one left to protest. While the analogy may be strong, the question is the same. When do you choose to take a stand when it comes to protecting individual rights. Do we only take a stand when our rights are at stake or do we take the risk and stand on principle. For once having given the first inch it becomes harder and harder to find a place to stand.

If the legislature is willing to deprive people of water rights based upon a failure to meet a filing deadline, where does it end? For instance, if the courthouse in Yellowstone County burns to the ground, the government will need to re-establish property records. Could it require everyone to recreate their chain of title and file a claim form with the county by July 15, 1997, with failure to properly file resulting in forfeiture to adjoining landowners. Or suppose the federal government in its ever zealous quest for revenue enacts legislation stating that any person not filing their tax return and or estimate on time forfeits that year's income. Certainly, such actions would increase the chance of timely filing and payment.

Does the government's interest in timely filing and payment justify the loss of a few rights? Perhaps only 2% would fail to meet

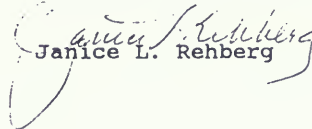


the requirements. Is that permissible? What if it is 5% or 10% or 20%. Or should the judgment rest on who makes the mistake? If it's me or my neighbor, the system is justified; if it's you or your neighbor, it's not. In my mind, it is not a question of percentages or personalities. It is a question of real people with real losses. We often hear that the time and cost of our criminal justice system is worth it if it saves one innocent life. Should not the same be said for our civil justice system? Should we not strive to see that judicial decrees are based on fact rather than legislative fiction?

And, one final work on Secretary Babbit. If the Montana legislature accepts the rationale that it can require people to reclaim their property by a date certain with failure to comply resulting in loss of the property, how could Montana complain if the Department of Interior, under Secretary Babbit or some future appointee, takes the same position with respect to original homestead properties? That is the Pandora's box you open when you fail to take a stand now.

I have a great deal of respect for this committee and our legislative process. I do not mean by this submission to belittle your concerns. Instead, I hope to clear up misconceptions and articulate reasons for continued efforts on behalf of the late claimants. It is true as Professor Stone points out that I represent clients who are adversely affected by forfeiture provisions. That is my job. It is what professors like Professor Stone trained me to do. I also realize that you have a larger constituency than I and must weigh your decisions carefully. It is my hope, however, that the response provided above will give you cause to reconsider the decision of August 18, 19943 and look at meaningful ways to provide additional relief to the late claimants, not only to protect my clients, but to protect all Montanans from the danger of legitimizing a procedure which ignores the human frailties in all of us and makes each citizen vulnerable to the excesses of government in some future place or time.

Respectfully submitted,

  
Janice L. Rehberg

c: Mons Teigen



# NORTH DAKOTA Atmospheric Resource Board

A DIVISION OF THE NORTH DAKOTA STATE WATER COMMISSION

900 EAST BOULEVARD • BISMARCK, NORTH DAKOTA 58505-0850 • (701) 224-2788 • FAX (701) 224-4749

12-15-94

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Post-It™ brand fax transmittal memo 7671 # of pages 1

|                          |                         |
|--------------------------|-------------------------|
| To <i>Michael Krakuk</i> | From <i>M. Simonich</i> |
| Co. <i>EQC</i>           | Co. <i>DNRC</i>         |
| Dept.                    | Phone # <i>444-6699</i> |
| Fax # <i>3036</i>        | Fax # <i>444-0533</i>   |

12 December 1994

Mr. Mark Simonich, Director  
Department of Natural Resources  
and Conservation  
Lee Metcalf Building  
1520 East Sixth Avenue  
Helena, MT 59620-2301

Dear Mr. Simonich:

The Atmospheric Resource Board met last week, and further discussed the need to proceed with the environmental impact statement requested by the Montana Board of Natural Resources and Conservation. A source has been identified which would provide the required funding, however, such monies would not be available until 1996. The existing cost estimate is beyond our resources, so it appears that work on the EIS must be deferred until 1996 at the earliest.

This board remains interested in pursuing the EIS, and views it as a positive step towards resolving the matter. I'll let you know when we've arranged for funding, or if there are other developments.

Sincerely,

Bruce A. Boe  
Director

**BOARD MEMBERS**

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## WATER POLICY COMMITTEE

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#### COMMITTEE STAFF

Environmental Quality Council  
 State Capitol, PO Box 201704  
 Helena, Montana 59620-1704  
 (406) 444-3742

October 27, 1994

1~

Dear 2~:

I am writing as Chair of Montana's legislative Water Policy Committee to express our concerns regarding the reduction of USGS hydrologic monitoring activities in Montana.

The USGS plans to discontinue 29 monitoring sites in Montana this year. The importance of the streamflow and water quality data gathered at these sites can not be overemphasized.

The following incomplete list of current water issues in Montana should help explain our need for increased - not reduced - data collection activities.

**Fire** - Fires burned over 250,000 acres in Montana this summer. The impacts to water quantity from changes in runoff, and water quality from erosion and ash deposition, need to be evaluated to both determine the appropriate immediate response and to better understand the long term impacts from wildfires.

**Fisheries** - Montana is struggling with numerous fisheries management concerns. The potential listing of the Bull Trout and the Arctic Grayling as endangered species stand out among them. More information is needed regarding the quantity and quality of these species' existing and potential habitat to insure proper management decisions.

**Drought** - Montana is again experiencing serious drought. Increased data collection is required to document drought severity; measure, analyze, and predict drought impacts; and ensure the development and implementation of effective drought mitigation strategies. An excellent example of the need for additional information concerns the quantity, quality, and timing of return flows from flood irrigated acres back to the watercourse.

2~

October 27, 1994

Page 2

Return flows can be crucial for maintaining adequate instream flows for the fisheries resource and for protecting public health. Unfortunately, the mechanics of return flows are very site specific and poorly understood in most areas in Montana.

Additionally, eliminating a specific gauging station affects more than that one watercourse in that one basin. Recent efforts indicate that data from one station can be extrapolated to other hydrologically similar basins with a dependable degree of accuracy. In a state the size of Montana, the potential use of out-of-basin data will be of significant value.

The Water Policy Committee strongly believes that, as these and other problems become more severe and complex, now is hardly the time to reduce the availability of information. At the risk of stating the obvious, without adequate information we can not make the right decisions.

