

BEFORE THE MONTANA LEGISLATURE
SENATE NATURAL RESOURCES COMMITTEE
HB 697
TESTIMONY OF THE
TONGUE RIVER WATER USERS' ASSOCIATION

MARCH 11, 2011

Madame Chair And Members Of The Committee:

- ❖ The Montana Legislature has repeatedly stated that "large consumptive use is the biggest threat to Montana's waters."
- ❖ Based on concerns over large consumptive uses, beginning in 1983, during the 48th Legislature of the State of Montana, a bi-partisan Select Committee on Water Marketing was formed to undertake a two-year study not only water marketing, but also large consumptive uses and Montana's water policy in general.
- ❖ The Select Committee On Water Marketing also stated: "Montana needed to develop its water through projects such as improvement of the Tongue River Dam [and others of course], but substantial funds were needed. Therefore, the conclusion seemed logical . . . sell water to produce revenues to fund water projects necessary to save Montana's water [from going to downstream states]." The Committee recommended that the former 10,000 acre-foot or 15 cubic feet per second (cfs) threshold be reduced to 4,000 acre feet or 5.5 cfs, Anyone wanting greater amounts of Montana's waters could lease the water from the state, and in turn generate revenue for the state.
- ❖ The revenue generated from the State's water leasing program would provide much needed revenue for new water projects, and for rehabilitation of older projects and dams that were in need of repair, such as the Tongue Dam at the time.
- ❖ HB 497 would take away much needed revenue from the state water leasing program that is needed to keep our state-owned dams safe and keep such storage projects vital and in good repair for smaller water users.
- ❖ Montana's waters are a precious and finite resource. This bill does not protect Montana's waters, and it reduces revenue to the state that is greatly needed to maintain Montana's reservoirs and dams.
- ❖ Because of the reduction in revenue to the state through loss of water leasing revenue, the fiscal note indicating that there will be zero fiscal impact to the state is probably not accurate.
- ❖ I have distributed the Report of the Select Committee on Water Marketing that was prepared after two years of studying water issues, and which formed the basis for the current 4,000 acre-foot or 5.5 cfs limitation. I would encourage you to read it before voting on this bill.
- ❖ We urge a DO NOT PASS on HB 497.

2/18/85

House Bill
689



Summary of the
REPORT OF THE SELECT COMMITTEE ON WATER MARKETING
TO THE
49TH LEGISLATURE
STATE OF MONTANA
JANUARY 1985

Senator Jean Turnage, Chair

Representative John Shontz, Vice-Chair

Representative Dan Kemmis

Senator Chet Blavlock

Representative Dennis Iverson

Senator Dave Manning

Representative John Harp

Senator Jim Shaw

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The Big Sky Country

MONTANA STATE SENATE

January 1985

President of the Senate
Speaker of the House
Montana Legislature

Gentlemen:

No more important natural resource issue faced the 48th Legislature, which met January 3 to April 21, 1983, than the question of marketing Montana's waters. Based upon the work and recommendations of the Select Committee on Water Marketing, whose report I am honored to transmit, Montana's policies for the management, conservation, and use of its waters will be a vital issue facing the 49th and future Legislatures as well.

The 48th Legislature was highlighted by deliberations over whether Montana should market its waters - principally for industrial uses and particularly for coal slurry. There were some who urged us into immediate action based on their prediction that, if Montana did not act swiftly to market its surplus waters, two undesirable results would occur. First, downstream states would satisfy the demand and reap the financial rewards. Worse, in doing so, they would appropriate, put to use, and remove from Montana's eventual use those waters involved.

The 48th Legislature did act to suspend the constitutionally suspect ban against out-of-state exports of water (MCA § 85-1-121) and to allow limited water marketing from Fort Peck and other federal reservoirs. Its members, however, chose not to adopt a hastily conceived and insufficiently understood water marketing program. The Legislature's principal response, with the passage of House Bill 908, was to mandate a two-year study of water marketing by a Select Committee which it has been my privilege to chair.

Events have demonstrated the wisdom of this caution. Although interest in the water marketing concept continues to grow, there has not developed a regional water market. There has been no serious interest in the purchase of water from Fort Peck. In fact, the sale by South Dakota of 50,000 acre feet of water per year from Oahe Reservoir to the BNSF coal slurry pipeline conglomerate has fallen through.

This market hiatus has benefitted the committee's work. When initially proposed to the Legislature, the water marketing concept diverted attention away from the more important issue: what should be Montana's water policy in an interstate setting?

I am pleased to report that, in nine meetings of the Select Committee over the last 19 months, this broader inquiry has been addressed. We have received the insightful testimony of concerned Montana citizens and organizations. We have benefitted from the expertise of practitioners and scholars from Montana and other western states. We have been aided by the cooperative efforts of the departments of Natural Resources and Conservation and Fish, Wildlife, and Parks. The committee is particularly indebted to the Lincoln Institute of Land Policy, which cosponsored two excellent legal and policy seminars on interstate water issues.

The complete final report of the committee is being conveyed to the Legislature under separate cover, and I urge any person who is deeply interested in this topic to consult this very complete document. This summary report sets forth the actions that have been approved by and are being recommended by the committee. I am pleased to report that these recommendations were unanimously approved by all members of the committee in attendance at its meeting on December 3, 1984.

