

FINAL REPORT
OF THE
SELECT COMMITTEE ON WATER MARKETING
TO THE
49TH LEGISLATURE
STATE OF MONTANA

JANUARY 1985

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MARCH 10, 2010
EXHIBIT 13





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 ETSJ 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?

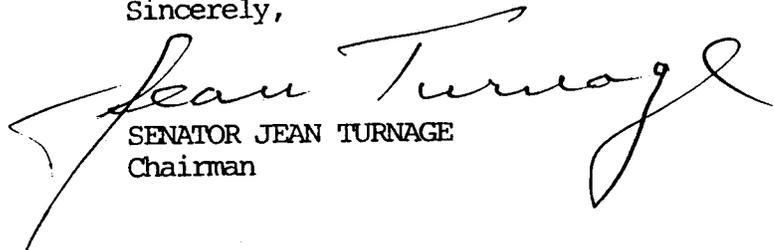
I am pleased to report that, in eight meetings of the Select Committee over the last 19 months, this broader inquiry has been addressed. We have received the insightful testimony of concerned Montana citizens and organizations. We have benefitted from the expertise of practitioners and scholars from 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.

This document is the complete final report of the committee. It includes the recommendations that were unanimously approved by all members of the committee in attendance at its meeting on December 3, 1984. The committee has already submitted a summary report to the Legislature.

Many of the recommendations in this report specify 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.

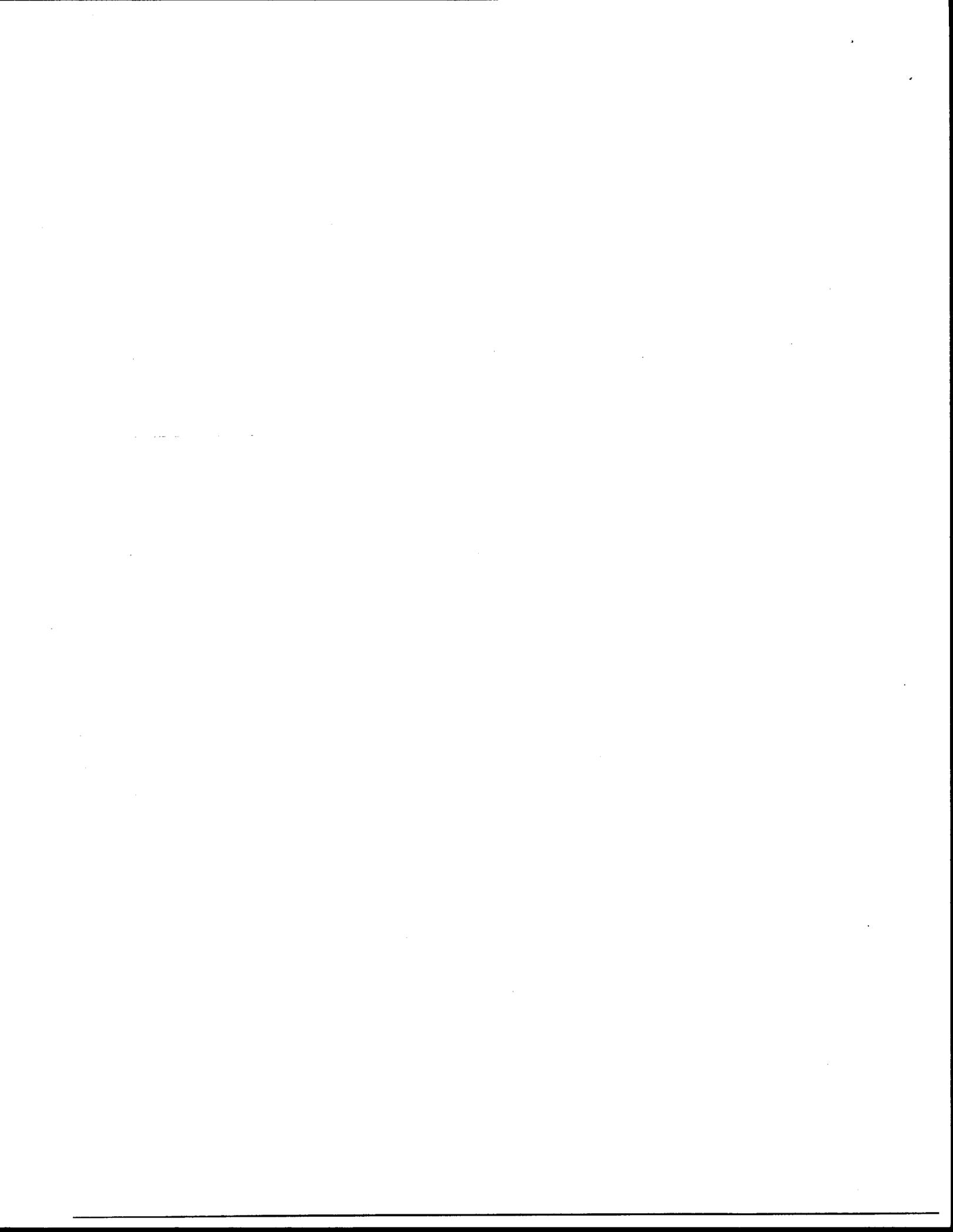
"RELATING TO OTHER STATES IN THE MISSOURI RIVER BASIN"