The Committee suggests that the federal government reassess the importance of, and its commitment to, data collection activities. The Committee also suggests that this reassessment involve a closer dialogue between the federal and state governments. The Governor's office has expressed an interest in meeting with federal representatives to discuss this issue.

Data collection activities are vital to developing and implementing the best water policy in Montana. The Committee stands ready to assist in achieving the highest level of data collection possible.

Sincerely,

Representative Hal Harper  
Chair

cc: The Honorable Max Baucus  
The Honorable Conrad R. Burns  
The Honorable Pat Williams  
Bruce Babbitt, Secretary of Interior  
Dallas L. Peck, Director, U.S.G.S.  
Governor's Office  
NRIS  
MT Bureau of Mines and Geology



**WATER POLICY COMMITTEE**  
 Montana State Legislature

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**COMMITTEE STAFF**

Environmental Quality Council  
 State Capitol, PO Box 201704  
 Helena, Montana 59620-1704  
 (406) 444-3742

September 7, 1994

The Honorable Marc Racicot  
 Governor of Montana  
 Room 204, State Capitol  
 Helena, MT 59620

Dear Governor Racicot:

Thank you for addressing the Water Policy Committee at its August meeting regarding the Ground Water Assessment Account. The Committee appreciates your sincere concern and found your comments valuable. The Committee has a special interest in this ground water program having played a role in its development and passage in 1991.

The Committee shares your concerns regarding both the short and long term viability of the Ground Water Characterization and Assessment Program. The Committee unanimously passed a motion supporting corrective action to ensure that this important program continues uninterrupted. Such corrective action could include interentity loans, a supplemental appropriation, use of the Environmental Emergency Fund as provided under 75-1-1101, and corrective legislation during the 1995 session.

Your prompt response to this problem and your desire to work with the legislature has mitigated the impacts of this unfortunate funding situation. The Water Policy Committee pledges continued cooperation with your administration to ensure the enactment of legislation that will permanently solve this problem.

Sincerely,

Representative Hal Harper  
 Chair

cc: Representative Thomas E. Nelson  
 Chair, Legislative Finance Committee  
 Representative Dan Harrington  
 Chair, Revenue Oversight Committee

## RESOURCE INDEMNITY TRUST INTEREST ACCOUNTS

| RIT PROCEEDS PROJECTIONS   |                     |                           |                        | Ending                           |                     |
|--|---------------------|---------------------------|------------------------|----------------------------------|---------------------|
|  | RIT Proceeds        | To RIT Trust              | Trust Balance          |                                  |                     |
| FY 93  | \$4,622,161         | \$4,822,161               | \$87,312,059           |                                  |                     |
| FY 94  | 4,518,037           | 2,525,583                 | 89,837,642             |                                  |                     |
| FY 95  | 4,611,772           | 2,577,981                 | 92,415,623             |                                  |                     |
| RIT TRUST INTEREST EARNINGS PROJECTIONS  |                     |                           |                        | Total                            |                     |
|  | FY94                | FY95                      |                        |                                  |                     |
|  | \$8,649,747         | \$8,902,927               | \$17,552,674           |                                  |                     |
| <b>TOTAL 1995 BIENNIIUM ALLOCATION OF RIT INTEREST EARNINGS</b>                        |                     |                           |                        | <b>\$17,552,674</b>              |                     |
| Environmental Contingency Account  |                     | 175,000                   |                        |                                  |                     |
| Oil & Gas Production Damage Mitigation Account   |                     | 50,000                    |                        |                                  |                     |
| Renewable Resource Grant & Loan Program  |                     | 1,025,000                 |                        |                                  |                     |
| Reclamation & Development Grants   |                     | 2,200,000                 |                        |                                  |                     |
| Northern Montana College   |                     | 240,000                   |                        |                                  |                     |
| Water Storage Account  |                     | 250,000                   |                        |                                  |                     |
| <b>TOTAL BIENNIAL APPROPRIATIONS</b>   |                     |                           | 3,940,000              |                                  |                     |
| <b>AMOUNT AVAILABLE FOR FURTHER DISTRIBUTION</b>                                       |                     |                           |                        | <b>\$13,612,674</b>              |                     |
| <b>DISTRIBUTION OF REMAINING INTEREST EARNINGS</b>                                     |                     |                           |                        |                                  |                     |
|  | ----- Account ----- |                           |                        |                                  |                     |
|  | Renewable Resources | Reclamation & Development | Hazardous Waste/CERCLA | Environmental Quality Protection | Total               |
| Percent of RJIT Interest   | 38.0%               | 41.5%                     | 15.0%                  | 5.5%                             | 100.0%              |
| <b>Beginning Balance</b>   | <b>\$590,367</b>    | <b>\$0</b>                | <b>\$1,169,906</b>     | <b>\$915,135</b>                 | <b>\$2,975,408</b>  |
| <b>Revenues</b>  |                     |                           |                        |                                  |                     |
| RIT Interest   | \$5,172,816         | \$5,649,260               | \$2,041,901            | \$748,697                        | \$13,612,674        |
| RIT Tax Proceeds   | 1,369,471           | 1,369,471                 |                        |                                  | \$2,738,942         |
| Coal Tax   | 782,106             |                           |                        |                                  | 782,106             |
| Loan Repayments  | 1,338,831           |                           |                        |                                  | 1,338,831           |
| NR Damage Repayment Interest (STIP)  |                     |                           | 100,000                | 110,000                          | 210,000             |
| Administrative Fees  | 10,000              |                           |                        |                                  | 10,000              |
| State Owned Proj. Rev.   | 538,604             |                           |                        |                                  | 538,604             |
| <b>Total Funds Available</b>   | <b>\$10,102,195</b> | <b>\$7,018,731</b>        | <b>\$3,311,507</b>     | <b>\$1,773,832</b>               | <b>\$22,206,565</b> |
| <b>Appropriation</b>   |                     |                           |                        |                                  |                     |
| Bond Debt Service  | \$1,834,273         | \$0                       | \$0                    | \$0                              | \$1,834,273         |
| DNRC Centralized Services Division   | 1,157,119           | 311,576                   |                        |                                  | 1,468,695           |
| DNRC CARD*   | 1,088,585           | 1,051,527                 | 45,000                 |                                  | 2,185,112           |
| DNRC Water Resources Division  | 1,943,544           | 2,724,302                 |                        |                                  | 4,667,846           |
| Reserved Water Rights Compact Comm   | 326,747             | 674,341                   |                        |                                  | 1,001,088           |
| DNRC State Water Projects  | 1,785,000           |                           |                        |                                  | 1,785,000           |
| State Project Ownership Transfer   | 125,088             |                           |                        |                                  | 125,088             |
| Missouri River Reservation   | 274,191             |                           |                        |                                  | 274,191             |
| Yellowstone Groundwater Study  | 9,708               |                           |                        |                                  | 9,708               |
| State Water Plan   | 70,234              |                           |                        |                                  | 70,234              |
| Clean Coal   |                     | 50,000                    |                        |                                  | 50,000              |
| Montana Salinity Control Association   |                     | 200,000                   |                        |                                  | 200,000             |
| DSL Reclamation Div  |                     | 2,534,319                 |                        |                                  | 2,534,319           |
| DSL Central Management   |                     | 63,592                    |                        |                                  | 63,592              |
| DHES Environmental Division  |                     |                           | 2,320,159              | 1,040,869                        | 3,361,028           |
| DHES-HB 585 Montana Radon Control Act  |                     | 50,000                    |                        |                                  | 60,000              |
| Governor's Office - Flathead Basin Commission  | 80,082              |                           |                        |                                  | 80,082              |
| Water Courts   | 1,046,712           |                           |                        |                                  | 1,046,712           |
| State Library  | 207,470             | 183,615                   |                        |                                  | 391,085             |
| Environmental Quality Council  |                     | 27,256                    |                        |                                  | 27,256              |
| <b>Total Appropriations</b>  | <b>\$9,948,753</b>  | <b>\$7,870,528</b>        | <b>\$2,365,159</b>     | <b>\$1,040,869</b>               | <b>\$21,225,309</b> |
| <b>Projected Biennium Ending Balance</b>   | <b>\$153,442</b>    | <b>(\$851,797)</b>        | <b>\$946,648</b>       | <b>\$732,963</b>                 | <b>\$981,256</b>    |
| *\$55,052 of reclamation & development funds is authorized by language in House Bill 2 |                     |                           |                        |                                  |                     |