Many of these recommendations specify those actions that should be taken by the 49th Legislature. Other recommendations set forth an agenda of water issues that must be systematically addressed by the Legislature and the citizens of the state in the years to come. These recommendations concern a strategy for a water policy for Montana in an interstate setting. This agenda is too important and too complex to be addressed by one interim committee or one legislative session. These issues significantly affect the future of Montana. The deliberations around them must be ongoing.

In behalf of all members of the Select Committee, I urge your careful consideration of this report.

Sincerely,

SENATOR JEAN TURNAGE
Chairman

OVERVIEW OF THE COMMITTEE'S RECOMMENDATIONS

The following is an overview of the major recommendations of the Select Committee on Water Marketing to the 49th Legislature.

A. REGULATING THE INTERSTATE MOVEMENT OF WATER

1. Ban on the exportation of water. The statutory ban on the exportation of water from Montana (MCA § 85-1-121) should be permanently repealed; and, with appropriate safeguards, Montana's waters should be permitted to move interstate.
2. Permit criteria. Applications to appropriate large quantities of new water [4000 acre feet/year (ac-ft/yr) and 5.5 cubic feet/second (cfs)] or to change the use or location of presently appropriated water - especially when these applications contemplate the interstate movement of water - should be closely evaluated with reference to detailed public interest criteria (MCA § 85-2-311).
3. Water for coal slurry purposes. With safeguards appropriate to protect the state, its environment, and its citizens, Montana's ban on the use of water for coal slurry purposes (MCA § 85-2-104) should be repealed.
4. Coverage of pipelines under the Major Facility Siting Act. The committee recommends that the siting of all future pipelines exceeding 30 miles in length and 17 inches in diameter be covered by the provisions of the Major Facility Siting Act (MCA § 75-20-101 et seq.).

B. STATE WATER LEASING PROGRAM

5. Limited water leasing program. The committee recommends a limited state water leasing program involving 50,000 ac-ft of impounded water. A lease, for a period not to exceed 50 years' (which can be renewed), would be required to obtain water in two instances: (a) for transport, in any amount, outside of specified water basins; or (b) for any beneficial water use where consumption would exceed 4000 ac-ft/yr and

5.5 cfs. Lease applications would be reviewed under the public interest criteria of MCA § 85-2-311 (as proposed) and, in most cases, through an environmental impact statement.

6. Acquisition of water. Water for the water leasing program would be obtained from (a) specified existing federal reservoirs (i.e., Fort Peck, Canyon Ferry, Tiber, Hungry Horse, Yellowtail); or (b) other existing or future reservoirs in adjudicated basins.

7. Use of water leasing proceeds. The committee identifies numerous possible uses of proceeds from the water leasing program.

C. MAXIMIZING MONTANA'S FAIR SHARE OF MISSOURI RIVER BASIN WATER

"GETTING MONTANA'S HOUSE IN ORDER"

8. General stream adjudication. The committee urges an expeditious and accurate completion of the statewide water adjudication process. The committee recommends that the Legislature support any justified funding request from the water courts.

9. Indian and federal reserved water rights. The committee recommends support for legislation to extend the Reserved Water Rights Compact Commission for two years and the appropriation of adequate funds for the commission to complete its goals.

10. Water resources data management system. The committee recommends the establishment with the Department of Natural Resources and Conservation (DNRC) of a centralized water resources data management system making readily accessible to the state's policymakers necessary information on the state's water resources, existing and projected uses, and existing and projected demands.

11. Water reservation system. Additional funds should be appropriated to ensure adequate monitoring and perfection of the existing Yellowstone water reservations. Water reservations similar to those developed for the Yellowstone River Basin should be prepared for the Missouri River Basin and funds should be appropriated to provide the necessary technical and financial assistance to applicants. Any reservation application proposing out-of-state use of water should be evaluated with

reference to detailed public interest criteria. The DNRC should continue its public education program concerning the merits and procedures of the reservation process.

12. State water plan. The committee strongly urges DNRC to comply with the provisions of MCA § 85-1-203 which requires the preparation of a state water plan, its approval by the Board of Natural Resources and Conservation, and its submission to each general session of the Legislature.

13. Water development. The committee recommends continued funding and bonding for identifying, developing, and constructing water projects within the state. The DNRC, Montana's Washington, D. C. office, and the state's Congressional delegation should work actively for the authorization and funding of federal projects within the state.

14. Water policy committee. The committee recommends the creation of a permanent legislative water policy committee to advise the Legislature, in an ongoing way, on water policy and issues of importance to the state.

"RELATING TO OTHER STATES IN THE MISSOURI RIVER BASIN"

15. Preparation for negotiations and possible litigation. Montana should systematically prepare for negotiations and potential litigation with other Missouri River Basin states.

16. Efforts toward an interstate compact. Efforts toward negotiating a compact among the Missouri River Basin states should be a high priority of Montana. While DNRC should have lead responsibility in this effort, the Legislature's water policy committee should be active in and supportive of these efforts.

D. MISCELLANEOUS PROVISIONS

17. Miscellaneous provisions. The committee makes certain miscellaneous and technical recommendations.

BACKGROUND

The history and culture of Montana are integrally linked with its waters - principally the waters of the Missouri and its tributaries. Before Europeans found their way into these quarters, the native people of the region were spiritually and practically reliant on the river. The journey of Lewis and Clark up to Three Forks and beyond opened the west. The fur trade of the 1800s resulted in a series of settlements along the river. Steamboats operated up as far as Fort Benton providing the materials and goods for the settlement in this new terrain. The major dams on the Missouri's mainstem - Canyon Ferry, Hauser, Holter, Fort Peck - have provided hydropower for the electrification and industrialization of the region as well as water for the irrigation of arid soils.