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.



Reports and Statutes Cited
Water Policy Interim Committee
Presentation: "Water Marketing – Present & Future"
Mike McLane, Water Conservation and Instream Flow Specialist

Date	Event
January 1985	<p>Report of the Select Committee on Water Marketing, 49th Legislature, State of Montana, Environment Quality council.</p> <ul style="list-style-type: none"> ➤ Regulating the Interstate Movement of Water <ul style="list-style-type: none"> ○ Repeal ban on exportation of water <ul style="list-style-type: none"> ▪ (response to Sporhase v. Nebraska a July 1982 US. Supreme Court Decision on the interstate movement of water. ○ Create new permit and change of use criteria for large applications (4,000 acre foot and 5.5 cfs) ○ Repeal ban on use of water in coal slurry pipelines ○ Facility Siting Act regulation of certain pipeline ➤ State Water Leasing Program <ul style="list-style-type: none"> ○ Encouraged DNRC to comply and develop state water plan ○ Funding a Water Development Program ○ Create a Water Policy Committee ○ Limited Water Leasing Program <ul style="list-style-type: none"> ▪ Limited program of 50,000 acre feet ▪ Water to be sub leased to uses for periods not to exceed 50 yrs. Renewable ▪ Leases would be used to provide water for <ul style="list-style-type: none"> • Transport outside specified basins, • For any beneficial use greater than 4,000 ac. ft & 5.5 cfs ▪ Leases reviewed under public interest criteria ▪ Water for program to come from existing federal reservoirs or other existing or future reservoirs. ▪ Made recommendation of proceeds of the lease. ➤ Recommendations for "Getting Montana's House in Order" ➤ Preparations related to other downstream states use of water. <p>Water Leasing Program (85-2-141 MCA).</p>
1985	

- Create a water leasing program on behalf of the State to be administered by DNRC
- 1985 ***Slurry Transport of Coal, (85-2-104 MCA) (enacted 1979, repealed 1985)***
- Feb. 1989 ***Montana Water Plan – Agricultural Water Use Efficiency***
 - Three recommendations include
 - “The law should clearly provide that if an irrigator salvages water, he maintains the right to use the water. However, salvaged water must be defined to include only water that has not been available for reuse by other water users.
- Feb. 1989 ***Montana Water Plan – Instream Flow Protection***
 - Three recommendations including the following
 - Allow FWP to lease water rights from off stream or consumptive uses for purpose of protecting instream flows in important stream reaches. Those opportunities are entirely voluntary and would not jeopardize existing off stream water rights. It would result in the temporary transfer of an off stream water right to enhance instream flows during critical low flow periods.
- 1989 ***Instream Flow to Protect, Maintain or Enhance Streamflows to Benefit Fishery Resource – Change in Appropriation Rights by Department of Fish, Wildlife and Park...(85-2-436 MCA 2009)***
 - In 1989 section 436 was titled “Water Leasing Study)
- Dec. 1990 ***Montana Water Plan - Drought Management***
 - Made 12 recommendations including the following
 - Clarify state law so that water right holders who conserved water are clearly allowed to sell or lease the salvaged water in manner that does not adversely affect existing water users.
 - Clarify state law to clearly allow the voluntary temporary changes of private water rights contract exchanges. Such change could reallocate water to highly valued off stream and instream uses, whose users anticipated water short years. Such reallocation would be regulated by the state to insure the protection of other potential affected water users and would have to be planned well in advance of the anticipated dry years.
- 1991 ***Salvaged Water, (85-2-419 and 85-2-402 (2)(e) 85-2-407***
- 1991 ***Temporary Changes in Appropriation Water Rights (85-2-407)***
- 1995 ***Temporary Changes in Appropriation Water Rights for Instream Flow – Additional Requirements (85-2-408 MCA)***
- 2001 ***Short-term lease of Appropriation Right (85-2- 410 MCA)***