RENEWABLE RESOURCE GRANT AND LOAN PROGRAM RULES

DRAFT

I. *Grants to Public Entities*

- a. *Application Fee*
- b. *Form and Content of Application*
- c. *Terms and Conditions of grants; agreements necessary.*
- e. *Criteria to be used to evaluate and prioritize grants.*

II. *Emergency Grants to Public Entities*

- a. *Application Fee*
- b. *Form and Content of Application*
- c. *Terms and Conditions of grants; agreements necessary.*
- e. *Criteria to be used to evaluate and prioritize grants.*

III. *Loans to Public Entities in Amounts Equal To Or Less Than \$200,000.00*

- a. *Application Fee*
- b. *Form and Content of Application*
- c. *Provisions for servicing; security interests; and establishment of reasonable fees.*
- d. *Terms and Conditions of loans; agreements necessary; security instruments.*

IV. *Loans to Public Entities in Amounts More Than \$200,000.00*

- a. *Application Fee*
- b. *Form and Content of Application*
- c. *Provisions for servicing; security interests; and establishment of reasonable fees.*
- d. *Terms and Conditions of loans; agreements necessary; security instruments.*

V. *Grants to Private Entities*

- a. *Application Fee*
- b. *Form and Content of Application*
- c. *Terms and Conditions of grants; agreements necessary.*
- e. *Application of criteria to be used to evaluate and prioritize grants.*

VI. *Loans to Private Entities*

- a. *Application Fee*
- b. *Form and Content of Application*
- c. *Application of criteria to be used to evaluate and prioritize grants.*
- d. *Provisions for servicing; security interests; and establishment of reasonable fees.*
- e. *Terms and Conditions of loans; agreements necessary; security instruments.*

DRAFT



Task

June

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30  
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1. Rules Draft

July

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31  
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2. Legal Review  
3. Bureau Review

August

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31  
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4. Final Draft  
5. Agency Review  
6. Informal Review [out]

September

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30  
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7. Comments Due  
8. Final Revisions

October

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31  
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9. Final Legal/Agency Review  
10. Editing/Typing  
11. File notices w/Secretary of State 10/18/93  
12. Publication of notice in Register  
13. Send out direct mailing to ACC (list (within 3 days)

November

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30

14. Earliest possible hearing date (20 days after notice published)  
15. Adoption and Repeal (10 days after hearing or 30 days after notice).

December

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31

16. Filing Notice of Adoption/Repeal (all materials to be published must be submitted by 12/13/93)

DRAFT

November 19, 1994

Draft

**State Water Plan Evaluation  
Decision Summary*****1. What should be included in the State Water Plan (SWP)?***

Statewide water policy issues and watershed plans should be adopted as sections of the State Water Plan. Specific water project planning, special watershed issues/projects, and regional (interstate) planning activities should be consistent with and coordinated with the State Water Plan.

***2. If watershed issues are included in the State Water Plan, what is the role of DNRC?***

Upon request from community groups, DNRC should continue to meet the needs of as many local watershed committees as time and financial resources allow. If demand for local watershed planning outstrips available resources, prioritization should be established based on criteria such as the level of grassroots, broad-based support; potential for solving the issue; and magnitude of the problem, urgency, or opportunity to be solved. If appropriate, the DNRC will request representation on the watershed planning committee to provide the department's input on planning decisions. This representation will be a prerequisite for basin plan adoption as part of the State Water Plan. The department may initiate a local planning effort if obligated to address issues that significantly affect that basin.

***3. If statewide policy issues are included in the SWP, what is the role of DNRC?***

DNRC can provide facilitation and administrative support including literature research, education, technical expertise, data gathering, and map preparation toward the development of state water plan sections. Other agencies which have responsibilities with respect to a particular issue should be invited and encouraged to participate.