In the last several decades, the wilderness, recreational, and aesthetic importance of the river has been emphasized. Montanans are also concerned with the quality of the river - its cleanliness, as well as the visual and biological impact of human activities in its proximity.

Because of our ability to dam, divert, pollute, and even sterilize these waters, we as citizens and policymakers have a special responsibility toward our lifeblood. Our stewardship is particularly important due to our location at the headwaters: what we do here with these waters will affect downstream states and users. It was in response to this special and serious responsibility that the 48th Legislature mandated the study of water marketing by an interim Select Committee with four representatives from each of the houses of the Legislature.

The issue of water marketing became prominent during the 1983 Legislature because of the confluence of three events occurring during the six months preceding the opening of the session on January 3, 1983. The first event was the decision of the United States Supreme Court in Sporhase v. Nebraska in July 1982, that water is an article of interstate commerce and that absolute state statutory bans against the

exportation of water are unconstitutional as violations of the dormant interstate commerce clause.

The second event, which occurred on September 16, 1982, was the announcement by the State of South Dakota and Energy Transportation Systems, Inc. (ETSI), that South Dakota, after several months of secret negotiations, had agreed to sell 50,000 acre feet of water per year (ac-ft/yr), from Oahe Reservoir on the Missouri for \$1.4 billion. The water would be used as the transport medium in a coal slurry pipeline to be built from coal fields in the Powder River Basin near Gillette, Wyoming, with a terminus 1300 to 1800 miles south in Arkansas and possibly Louisiana. And, while ETSI has ultimately been cancelled, an alarm was sounded in other states at the time: "Let's get ours before we lose our chance."

The third event was the release, also on September 16, 1982, by the Montana Department of Natural Resources and Conservation (DNRC) of its Water Protection Strategy for Montana: Missouri River Basin (the "Trelease report"). In 1981, the Legislature had directed the department to develop a strategy to protect Montana's options for future instate water use in the face of expanding water use by downstream states. Completed by renowned water expert Frank J. Trelease and Wright Water Engineers, Inc., the study set forth a six-part strategy which, somewhat unfairly, has been widely summarized as suggesting a water development, "use it or lose it," strategy for the state.

By the commencement of the 1983 Legislature, these three events converged. Montana needed to protect its waters, principally on the Missouri. State control over its waters had been significantly weakened by the holding in Sporhase, and its long-term effects were uncertain. South Dakota had turned the damage done by Sporhase to state water jurisdiction into a huge, potential financial bonanza. Other states were likely to follow, with uncertain effects on the allocation of Missouri River water. Montana needed to develop its water through projects such as improvement of the Tongue River Dam, but substantial funds were needed. Therefore, the conclusion seemed logical at the

time: sell water to produce revenues to fund the water development projects necessary to save Montana's water.

During the 1983 session, three bills were ultimately introduced concerning water marketing. Rep. Ted Neuman introduced HB 893 for the Schwinden administration. Rep. Bob Marks introduced HB 894 in a measure closely paralleling the administration's bill.

Ultimately, HB 893 made it to the House floor where, during a late-night session, it was defeated. In its place the Legislature adopted HB 908, authored by Rep. Hal Harper and others. As amended and finally passed, this bill accomplished two things. First, the measure authorized a temporary water marketing program by broadening the authority of DNRC to purchase or acquire water from any federal reservoir (not just Fort Peck, as under the then-existing law) for the purposes of "sale, rent, or distribution for industrial or other purposes." The state's ban on the export of water was repealed, and detailed public interest criteria for the issuance of permits (and retaining ultimate legislative approval of certain large diversions) were placed into law. These provisions will expire on June 30, 1985, and the pre-existing law will be "revived" unless the 49th Legislature acts.

The second accomplishment of HB 908 was the creation of a Select Committee on Water Marketing to "undertake a study of economic, tax, administrative, legal, social, and environmental advantages and disadvantages of water marketing." The committee has been staffed by the Environmental Quality Council. Over the course of the two-year study, the committee has met for eight official meetings, two seminars, and three public hearings.

In developing its final recommendations, the committee considered the merits of four sets of water strategies. These strategy sets were identified as "Level 1" through "Level 4 Responses" depending on the breadth of the actions proposed. The four strategy sets, or levels of response, were as follows:

- Level 1 Response - Do nothing
- Level 2 Response - Undertake a "minor tune-up" of existing statutes
- Level 3 Response - Develop a water marketing program

Level 4 Response - Develop a state strategy to maximize Montana's
fair share of Missouri River Basin water

The committee ultimately decided that a comprehensive state water strategy (Level 4 Response) be recommended to the Legislature. The committee reached the consensus that, while they are important considerations, neither coal slurry nor water marketing are the only issues to be addressed. Rather, the fundamental concern of the 49th Legislature, as well as of many future legislature sessions, is the adequacy of state policies to maximize and reserve for present and future use Montana's fair share of the water in interstate rivers and streams - particularly the Missouri. We do not sell our heritage by marketing 50,000 ac-ft/yr of water. We do let our precious heritage slip away if we fail to adopt legally sufficient policies to protect Montana's present and future interests in the 16.68 million acre feet of water that leave the state through the Missouri and the 26 million acre feet that leave the state through the Clark Fork and Kootenai each year.

