**MINUTES**

**MONTANA SENATE**
**56th LEGISLATURE - REGULAR SESSION**

**COMMITTEE ON JUDICIARY**

**Call to Order:** By **CHAIRMAN LORENTS GROSFIELD,** on March 15, 1999 at 10.00 A.M., in Room 415 Capitol.

## ROLL CALL

**Members Present:**
Sen. Lorents Grosfield, Chairman (R)
Sen. Al Bishop, Vice Chairman (R)
Sen. Sue Bartlett (D)
Sen. Steve Doherty (D)
Sen. Mike Halligan (D)
Sen. Ric Holden (R)
Sen. Reiny Jabs (R)
Sen. Walter McNutt (R)

**Members Excused:** Sen. Duane Grimes (R)

**Members Absent:** None.

**Staff Present:** Judy Keintz, Committee Secretary
Valencia Lane, Legislative Branch

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

**Committee Business Summary:**
Hearing(s) & Date(s) Posted: HB 283, HB 407, HB 593, 3/12/1999
Executive Action:

## HEARING ON HB 407

**Sponsor:** **REP. CINDY YOUNKIN, HD 28, Bozeman**

**Proponents:** **Russ Mackley, Water Court Advisory Committee**
**Barry Hedrick, Rancher, Adjudication Advisory Committee**
**Scott Kulbeck, Montana Farm Bureau**
**John Bloomquist, Montana Stockgrowers Association**

**Jim North, Attorney and Rancher**
**Opponents: Bruce Loble, Water Judge, Montana Water Court**
**Wally Congdon, Rancher and Attorney**
**Tracy Turek, Citizen**

**Opening Statement by Sponsor:**

**REP. CINDY YOUNKIN, HD 28, Bozeman,** remarked that the Water Use Act of 1973 was the beginning of the adjudication process. It left the process in the hands of the Department of Natural Resources (DNRC). In 1979, the Legislature passed SB 76, which created the current adjudication process and the Montana Water Court. This process to protect Montana's water resources from claims by downstream states and to allow Montana to adjudicate it's own water rights, including the federal and Indian reserved water rights, was the impetus for beginning the adjudication process in the first place. The Water Use Act required that all users of water rights which were in existence as of July 1, 1973, had to file a claim for a water right. The deadline for filing those claims was April 30, 1982. This deadline was extended several times to allow for the filing of late claims. Domestic and in stream stock water rights were exempt from filing but all other water rights for irrigation, mining, municipal, and various other types of uses had to be filed by the April 1982 deadline.

There were over 200,000 claims filed with the DNRC for different types of water rights. The claims were organized by the DNRC into watersheds or basins and they were compiled into temporary preliminary decrees or preliminary decrees. Those decrees were issued by the Water Court. In basins where there are federal and Indian reserved rights, the temporary preliminary decree is issued before a preliminary decree. Both decrees are opened up for other water users to review those decrees and file objections to claims which they feel may adversely them. If they were not filed based on actual historic use, another party has an opportunity to file an objection. The Water Court places the objections into cases usually based on all the objections or claims of one water user or perhaps all of the claims on one creek. Most cases before the Water Court are resolved without a need for a trial.

The measure of a water right is actual historic beneficial use. Beneficial use is defined Section 85-2-102(2). There is no allowance for planned future uses.

There are four ways that the accuracy of the decree in insured. The first way is between two adverse parties on the creek, a claimant and an objector. For example, a neighbor may realize that there is a problem with a claim. He sends his objection to

the claim to the Water Court. The adversarial nature of the proceedings is a good measure of accuracy.

Another way to insure accuracy is an institutional objector. This would be either the Attorney General's Office or the DNRC. Currently Montana does not have an institutional objector. In the early 1980s, the DNRC was enabled and budgeted to be the institutional objector. The funds for this process were removed from the DNRC in the 1989 Legislative Session.

When clams are first filed, the DNRC reviews the maps, legal descriptions, acres claimed, priority dates, decree, any filed appropriations, etc. If irregularities are found, a grey area remark is placed on the abstract of the claim. Currently, the DNRC provides assistance to the Water Court after the temporary preliminary decree is issued. The Water Court may also call in a claim on its own motion in the absence of an adverse party.

Once parties have come to agreement, the Water Court has the power to hire its own expert witness and have the settlement agreement reviewed by the DNRC, which is not a party to the proceeding or an objector. If the DNRC is to be involved in this process, it should be involved from the very beginning. The current procedures create or find a problem where the parties did not have a problem. If the Water Court is to look out for the public interest and assume the role of a prosecutor or an institutional objector, specific rules need to be developed that outline the process and notice for the parties involved in the cases.

This bill allows that after January 1, 2000, the Water Court would be allowed to fix only those issues of fact or law as they exist between adverse parties until rules have been promulgated by the Supreme Court. If a court is an adversary in a proceeding before it, it cannot remain a neutral trier of fact and the rights of the parties to impartiality in that proceeding are severely compromised.