***4. For watershed plans to be adopted as part of the State Water Plan, what guidelines, if any, should be developed to ensure that watershed plan sections reflect public opinion and are consistent with each other and with state policy?***

Guidelines for watershed plans, which shall constitute prerequisites for incorporation into the State Water Plan, should be clearly outlined in basin planning materials to be developed and distributed by the department. These

guidelines are to include: 1) representation of all basin water users/interests are on the local planning committee (the director has the authority to review watershed committee membership to ensure all interests are represented); 2) DNRC and other appropriate state agencies have membership; 3) demonstration that effects on downstream or upstream water users have been carefully considered; 4) public notice and open meetings policies are followed for watershed planning meetings; and 5) public hearings, jointly sponsored by the local planning committee and the department.

**5. How should staff time and resources be allocated among the various activities included under the State Water Plan?**

Allocate staff time and resources among watershed and statewide issues where DNRC feels it can provide the greatest service to Montanans and where there is a reasonable likelihood for solving important problems.

**6. Should water planning activities be confined to resolving identified water problems or should the state water plan include proactive and preventative strategies?**

The State Water Plan should continue addressing both types of issues--solving existing problems and preventing problems from developing in the future.

**7. Who should decide on the issues to be resolved?**

For watershed issues, listen carefully to citizens within local watersheds and respond appropriately. Let them identify issues and define the agenda. DNRC should ensure that all affected parties are working together in identifying the issues.

For statewide issues, continue to seek advice from the general public, Governor, Legislative Water Policy Committee, and Board of Natural Resources and Conservation with the State Water Plan Advisory Council choosing the issue(s) to be addressed.

**8. What is the most practical planning cycle length to adequately address water issues balancing flexibility and timeliness? Should the planning cycle be without a time limit? Should the schedule be different for statewide issues and basin issues?**

For statewide issues, maintain a two-year cycle, but allow flexibility to shorten or lengthen the time frame depending on the issue. For watershed planning activities, a time line is not appropriate as the schedule will depend upon the issues. These local committees may choose to be ongoing in order to address

problems and opportunities as they arise. Watershed planning committees, however, are required to provide biennial reports to DNRC. In turn, DNRC will prepare and submit a biennial status report on all watershed activities in Montana to the Governor and Legislature.

***9. Should the director have the authority to change recommendations after the State Water Plan Advisory Council has achieved consensus?***

The DNRC director should retain authority to approve recommendations and to adopt State Water Plan sections since the director is responsible for necessary legislation and administrative support to implement the plans. The director will provide input throughout plan development through appropriate representation on steering committees and watershed planning committees. If a recommendation is not acceptable to the director, the director will specify his/her concerns and allow the committee an opportunity to revise the recommendation.

***10. What role should the Board of Natural Resources and Conservation have in the State Water Plan?***

Seek comment from the Board on draft plan sections, just as comments are sought from the Legislative Water Policy Committee, but remove their statutory authority to approve final State Water Plan sections.

***11. Who should be bound by recommendations in the State Water Plan?***

The legislature should carefully consider statutory amendments recommended by State Water Plan sections. All state agencies involved in the development of the statewide or watershed plans should put a significant priority on implementing recommended administrative actions.

***12. How can steering committee members and SWP Advisory Council members be bound to support recommendations?***

Request steering committee and Council members to regularly inform their constituents about ongoing discussions and recommendations. They need to seek frequent guidance from their constituency group before final recommendations are approved by committees and the Council. The DNRC shall distribute meeting minutes, with decisions highlighted, directly to organizations represented on steering committees and the Council. Watershed committees should periodically provide press releases and/or publish a newsletter describing progress of discussions, issues being addressed, and recommendations being considered.

**13. Should steering committee members be compensated for time and travel to attend meetings?**

For each steering committee member who is not compensated by a government employer or other organization for participation in state water plan activities, the DNRC shall pay actual travel expenses for attending meetings.

**14. Should a professional facilitator be employed to conduct steering committee and State Water Plan Advisory Council meetings? Should funds be budgeted to train the chairperson in facilitation?**

As time and budget permits, the DNRC shall provide facilitation training to all chairpersons and appropriate staff at the beginning of each planning initiative. Local watershed committees are free to retain a facilitator of their choice. The State Water Plan Handbook will identify options and guidelines to assist facilitation of local watershed planning committees.

**15. Should the steering committees and State Water Plan Advisory Council draft legislation which implements water plan recommendations?**

DNRC should have responsibility for drafting legislation. The steering and watershed committees and the State Water Plan Advisory Council will meet to review, amend, and approve proposed legislation.

**16. How should decisions be made?**

Attempt to achieve consensus, but realize consensus is not always possible if you want to have meaningful recommendations. In the ground rules, the committee should define the majority that is needed to pass a recommendation. Dissenting votes and/or opinions should be included in the record.

\*[Does "the record" mean in the plan section or in the meeting minutes?]

**17. Based on the previous discussion, should the State Water Plan statute be amended?**

Introduce legislation amending the Water Use Act to execute the above decisions.

House BILL NO. 192

INTRODUCED BY

*Hayden Newman Jewellon Hillard Be...*

BY REQUEST OF THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

*Sen. Randy Knox*

A BILL FOR AN ACT ENTITLED: "AN ACT AUTHORIZING STATE AGENCIES TO ASSIST AND TO COOPERATE WITH LOCAL WATERSHED COUNCILS; AUTHORIZING THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION TO COORDINATE GOVERNMENT ASSISTANCE TO LOCAL WATERSHED COUNCILS; ENCOURAGING LOCAL CITIZENS, ORGANIZATIONS, AND GOVERNMENTS TO FORM WATERSHED COUNCILS; REMOVING BOARD OF NATURAL RESOURCES AND CONSERVATION APPROVAL FOR THE STATE WATER PLAN; CREATING A SPECIAL LICENSE PLATE AND STATE SPECIAL REVENUE ACCOUNT TO FUND STATEWIDE AND LOCAL WATER RESOURCES EDUCATION AND ACTIVITIES OF LOCAL WATERSHED COUNCILS; AMENDING SECTIONS 61-3-332 AND 85-1-203, MCA; AND PROVIDING AN EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. Section 1. Legislative findings and declarations. (1) The legislature finds that:

(a) the long-term use and protection of the water resources of the state, including watersheds, are essential components of Montana's economic stability and growth, high-quality environment, and cultural heritage;

(b) each watershed in Montana is unique, requiring different management approaches and programs;

(c) the management of watersheds can be most effective and efficient when initiated and conducted at the local watershed level; and

(d) building cooperative partnerships between affected private individuals, interested citizens, local organizations, and representatives of local, state, federal, and tribal agencies will improve management of the state's watersheds.