A. REGULATING THE INTERSTATE MOVEMENT OF WATER

1. BAN ON THE EXPORTATION OF WATER

Recommendations:

The committee finds that under appropriate circumstances (and as has been the policy for the last two years) the exportation of Montana's water is not in conflict with the public welfare of its citizens or with the conservation of its waters. Thus, the committee recommends that the statutory ban on the exportation of water from Montana (MCA § 85-1-121), which is scheduled to come back into operation of law on July 1, 1985, should not be allowed to revive. The present freedom for water to move interstate, when coupled with the other recommendations of the committee, should be allowed to continue.

Commentary:

With the passage of HB 908, the 1983 Legislature temporarily suspended the provisions of MCA § 85-1-121 that had prohibited the export of water outside the State of Montana unless approved by the Legislature. This suspension was in response to the uncertainty as to the constitutionality of the statute raised by the U.S. Supreme Court's decision in Sporhase v. Nebraska (1982). In its place, the Legislature expanded the criteria enumerated in MCA § 85-2-311 to guide the issuance of a water permit. By the terms of HB 908, these new provisions are to expire on June 30, 1985, with the revival of the pre-existing law, including the export ban.

The Sporhase decision held that Nebraska's statute, which banned the export of groundwater except under limited circumstances, violated the "dormant" interstate commerce clause. Similar litigation concerning the constitutionality of New Mexico's own anti-export ban has been underway in the case of El Paso v. Reynolds. Also, the case of Altus v. Carr (1966) found unconstitutional a Texas statute almost identical to MCA § 85-1-121.

While not completely free of ambiguity, these cases give us helpful guidance in evaluating the constitutionality of Montana's export ban. While each of these three cases involved a prohibition on the exportation of groundwater, we should expect no different analysis by the courts when a state attempts to ban the exportation of surface water. In fact, surface water is more of an interstate commodity than groundwater and invites more scrutiny from the courts in application of the interstate commerce clause.

The conclusion seems inescapable that the provisions of MCA § 85-1-121 are unconstitutional. It is true that the Sporhase decision, in general, allows a state to impose some burdens on interstate commerce as a result of its water management policies and specifically allows measures by arid states to achieve water conservation for health, welfare, and safety purposes. Such restraints must, however, be closely tailored to achieve the conservation purposes intended.

The provisions of MCA § 85-1-121 fail to achieve such a closely tailored fit. While the section does not impose an absolute ban on

exporting, due to the Legislature's ability to approve such a diversion, the discretion given to the Legislature is unduly broad. No criteria to guide the Legislature's consideration of an export petition are set forth; thus, the decision could be made on any basis. Also, the export petition is not required to be reviewed by DNRC prior to its submission to the Legislature. Consequently, there is no assurance that an export petition would ever be subjected to expert water management scrutiny so as to determine whether the proposal threatens to endanger the health, welfare, or safety of Montanans.

The Legislature has not been faced with a petition for the exporting of water so it is uncertain how such a petition would be processed. While it is possible that the constitutionality of the statute could be salvaged by careful legislative scrutiny of the petition on the basis of water conservation considerations, the Legislature would still face a heavy burden of justifying any denial.

Proposed language:

[See Section 24 of the bill]

2. PERMIT CRITERIA

Recommendation:

The committee recommends that the public interest considerations enacted in 1983, which govern the issuance of water permits in the state (MCA § 85-2-311), be continued. The committee suggests that these criteria be strengthened by including provisions which were recently approved by a federal court in New Mexico. The committee also suggests that, in certain instances, these public interest criteria apply to applications for a change in use of water. Under certain circumstances, the Department of Natural Resources and Conservation should undertake rulemaking to more completely implement the permit criteria.

Commentary:

In 1983, the Legislature strengthened the criteria contained in MCA § 85-2-311 governing the issuance of water permits. This modification, effective for two years, added the following major features to the criteria (commonly called "public interest criteria"). In permit applications for appropriations of 10,000 ac-ft/yr or more or 15 cfs or more:

- (1) a determination that the proposed appropriation is "reasonable" based on the following considerations:
 - (a) existing and future demands for water;
 - (b) anticipated benefits to the applicant and state;
 - (c) effects on the quantity and quality of water;
 - (d) possibility of saline seep; and
 - (e) probable, significant adverse environmental impacts; and
- (2) for consumptive diversions in these amounts, approval of the Legislature.

These provisions are scheduled to expire on July 1, 1985; and the old version of section 85-2-311 is scheduled to revive. The committee, however, has received favorable public comment concerning the temporary provisions of MCA § 85-2-311. In general, the committee believes such provisions can safeguard many of the state's concerns about the export of water and coal slurry pipelines and should be reenacted.

Additionally, however, the committee believes that several provisions drawn from New Mexico (and that have been approved by the federal district court there), if coupled with Montana's statute, could significantly protect Montana's valid interest when proposals are made to move water interstate. Specifically, proposals for the out-of-state movement of water would have to be evaluated against the following additional criteria:

- (1) whether there are water shortages in Montana;
- (2) whether water subject to the application could feasibly be transported to alleviate shortages in Montana;
- (3) the sources of water available to the applicant in the state of destination; and
- (4) the demand being placed on the applicant's sources and supply in the state of destination.

* Acting upon the recommendation of DNRC, the committee believes the water quantity necessary to trigger application of the public interest criteria should be reduced to 4000 ac-ft/yr or more and 5.5 cfs or more. This reduction would not be onerous to applicants as only 56 out of more than 8,000 permit applications since 1973 have been of this magnitude.

At present, the protective public interest criteria do not apply to change of use applications for existing water rights. Thus, existing water rights might be transferred to another use although, under the public interest criteria, water could not be appropriated for such a use. In order to ensure that the public interest criteria apply across the board, the committee recommends their application to certain change of use applications of 4,000 ac-ft/yr or more and 5.5 cfs or more.

Proposed language:

[See Sections 4 through 7 of the bill]

3. WATER FOR COAL SLURRY PURPOSES

Recommendations:

The committee recommends that Montana's ban on the use of water as a medium to transport coal in a pipeline be removed. The use of water in a coal slurry pipeline should be recognized as a beneficial use of water. This recommendation is expressly conditioned on the passage of other recommendations made by the committee to protect the state, its environment, and its citizens from the potential damage that can be caused by such pipelines.

Commentary:

Section 85-2-102, MCA, defines the beneficial use of water to mean a use of water for the benefit of the appropriator, other persons, or

the public, including but not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses. Also, MCA § 85-2-103 makes clear: "(1) the Legislature finds that the use of water for the slurry transport of coal is detrimental to the conservation and protection of the water resources of the states; and (2) the use of water for the slurry transport of coal is not a beneficial use of water."

The coal slurry ban, as presently constituted, results in some potentially strange results. Surprisingly, it bans neither the transport of coal by pipeline nor the use of water in a pipeline. What it does ban is the mixing of the two substances in a pipeline.

A coal slurry pipeline can be built and operated in the state so long as the medium for transport is other than water (e.g., methane, liquid carbon dioxide). Also, water can be used as the medium in a slurry pipeline so long as the substance being transported is not coal (e.g., grain, other minerals). Even though the coal slurry ban has been justified on the basis of minimizing negative environmental impacts, the construction of a pipeline for the conveyance of coal (without water) or other substances (with or without water) is not subject to permitting under the state's Major Facility Siting Act or any other statewide regulatory scheme (except for possible requirement of an environmental impact statement under the Montana Environmental Policy Act).

The Sporhase case recognizes the legitimacy of state conservation measures "to regulate the use of water in times and places of shortage for the purpose of protecting the health of its citizens...." The questions for Montana, however, become (1) whether such a ban violates the equal protection clause of either the U.S. Constitution or the Montana Constitution; and (2) whether a ban against coal slurry pipelines violates the "dormant" interstate commerce clause of the federal Constitution by impermissibly burdening commerce between the states.

Numerous experts have provided the committee with their views as to the constitutionality of the coal slurry ban. Their views have generally been mixed. Supporters of the ban have indicated that Montana has both a strong constitutional and statutory basis for the conservation of natural resources. They argue that coal slurry is a totally consumptive water use, unlike many industrial uses; that it requires continuous, large amounts of coal to operate; and that it has other environmental impacts in the construction and operation of the pipeline. The ban, therefore, represents a state policy whose purpose is to closely regulate the speed and intensity of coal development.

Critics of the statute argue that the coal slurry ban is irrational in relationship to its stated purposes and cannot be sustained. The ban does not conserve coal, as the mineral can be moved by other transportation modes or, even, by pipelines using a transport medium other than water. Nor does the ban conserve water; water can be used for all other forms of pipelines.

Critics of the statutory ban also argue that "coal slurry pipeline transportation systems, simply because of their size and economic scale,

contemplate the interstate movement of coal to distant markets." As these pipelines generally use water as the medium of transport, a ban on the appropriation or use of any water, regardless of its quality, may unreasonably interfere with interstate commerce. Montana's interest in protecting and conserving its waters can be pursued through other means having less impact on interstate commerce.

The committee is of the judgment that the constitutionality of the coal slurry ban could be sustained against an equal protection attack. The committee, however, agrees with the observation of Professor Albert Stone of the University of Montana School of Law: the constitutionality of the coal slurry ban under the interstate commerce clause is "a close question, too close to permit reliance upon the statute." The consequence of the state being wrong in terms of the ultimate defensibility of its ban are severe: the water could be appropriated without significant payment to the state, the pipeline could be constructed outside any significant state regulation (except the Montana Environmental Policy Act), and the state could be liable for the prevailing party's attorneys fees.

Proposed language:

[See Section 25 of the bill]

4. COVERAGE OF PIPELINES UNDER THE MAJOR FACILITY SITING ACT

Recommendation:

The committee recommends that the siting of all future pipelines exceeding 30 miles in length and 17 inches in diameter be covered by the provisions of the Major Facility Siting Act (MFSa). The DNRC should continuously monitor slurry technology to ascertain whether this standard provides sufficient protection to the state.

Commentary:

Montana's Major Facility Siting Act requires that a major facility (usually an energy-related facility) obtain a certificate of environmental compatibility and public need from the Board of Natural Resources and Conservation prior to construction. The certificate is considered by the board only after an extensive application has been submitted with an opportunity for federal, state, and local governmental agencies, as well as the general public, to comment on it. The application also receives a thorough evaluation from DNRC, which forwards its recommendations to the board.