(2) The legislature declares that:

(a) the formation of local watershed councils by affected private individuals, interested citizens, local organizations, and representatives of local, state, federal, and tribal agencies is encouraged; and

1 (b) the initiation and implementation of watershed management programs and strategies by local  
2 watershed councils are a high priority of the state and should be encouraged.

3

4 **NEW SECTION. Section 2. Watershed councils.** (1) Affected private individuals, interested  
5 citizens, local organizations, and government bodies are encouraged to form local watershed councils.  
6 Membership on each local watershed council must include the appropriate affected interests and users.  
7 Each local watershed council shall submit a status report to the department prior to each regular legislative  
8 session.

9 (2) The purposes of local watershed councils may include but are not limited to:

10 (a) providing a forum for all interests to communicate about water-related issues, concerns, and  
11 problems;

12 (b) providing education on water-related issues, concerns, and problems;

13 (c) identifying water-related issues and problems and, if appropriate, facilitating the resolution of  
14 problems through a collaborative, consensus-based process;

15 (d) coordinating with other planning efforts within and outside the watershed;

16 (e) consulting with and advising local, state, and federal government agencies on an issue or action  
17 that could affect the watershed; and

18 (f) developing proposed watershed sections of the state water plan in accordance with 85-1-203.

19 (3) A watershed may be an individual hydrologic unit or drainage or a composite of watershed  
20 drainages.

21

22 **NEW SECTION. Section 3. Agency duties.** (1) State agencies are authorized and encouraged to  
23 provide financial and technical assistance to and cooperate with a local watershed council.

24 (2) The department, when necessary, shall coordinate government assistance to a local watershed  
25 council formed under [section 2].

26 (3) The department shall submit to each regular legislative session a report that describes the  
27 activities of each local watershed council formed under [section 2].

28 (4) To the greatest extent possible, state agencies are encouraged to coordinate their respective  
29 watershed activities with other affected state and federal agencies.

30 (5) State agencies are encouraged to work with a local watershed council before initiating an action

1 affecting that watershed.

2

3 NEW SECTION. Section 4. Funding for local watershed councils. The department is authorized  
4 to apply for grants from state or federal programs that may be available for appropriation to the department  
5 for developing and implementing watershed council strategies. The department may disburse money  
6 available from an appropriation made to the department to local watershed councils. The department may,  
7 on behalf of local watershed councils, include funding for local watershed councils in its budget requests  
8 to the legislature.

9

10 Section 5. Section 85-1-203, MCA, is amended to read:

11 "85-1-203. State water plan. (1) The department shall gather from any source reliable information  
12 relating to Montana's water resources and prepare from the information a continuing comprehensive  
13 inventory of the water resources of the state. In preparing this inventory, the department may conduct  
14 studies; adopt studies made by other competent water resource groups, including federal, regional, state,  
15 or private agencies; perform research or employ other competent agencies to perform research on a  
16 contract basis; and hold public hearings in affected areas at which all interested parties must be given an  
17 opportunity to appear.

18 (2) The department shall formulate, ~~and, with the approval of the board, adopt, and~~ amend, extend,  
19 or add to a comprehensive, coordinated multiple-use water resources plan known as the "state water plan".  
20 The state water plan may be formulated and adopted in sections, ~~these sections corresponding with that~~  
21 deal with statewide water resource policy issues or hydrologic divisions of the state or watersheds. The  
22 state water plan must set out a progressive program for the conservation, development, ~~and utilization use,~~  
23 and management of the state's water resources and propose the most effective means by which these  
24 water resources may be applied for the benefit of the people, ~~with due consideration of~~ after considering  
25 alternative uses and combinations of uses. Before adopting the state water plan or ~~any a~~ section of the  
26 plan, the department shall hold public hearings in the state or in an area of the state encompassed by a  
27 section of the plan if adoption of a section is proposed. Notice of the hearing or hearings must be published  
28 for 2 consecutive weeks in a newspaper of general county circulation in each county encompassed by the  
29 proposed plan or section of the plan at least 30 days prior to the hearing.

30 (3) The department shall submit to the board, to the water policy committee established in



1 85-2-105, and to the legislature at the beginning of each regular session the state water plan or any a  
2 section of the plan or amendments, additions, or revisions to the plan that the department has formulated  
3 and adopted.

4 (4) The legislature, by joint resolution, may revise the state water plan.

5 (5) The department shall prepare a continuing inventory of the ground water resources of the state.  
6 The ground water inventory must be included in the comprehensive water resources inventory described  
7 in subsection (1) but must be a separate component of the inventory.

8 (6) The department shall publish the comprehensive inventory, the state water plan, the ground  
9 water inventory, or any part of each, and the department may assess and collect a reasonable charge for  
10 these publications.

11 (7) In developing and revising the state water plan as provided in this section, the department shall  
12 consult with the board and the water policy committee established in 85-2-105 and solicit the advice of  
13 the board and the committee in carrying out its duties under this section."  
14

15 NEW SECTION. Section 6. "MONTANA - THE LAST BEST PLACE" license plates. (1) Subject to  
16 the provisions of 61-3-332(3) and the requirement that "MONTANA - THE LAST BEST PLACE" license  
17 plates must have a white reflectorized background, the department shall design, cause to be manufactured,  
18 and issue license plates with the slogan "MONTANA - THE LAST BEST PLACE", as provided in [sections  
19 7 through 9].

20 (2) After consultation with the department of natural resources and conservation, the department  
21 shall prescribe the color and insignia to be displayed on "MONTANA - THE LAST BEST PLACE" license  
22 plates.

23 (3) Each "MONTANA - THE LAST BEST PLACE" license plate must:

24 (a) be imprinted consecutively with distinctive numerals from 1 through 99999, capital letters A  
25 through Z, or a combination of numerals and letters; and

26 (b) bear a nonremovable sticker denoting the correct county designation under 61-3-332.