Coverage by the MFSa results in a comprehensive review by the board of numerous environmental and economic considerations. At present, there is limited coverage of pipelines under the Siting Act. Under current law, if pipelines run to or from a large energy facility located in or out of Montana, the pipeline and its associated facilities must be constructed in accordance to a certificate issued by the board. This

application is very limited however in that pipeline developers could easily tailor new coal slurry pipelines to circumvent this limited coverage.

Coverage of certain large pipeline projects under the public need provision of the Siting Act would appear justified on the same basis that other large projects are under the Act: if the public is to invest in public works and services to support the construction and operation of such projects (as well as to mitigate their negative impacts), then the taxpayers should be afforded an independent review of the feasibility of the project.

The committee also feels that environmental compatibility is another reason for which to place large pipelines not running to major energy facilities under the Siting Act. Because the committee is concerned with minimizing environmental damage along the construction route, all pipelines in excess of a certain length and width should be covered.

Proposed language:

[See Sections 8 through 13 of the bill]

B. STATE WATER LEASING PROGRAM

5. LIMITED WATER LEASING PROGRAM

Recommendation:

The committee recommends establishing a limited state water leasing program involving a total of 50,000 acre feet of impounded water. A lease from the state would be required to obtain water in any amount for transport outside the specified river basins or for uses where water in excess of 4,000 ac-ft/yr and 5.5 cfs is consumed. All such leases would be reviewed under the public interest criteria of MCA § 85-2-311; and an environmental impact statement would be required in most instances. Lease terms would be 50 years or less and could be renewed.

Commentary:

The details of the limited water leasing program recommended by the committee are as follows. Administered by DNRC, water would be leased from the state under two prospective circumstances:

(a) whenever water in any amount is being sought for transport out of the following river basins: the Clark Fork River and its tributaries to its confluence with Lake Pend Oreille in Idaho; the Kootenai River and its tributaries to its confluence with Kootenay Lake in British Columbia; the St. Mary River and its tributaries to its confluence with the Oldman River in Alberta; the Little Missouri River and its tributaries to its confluence with Lake Sakakawea in North Dakota; the Missouri River and its tributaries to its confluence with the Yellowstone River in North Dakota; and the Yellowstone River to its confluence with the Missouri River in North Dakota; or

(b) for uses where water in excess of 4,000 ac-ft/yr and 5.5 cfs would be consumed.

Only a total of 50,000 ac-ft/yr of water could be leased under this program for the foregoing two purposes. As water was leased, water would be appropriated in the name of the State of Montana and a certificate issued to DNRC. In the event lease applications exceeded 50,000 ac-ft/yr, DNRC would have to return to the Legislature for additional leasing authority.

The source of water for the leasing program would be impounded water from any reservoir within Montana. Water could not be leased from a reservoir in a basin for which a pending or final decree under the general stream adjudication program had not been entered. This restriction would not apply to Fort Peck, for which the state has an existing water purchase and revenue sharing agreement with the U.S. Bureau of Reclamation, and Tiber, Canyon Ferry, Hungry Horse and Yellowstone reservoirs, once memoranda of agreement have been executed. The committee strongly urges that DNRC negotiate (or renegotiate, in the case of Fort Peck) memoranda of agreement covering all federal reservoirs within the state and water purchases for all types of uses (not just industrial).

Water would be leased through bilateral negotiations. Upon receipt of an application to lease water, DNRC would evaluate the proposal with reference to the public interest criteria of MCA § 85-2-311(2) [as proposed in this report], regardless of the amount of water involved. For proposals involving less than 4,000 ac-ft/yr and less than 5.5 cfs, however, an environmental impact statement would be required only in the discretion of DNRC under its Montana Environmental Policy Act (MEPA) rules and whenever the cumulative effect of several small applications caused a significant environmental impact.

Water would be leased for terms not to exceed 50 years, although the term could be renewed. DNRC could require that 25 percent of project capacity be set aside for municipal and rural purposes (upon payment by the municipal or rural government entity of the costs of tie-in). Any other terms or conditions would be determined by DNRC through negotiations.

Proposed language:

[See Section 14 of the bill]

6. USE OF WATER LEASING PROCEEDS

Recommendation:

The committee recommends that proceeds from a water leasing program should be used to develop a sound water policy and water development program in Montana. Some possible uses of water leasing proceeds that were suggested by the committee are as follows:

- (a) all proceeds paid into the general fund;
- (b) to administer a water leasing program;

- (c) to support the water courts in their adjudication of water rights;
- (d) to be deposited in the water development earmarked account within the earmarked revenue fund established in MCA 17-2-102;
- (e) to provide a centralized water resource data management system as described in this committee's recommendations;
- (f) to provide technical and financial assistance to applicants for water reservations and to perfect existing water reservations in the Yellowstone River Basin;
- (g) to repair and restore existing state-owned dams as required for safety reasons and/or to expand their beneficial use;
- (h) to provide for development of water projects including off-stream storage sites that are necessary to meet existing and future water demands;
- (i) to repair and restore existing municipal water supply systems;
- (j) to provide installation of rural water supply systems in areas of critical need;
- (k) to develop an inventory and classification of the state's groundwater resources;
- (l) to provide expenses and administrative costs of a water policy committee as recommended by the Select Committee on Water Marketing;
- (m) to purchase public access sites for recreational use of streams and lakes;
- (n) to fund water conservation measures;
- (o) to fund research on improved irrigation systems and water conservation measures especially suitable for Montana;
- (p) to complete soil surveys and mapping of the state and the identification of land areas suitable for irrigation; and
- (q) to further efforts to prepare for interstate litigation and negotiations.