27 (4) The department shall determine the minimum and maximum number of characters, including  
28 both numerals and letters, on "MONTANA - THE LAST BEST PLACE" license plates.  
29

30 NEW SECTION. Section 7. Application for "MONTANA - THE LAST BEST PLACE" license plates.

1 An applicant for "MONTANA - THE LAST BEST PLACE" license plates or renewal of "MONTANA - THE  
2 LAST BEST PLACE" license plates pursuant to [section 8] shall apply on the form and by the date that the  
3 department requires.

4  
5 NEW SECTION. Section 8. Issuance -- application -- additional fee -- disposition. (1) The  
6 department shall issue or renew "MONTANA - THE LAST BEST PLACE" license plates upon receipt of an  
7 application that shows:

8 (a) compliance with 61-3-303, 61-3-311, and 61-3-312; and

9 (b) payment to the county treasurer of:

10 (i) an initial application and manufacturing fee of \$2.50, when required; and

11 (ii) an annual donation of \$20 for the benefit of the department of natural resources and  
12 conservation to support statewide and local water resources education and activities of local watershed  
13 councils.

14 (2) Once each month, the county treasurer shall transfer to the state treasurer the total of the  
15 amounts collected for:

16 (a) the initial application and manufacturing fee for deposit in the Montana state prison industries  
17 account in the proprietary fund for appropriation by the legislature to pay the cost of manufacturing  
18 "MONTANA - THE LAST BEST PLACE" license plates; and

19 (b) donations provided for in subsection (1)(b)(ii), along with a schedule showing the number of  
20 "MONTANA - THE LAST BEST PLACE" license plates issued and the total donations received.

21 (3) Once each month, the state treasurer shall distribute to the water education and watershed  
22 council account provided for in [section 12] an amount equal to the total donations credited to the  
23 department of natural resources and conservation and transferred to the state treasurer by the county  
24 treasurers during the preceding month.

25  
26 NEW SECTION. Section 9. Personalized "MONTANA - THE LAST BEST PLACE" license plates.  
27 (1) Subject to the provisions of 61-3-405 and 61-3-406, an application for "MONTANA - THE LAST BEST  
28 PLACE" license plates may be combined with an application for personalized plates.

29 (2) An application for personalized "MONTANA - THE LAST BEST PLACE" license plates must be  
30 made on a form supplied by the department.

1 (3) Personalized "MONTANA - THE LAST BEST PLACE" license plates must bear the distinctive  
2 color and insignia as provided in [section 6].

3  
4 **NEW SECTION. Section 10. Authorization to receive and transmit donations.** As provided in  
5 [section 8] and notwithstanding any other provisions of Title 7, Title 17, or this title:

6 (1) the county treasurer shall receive the annual donations provided for in [section 8] and once  
7 each month transmit those donations to the state treasurer; and

8 (2) the state treasurer shall accept the annual donations and once each month distribute the  
9 accumulated proceeds to the department of natural resources and conservation according to the totals  
10 contained in the county treasurers' reports.

11  
12 **Section 11.** Section 61-3-332, MCA, is amended to read:

13 **"61-3-332. Number plates.** (1) A motor vehicle that is driven upon the streets or highways of  
14 Montana must display both front and rear number plates, bearing the distinctive number assigned the  
15 vehicle. The number plates are in 10 series: one series for owners of motorcars, one for owners of motor  
16 vehicles of the motorcycle or quadricycle type, one for trailers, one for trucks, one for dealers in vehicles  
17 of the motorcycle or quadricycle type that bear the distinctive letters "MCD" or the letters "MC" and the  
18 word "DEALER", one for franchised dealers in new motorcars (including trucks and trailers) or new and  
19 used motorcars (including trucks and trailers) that bear the distinctive letter "D" or the word "DEALER",  
20 one for dealers in used motorcars only (including used trucks and trailers) that bear the distinctive letters  
21 "UD" or the letter "U" and the word "DEALER", one for dealers in trailers and/or semitrailers (new or used)  
22 that bear the distinctive letters "DTR" or the letters "TR" and the word "DEALER", one for dealers in  
23 recreational vehicles that bear the distinctive letters "RV" or the letter "R" and the word "DEALER", and  
24 one for special license plates. All markings for the various kinds of dealers' plates must be placed on the  
25 number plates assigned to the dealer, in the position that the department designates.

26 (2) All number plates for motor vehicles must be issued for a minimum period of 4 years, must bear  
27 a distinctive marking, and must be furnished by the state. In years when number plates are not issued, the  
28 department shall provide nonremovable stickers bearing appropriate registration numbers that must be  
29 affixed to the license plates in use.

30 (3) Subject to the provisions of this section, the department shall create a new design for number

1 plates as provided in this section.

2 (4) In the case of motorcars and trucks, plates must be of metal 6 inches wide and 12 inches in  
3 length. The outline of the state of Montana must be used as a distinctive border on the license plates, and  
4 the word "Montana" and the year must be placed across the plates. Registration plates must be treated  
5 with a reflectorized background material according to specifications prescribed by the department.

6 (5) The distinctive registration numbers must begin with a number one or with a letter-number  
7 combination, such as "A 1" or "AA 1", or any other similar combination of letters and numbers. The  
8 distinctive registration number or letter-number combination assigned to the vehicle must appear on the  
9 plate preceded by the number of the county and appearing in horizontal order on the same horizontal  
10 baseline. The county number must be separated from the distinctive registration number by a separation  
11 mark unless a letter-number combination is used. The dimensions of the numerals and letters must be  
12 determined by the department, and all county and registration numbers must be of equal height.

13 (6) For the use of tax-exempt motor vehicles, in addition to the markings provided in this section,  
14 number plates must bear the following distinctive markings:

15 (a) For vehicles owned by the state, the department may designate the prefix number for the  
16 various state departments. All numbered plates issued to state departments must bear the words "State  
17 Owned", and a year number may not be indicated on the plates because these numbered plates are of a  
18 permanent nature and will be replaced by the department only when the physical condition of numbered  
19 plates requires it.

20 (b) For vehicles that are owned by the counties, municipalities, irrigation districts organized under  
21 the laws of Montana and not operating for profit, and school districts and that are used and operated by  
22 officials and employees in the line of duty and for vehicles on loan from the United States government or  
23 the state of Montana to, or owned by, the civil air patrol and used and operated by officials and employees  
24 in the line of duty, there must be placed on the number plates assigned, in a position that the department  
25 may designate, the letter "X" or the word "EXEMPT". Distinctive registration numbers for plates assigned  
26 to motor vehicles of each of the counties in the state and those of the municipalities and school districts  
27 situated within each of the counties and those of the irrigation districts that obtain plates within each  
28 county must begin with number one and be numbered consecutively. Because these number plates are of  
29 a permanent nature, they are subject to replacement by the department only when the physical condition  
30 of the number plates requires it and a year number may not be displayed on the number plates.

1 (7) On all number plates assigned to motor vehicles of the truck and trailer type, other than  
2 tax-exempt trucks and tax-exempt trailers, there must appear the letter "T" or the word "TRUCK" on plates  
3 assigned to trucks and the letters "TR" or the word "TRAILER" on plates assigned to trailers and  
4 housetrailer. The letters "MC" or the word "CYCLE" must appear on plates assigned to vehicles of the  
5 motorcycle or quadricycle type.

6 (8) Number plates issued to a passenger car, truck, trailer, or vehicle of the motorcycle or  
7 quadricycle type may be transferred only to a replacement passenger car, truck, trailer, or motorcycle- or  
8 quadricycle-type vehicle. A registration or license fee may not be assessed upon a transfer of a number  
9 plate under 61-3-317 and 61-3-335.

10 (9) For the purpose of this chapter, the several counties of the state are assigned numbers as  
11 follows: Silver Bow, 1; Cascade, 2; Yellowstone, 3; Missoula, 4; Lewis and Clark, 5; Gallatin, 6; Flathead,  
12 7; Fergus, 8; Powder River, 9; Carbon, 10; Phillips, 11; Hill, 12; Ravalli, 13; Custer, 14; Lake, 15; Dawson,  
13 16; Roosevelt, 17; Beaverhead, 18; Chouteau, 19; Valley, 20; Toole, 21; Big Horn, 22; Musselshell, 23;  
14 Blaine, 24; Madison, 25; Pondera, 26; Richland, 27; Powell, 28; Rosebud, 29; Deer Lodge, 30; Teton, 31;  
15 Stillwater, 32; Treasure, 33; Sheridan, 34; Sanders, 35; Judith Basin, 36; Daniels, 37; Glacier, 38; Fallon,  
16 39; Sweet Grass, 40; McCone, 41; Carter, 42; Broadwater, 43; Wheatland, 44; Prairie, 45; Granite, 46;  
17 Meagher, 47; Liberty, 48; Park, 49; Garfield, 50; Jefferson, 51; Wibaux, 52; Golden Valley, 53; Mineral,  
18 54; Petroleum, 55; Lincoln, 56. Any new counties must be assigned numbers by the department as they  
19 may be formed, beginning with the number 57.

20 (10) Each type of special license plate approved by the legislature, except collegiate license plates  
21 authorized in 61-3-463 and "MONTANA - THE LAST BEST PLACE" license plates authorized in [section 6],  
22 must be a separate series of plates, numbered as provided in subsection (5), except that the county number  
23 must be replaced by a nonremovable design or decal designating the group or organization to which the  
24 applicant belongs. Unless otherwise specifically stated in this section, the special plates are subject to the  
25 same rules and laws as govern the issuance of regular license plates, must be placed or mounted on a  
26 vehicle owned by the person who is eligible to receive them, and must be removed upon sale or other  
27 disposition of the vehicle. The special license plates must be issued to national guard members, former  
28 prisoners of war, handicapped persons, reservists, disabled veterans, survivors of the Pearl Harbor attack,  
29 veterans of the armed services, or veterans of the armed services who were awarded the purple heart  
30 medal, who comply with the following provisions:

1 (a) An active member of the Montana national guard may be issued special license plates with a  
2 design or decal displaying the letters "NG". The adjutant general shall issue to each active member of the  
3 Montana national guard a certificate authorizing the department to issue national guard plates, numbered  
4 in sets of two with a different number on each set, and the member shall surrender the plates to the  
5 department upon becoming ineligible to use them.

6 (b) An active member of the reserve armed forces of the United States of America who is a  
7 resident of this state may be issued special license plates with a design or decal displaying the following:  
8 United States army reserve, AR (symbol); United States naval reserve, NR (anchor); United States air force  
9 reserve, AFR (symbol); and United States marine corps reserve, MCR (globe and anchor). The commanding  
10 officer of each armed forces reserve unit shall issue to each eligible member of the reserve unit a certificate  
11 authorizing the issuance of special license plates, numbered in sets of two with a different number on each  
12 set. The member shall surrender the plates to the department upon becoming ineligible to use them.

13 (c) (i) A resident of Montana who is a veteran of the armed forces of the United States and who  
14 is 100% disabled because of an injury that has been determined by the department of veterans affairs to  
15 be service-connected may, upon presentation to the department of proof of the 100% disability, be issued:

16 (A) a special license plate under this section with a design or decal displaying the letters "DV"; or

17 (B) one set of any other military-related plates that the disabled veteran is eligible to receive under  
18 this section.

19 (ii) The fee for original or renewal registration by a 100% disabled veteran for a passenger vehicle  
20 or a truck with a GVW-rated capacity of 1 ton or less is \$5 and is in lieu of all other fees and taxes for that  
21 vehicle under this chapter.

22 (iii) Special license plates issued to a disabled veteran are not transferable to another person.

23 (iv) A disabled veteran is not entitled to a special disabled veteran's license plate for more than one  
24 vehicle.

25 (v) A vehicle lawfully displaying a disabled veteran's plate and that is conveying a 100% disabled  
26 veteran is entitled to the parking privileges allowed a handicapped person's vehicle under this title.

27 (d) A Montana resident who is a veteran of the armed forces of the United States and was  
28 captured and held prisoner by a military force of a foreign nation, documented by the veteran's service  
29 record, may upon application and presentation of proof be issued special license plates, numbered in sets  
30 of two with a different number on each set, with a design or decal displaying the words "ex-prisoner of

1 war" or an abbreviation that the department considers appropriate.