7. ACQUISITION OF WATER FROM FEDERAL RESERVOIRS

Recommendation:

The committee recommends that the DNRC be granted continued authority to acquire water from all federal reservoirs in the state (as is now the policy under the temporary two-year modification to this section). The committee recommends that the department's authority be clarified to allow acquisition for "any beneficial use."

The existing agreement with the Bureau of Reclamation for the state's acquisition of water from Fort Peck limits the acquisition to industrial water. Under the current agreement the Bureau could sell large amounts of water for nonindustrial purposes and avoid sharing revenues with the state. The committee strongly urges that this agreement be renegotiated, and all future agreements be negotiated to cover water for any beneficial use.

Proposed language:

[See Section 15 of the bill]

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C. MAXIMIZING MONTANA'S FAIR SHARE OF MISSOURI RIVER BASIN WATER
"GETTING MONTANA'S HOUSE IN ORDER"

8. GENERAL STREAM ADJUDICATION

Recommendation:

The committee urges an expeditious and accurate completion of the statewide water adjudication process. The committee strongly urges that priority be given to prompt and accurate adjudication of the Missouri River Basin. The committee recommends that the Legislature support any justified funding request from the water courts.

Commentary:

The adjudication of pre-1973 water rights presently underway in the five water courts of the state is essential to protect future water needs in Montana. To date, three final decrees involving 10,715 claims have been entered; and 26 sub-basins, involving 46,726 claims, are predicted to be covered by preliminary decrees by the end of 1984.

Chief Water Judge W. W. Lessley has indicated that the adjudication process for the 200,000 plus claims that are now on file will be completed by 1990. To ensure the process is completed on schedule the Legislature should support the court's funding request.

9. INDIAN AND FEDERAL RESERVED WATER RIGHTS

Recommendation:

The committee recommends support for legislation that would provide a two year extension of the Reserved Water Rights Compact Commission in its efforts to negotiate federal and Indian reserved water rights. The committee recommends that adequate funds be appropriated for the Reserved Water Rights Compact Commission to accomplish its goals.

Commentary:

The committee recognizes an urgency to conclude the equitable adjudication of Indian and federal reserved water rights. Unquantified reserved water right claims hamper the ability of the state to complete the statewide adjudication of water rights, interfere with water resource planning, and limit the state's ability to prepare for interstate apportionment of the Missouri River.

In the event the Legislature chooses to renew the charter of the commission, the level of resources dedicated to the compact commission should be examined. The Legislature might encourage the development of joint water project proposals with Indian tribes as a means to satisfy both Indian claims and state needs.

10. WATER RESOURCES DATA MANAGEMENT SYSTEM

Recommendation:

The committee recommends the establishment within DNRC of a centralized water resources data management system. The system would make

readily accessible to the state's policymakers necessary information on the state's water resources, existing and projected uses, and existing and projected demands. The committee also recommends that \$50,000 per year for each of the next five years be allocated for the development of such a system.

Commentary:

In the 1982 Trelease study done for DNRC, the authors found that:

"In order to make their specific decisions, each agency collects the necessary data which are stored in separate agency files and, in many cases, are difficult to relocate. At the present time much of the water resource data is fragmented, neither indexed nor inventoried, not recorded in a standard format, and most importantly, not readily accessible to those who need the information for making management decisions."

The study also reported that the state does not presently maintain data as to amount of water actually used by water claimants. Thus, the existing method reports maximum legal use rather than actual diversion.

The Trelease study suggested that centralized information is needed on the state's water resources, existing uses, and the potential for future development. As previously stressed in the present report, "the identification of existing uses and future development potential is Montana's only line of defense to obtain a fair share in any interstate allocation." Specifically, the Trelease report suggested a centralized water resources data system should have five objectives: (1) to inventory and index the location of all pertinent water resource data; (2) to assess the accuracy and completeness of existing data (remove all duplication); (3) to standardize data collection procedures; (4) to develop and implement a centralized data system that is easily accessible in a useable format to all users; and (5) to establish a continuous and integrated water resource data collection and management program. To meet this need, the Trelease report recommended the allocation of \$50,000 per year for the next five years for the development of such a centralized water resources data system.

Such a data system is important both to current Montana users and potential users, as well as to the state as it develops interstate water policy. The committee is concerned, however, about relying entirely on one data system to report on present and future supply and demand. The Legislature may well wish for its Water Policy Committee, recommendation 14, to undertake verification of water resource data maintained by DNRC. The purpose of the verification would not be to duplicate functions already performed by the agency but to challenge or confirm the methodological assumptions and to systematically spot-check the data. The function would go a long way in raising the level of confidence of Montana policymakers, including the Legislature and the department itself, in the water resource data that they utilize in determining their long-term water policy.

Proposed language:

[See Section 18 of the bill]

11. WATER RESERVATION SYSTEM

Recommendation:

The committee recommends an aggressive use of the water reservation system as provided in MCA § 85-2-316 to plan for and set aside water for the anticipated future needs of the state. To accomplish the reservation of waters, the committee further recommends the following:

(1) The Legislature should encourage the water reservation process by appropriating sufficient funds for technical and financial assistance to the appropriate state agencies and other political subdivisions that are authorized to reserve water.

(2) The Legislature should appropriate funds to increase the monitoring and review of existing water reservations in the Yellowstone River Basin to ensure that progress is made in perfecting these reservations.

(3) The Legislature should mandate and fund an expedited reservation process for the Missouri River Basin.

(4) Reserved waters should be exempt from the leasing program.

(5) Reservations for use of water out-of-state should be evaluated against public interest criteria based on the New Mexico statute (see Section 2).

Commentary:

Accurate predictions of future water needs are important both to water resource management within the state and in preparation for negotiations or litigation with other states. Such information is also essential in dealing with Congress concerning water project funding and other issues, such as a Congressional apportionment of the Missouri.

Montana's innovative water reservation system is a systematic means to identify future uses in a basin. While reservations operate like permits in that they are protected in most cases from subsequent appropriations within the state, they may not be recognized as inchoate permits in an interstate apportionment action. But to the extent the reservation process represents a well-conceived attempt by Montana to manage and plan for the necessary future uses of its water, established reservations should be persuasive to the courts and Congress.

Reservations have been completed in the Yellowstone River Basin but the committee recognizes an urgent need to proceed with the reservation process on other major river basins. Because of downstream states' interests in the Missouri River Basin, the committee has recommended special attention be given to water reservations in this basin.

There are uncertainties regarding some water rights in the Upper Missouri River Basin but the committee urges that the planning and technical efforts required for water reservations be initiated.

The successful development of water reservations in the Missouri River Basin will require sufficient financing and technical expertise to assist state and local government entities in initiating and completing the process.

The 1982 Trelease study done for the DNRC stated:

"It is critically important that the water reserved under the Yellowstone reservation process be developed within a reasonable time frame and that the reservants adhere to the schedule stipulated by the Board of Natural Resources and Conservation in the Reservation Order. This process must be able to withstand an equitable apportionment lawsuit among the Missouri Basin states. The Montana legislature realized this and allocated funds for administrative and technical assistance to the Yellowstone conservation districts in developing their reservations. The state should continue to closely monitor the development of these reservations to assure compliance with the Board reservation order."

The committee agrees with the Trelease recommendation and urges the Legislature to provide funding for additional technical and financial assistance to assure perfection of the Yellowstone reservations.

Proposed language:

[See Sections 16 and 17 of the bill]

12. STATE WATER PLAN

Recommendation:

The committee strongly urges DNRC to comply with the provisions of MCA § 85-1-203 which requires the preparation of a state water plan, its approval by the Board of Natural Resources and Conservation, and its submission to each general session of the Legislature. Also, the committee urges state officials and the state's Congressional delegation to pursue federal policies consistent with and in furtherance of the state water plan.

Commentary:

Section 85-1-203, MCA, which was originally passed in 1967 and revised in 1974, requires that the DNRC formulate, and, with the approval of the Board, adopt "a comprehensive, coordinated, multiple-use water resources plan" for the state. The plan, which can be formulated and approved in sections, is required to set forth "a progressive program for the conservation, development, and utilization of the state's water resources and to propose the most effective means by which these water resources may be applied for the benefit of the people." The section requires that the plan be adopted only after properly noticed public hearings. Additionally, the plan must be submitted to each general session of the Legislature.

While DNRC has undertaken many specific water studies in the state, it is unclear whether those are considered by the department as being the state water plan. There have been no public hearings advertised in accordance with the statute. The Board has not approved any document or set of documents or component of the plan. Most importantly, no such plan has been submitted to the Legislature in preceding sessions.

Although DNRC has given indications that such a "plan" will be submitted to the 1985 Legislature, whether it will have been scrutinized through the required public hearings is unclear. Thus, if the plain language of section 85-1-203 is applied, Montana does not have a state water plan.

Compliance with section 85-1-203 is no mere procedural nicety. It is an indispensable prerequisite for demonstrating, in any interstate apportionment action, that Montana has systematically and thoughtfully planned for its water future. The state is vulnerable to the extent it does not comply with its own statutory requirements for the development of the state water plan. Montana's equities are improved in an interstate setting if it develops a plan demonstrated as such and involving the public and the Legislature.

13. WATER DEVELOPMENT

Recommendation:

The committee recommends continued funding and bonding capacity for the identification, development, and construction of water projects within the state. The Department of Natural Resources and Conservation should prioritize potential federal projects that would qualify under the Pick-Sloan Plan and report this listing to the Legislature each biennium. In addition to monitoring developments and issues that affect the state, Montana's existing Washington, D.C. staff, in conjunction with the state's Congressional delegation, should work toward the authorization and funding of such projects.

Commentary:

Putting water to use is important for buttressing Montana's claim to its fair share of Missouri Basin water, and water development is important for putting the water to use.

While DNRC has pursued federal funding on projects such as on the Milk River, more could be done to see authorization or funding for water development projects which would qualify under the Pick-Sloan Plan. In the proposed amendments, the committee seeks to require DNRC, as a part of its biennial report to the legislature, to identify such potential projects and specify the efforts it will undertake to secure this authorization and funding. Also, the committee urges Montana's Washington, D.C. office and Congressional delegation to support these efforts.

Proposed language:

[See Section 20 of the bill]

14. WATER POLICY COMMITTEE

Recommendations:

The committee recommends the creation of a permanent legislative water policy committee to advise the Legislature, in an ongoing manner, on water policy and issues of importance to the state.