2 (e) Except as provided in subsection (10)(c), upon payment of all taxes and fees required by parts  
3 3 and 5 of this chapter and upon furnishing proof satisfactory to the department that the applicant meets  
4 the requirements of this subsection (e), the department shall issue to a Montana resident who is a veteran  
5 of the armed services of the United States special license plates, numbered in sets of two with a different  
6 number on each set, designed to indicate that the applicant is a survivor of the Pearl Harbor attack if the  
7 applicant was a member of the United States armed forces on December 7, 1941, was on station on  
8 December 7, 1941, during the hours of 7:55 a.m. to 9:45 a.m. (Hawaii time) at Pearl Harbor, the island  
9 of Oahu, or offshore at a distance of not more than 3 miles, and received an honorable discharge from the  
10 United States armed forces. If special license plates issued under this subsection are lost, stolen, or  
11 mutilated, the recipient of the plates is entitled to replacement plates upon request and without charge.

12 (f) A motor vehicle owner and resident of this state who is a veteran or the surviving spouse of  
13 a veteran of the armed services of the United States may be issued license plates inscribed as provided in  
14 subsection (10)(f)(i) if the veteran was separated from the armed services under other than dishonorable  
15 circumstances or was awarded the purple heart medal:

16 (i) Upon submission of a department of defense form 214(DD-214) or its successor or documents  
17 showing an other-than-dishonorable discharge or a ~~reinstatement~~ reenlistment, proper identification, and other  
18 relevant documents to show an applicant's qualification under this subsection, there must be issued to the  
19 applicant, in lieu of the regular license plates prescribed by law, special license plates numbered in sets of  
20 two with a different number on each set. The plates must display:

21 (A) the word "VETERAN" and a symbol signifying the United States army, United States navy,  
22 United States air force, United States marine corps, or United States coast guard, according to the record  
23 of service verified in the application; or

24 (B) a symbol representing the purple heart medal.

25 (ii) Plates must be furnished by the department to the county treasurer, who shall issue them to a  
26 qualified veteran or to the veteran's surviving spouse. The plates must be placed or mounted on the vehicle  
27 owned by the veteran or the veteran's surviving spouse designated in the application and must be removed  
28 upon sale or other disposition of the vehicle.

29 (iii) Except as provided in subsection (10)(c), a veteran or surviving spouse who receives special  
30 license plates under this subsection (10)(f) is liable for payment of all taxes and fees required under parts

1 3 and 4 of this chapter and a special veteran's or purple heart medal license plate fee of \$10. Upon an  
2 original application for a license under this subsection (10)(f), the county treasurer shall:

3 (A) deposit \$3 of the special fee in the county general fund;

4 (B) remit \$1 for deposit in the state general fund; and

5 (C) deposit the remainder of the special fee in the state special revenue account established in  
6 10-2-603 for administration, construction, operation, and maintenance of the state veterans' cemetery.

7 (iv) Upon subsequent annual renewal of registration, the county treasurer shall deposit all of the  
8 special fee as provided in subsection (10)(f)(iii)(C).

9 (g) A Montana resident who is eligible to receive a special parking permit under 49-4-301 may,  
10 upon written application on a form prescribed by the department, be issued a special license plate with a  
11 design or decal bearing a representation of a wheelchair as the symbol of the handicapped person."

12  
13 **NEW SECTION. Section 12. Water education and watershed council account.** There is established  
14 a water education and watershed council account in the state special revenue fund of the state treasury.  
15 All money received for distribution to the department pursuant to [section 10(2)] must be deposited in the  
16 account to support statewide and local water resources education and activities of local watershed  
17 councils.

18  
19 **NEW SECTION. Section 13. Codification instructions.** (1) [Sections 1 through 4 and 12] are  
20 intended to be codified as an integral part of Title 85, chapter 1, and the provisions of Title 85, chapter 1,  
21 apply to [sections 1 through 4 and 12].

22 (2) [Sections 6 through 10] are intended to be codified as an integral part of Title 61, chapter 3,  
23 part 4, and the provisions of Title 61, chapter 3, part 4, apply to [sections 6 through 10].

24  
25 **NEW SECTION. Section 14. Effective date.** [This act] is effective July 1, 1995.

26 -END-



THE PUBLIC LAND LAW REVIEW  
of The University of Montana School of Law,  
THE MONTANA WATERCOURSE,  
THE MONTANA UNIVERSITY SYSTEM WATER RESOURCES CENTER,  
and  
THE WATER POLICY COMMITTEE OF THE MONTANA STATE LEGISLATURE  
present

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THURSDAY, APRIL 21, 1994

8:30-10:00  
**REGISTRATION**

10:00-10:20  
**OPENING ADDRESS**  
Senator Lorentis Grosfield

10:20-10:40  
**INTRODUCTION**  
Missoula Mayor Dan Kemmis

10:40-12:30  
**RIVER LAW**  
*An overview of basic water law affecting streamflows in Montana*  
Dave Pengally & Professor Ralph Johnson

12:45-1:45  
**A BROWN BAG LUNCHEON**  
*Small group discussions with Thursday's speakers*

2:00-4:00  
**RIVER SCIENCE**  
*What we know and don't know about the watershed*  
Vicki Watson, Jim Bauder, Wayne Van Voast, & Jim Stimson

4:15-6:00  
**RIVER PEOPLE/RIVER PROBLEMS**  
*The many values of the Big Hole River*  
Moderated by Representative Hal Harper, Chair Water Policy Committee

6:00-7:00  
**RIVER RECEPTION**  
A wine and cheese soiree

FRIDAY, APRIL 22, 1994

8:30-11:45  
**RIVER COMMUNITIES AT WORK**  
*Water management tools: how and when they work*  
Moderated by Professor John Horwich, The University of Montana School of Law  
Featuring:  
Susan Cottingham, Holly Franz, John Grey, Mona Jamison, John Keys, Deborah Schmidt, & Liter Spence

12:00-1:00  
**A BROWN BAG LUNCHEON**  
*Small group discussions with Friday's speakers*

1:10-3:10  
**FROM LAW TO REALITY**  
*Collaborative approaches attending to grassroots complexities*  
Moderated by Gerald Mueller, Northern Lights  
Featuring:  
Citizen speakers on behalf of eight of Montana's rivers

3:15  
**CONCLUDING REMARKS**  
Professor David H. Getches, University of Colorado







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