***{Tape : 1; Side : A; Approx. Time Counter : 10.22}***

**Proponents' Testimony**:

**Russ Mackley, Water Court Advisory Committee**, remarked that it is impossible to arrive at an adjudication that is 100% accurate. Several mechanisms have been tried and rejected to deal with the accuracy versus equity issue. The DNRC has acted as an institutional objector. This was too expensive and time consuming. Various federal entities have acted as de facto institutional objectors. The Water Court has become concerned about accuracy.

A claimant and objector may pursue their differences of opinion through the litigation process. Those differences of opinion may be resolved by a settlement agreement. In an ordinary court setting, the settlement agreement is accepted without question by the court. In the Water Court, oftentimes the settlement agreement is rejected or questioned by the Court, in whole or in part, and the parties are left to redo their agreement based upon input from the Court. The parties are concerned over what level of investment to make in the settlement process.

**Barry Hedrick, Rancher, Adjudication Advisory Committee,** contended that this legislation will provide better direction for the participants in the adjudication process. He has been involved with a settlement agreement which addressed the issues of concern between the adverse parties. On motion from the Water Court, the DNRC reviewed the stipulation and overturned the same. Some people have raised concerns that adverse parties will work together on a sweetheart agreement on water rights issues. This may occur. However, the people who make the agreements need to be able to live with the agreements. It is very unlikely that persons will agree with something that they cannot work with in the future.

***{Tape : 1; Side : A; Approx. Time Counter : 10.31}***

**Scott Kulbeck, Montana Farm Bureau,** commented that they support the streamlining of the adjudication process pertaining to water rights.

**John Bloomquist, Montana Stockgrowers Association,** claimed that the adjudication process is one of the most important endeavors this state is working on in terms of quantification and parameters of the existing water rights. Water rights are property interests and are immensely important, not only to agriculture, but to municipalities and other water rights' users.

The adjudication process is a creature of the legislature. The on-motion situation involves the Water Court acting as an adverse party on occasion. He raised a concern with the role of the DNRC in terms of how the Water Court and the DNRC relationship is implemented in the adjudication process. There are circumstances where the parties have stipulated to the facts of a particular case after years of negotiation and litigation. This stipulation may be presented to a field office and totally new issues and concerns are raised which causes everything to fall apart.

The other situation, which includes due process ramifications, includes where exparte communication occurs, either with the DNRC and the Water Court or the DNRC and one party to a case, which

then is used in the adjudication of the rights or the questioning of a stipulation.

Section 3 of the bill addresses attorney fees and frivolous claims or objections. When the process began, the Water Court and DNRC recommended that filing should be made on what was believed to be accurate and it would be sorted out later. Someone acting on that advice should not be subjected to penalty.

**Jim North, Attorney and Rancher,** related that ranchers and irrigators are the ones who know about water rights. Lawyers who help their clients negotiate stipulations are finding those stipulations called into question by someone in an office looking at a piece of paper. This is costly to the clients. He suggested extending the time for the Supreme Court to enact rules to July l, 2000.

***{Tape : 1; Side : A; Approx. Time Counter : 10.40}***

**Opponents' Testimony**:

**Bruce Loble, Water Judge, Montana Water Court,** insisted that the bill is poorly drafted with unclear language. If the Supreme Court doesn't meet the deadline, parts of the adjudication process may come to a halt. The legislature has already set guidelines and rules. He has two boxes he uses for adjudication. One box involves what the legislature told him to do and the other box is where the Supreme Court tells him when he does it incorrectly. The legislature has stated that the clear purpose of the state adjudication of water rights is to adjudicate water rights as they existed on July 1, l973. A timely filed statement of claim that was filed between l979 and l982, is prima facie proof of its content. If there is a sworn statement filed in l979 and l982 and a l999 stipulation, the statement of claim carries the greater weight. From and after July l, l973, all changes to water rights must go through the DNRC. It needs to satisfy the legislative criteria. One of the fundamental concepts is that a water right is not to be changed that affects or injures a prior existing water right.

In l99l, the legislature felt so strong about the Water Use Act that it passed a provision which stated that a person who violates, refuses or neglects to comply with the Water Use Act is subject to a civil penalty not to exceed $1,000 per violation per day. Zealous advocates will always push the envelope. The question that needs to be answered is whether there should be a referee who blows the whistle when he thinks one of the rules may have been breached. Should the Water Court become a office of contract registration? If the parties do not go outside the box,

stipulations are usually accepted because they do not violate any rules. Section 3 requires sanctions for people who pursue unsubstantiated and frivolous claims. This bill recognizes that these claims exist.

Stipulations are between two or more parties to an agreement but they don't include all the water users on the stream. They see stipulations which change irrigation rights to year around flow rates. Flow rates are increased substantially. Priority dates are changed to the earliest on the source. Irrigated acreage is expanded. Even new claims are created, under the guise of stipulations. Rarely do the parties bring evidence that substantiates these changes. Should the Water Court review the stipulations or should they rubber stamp them? They review the information in the claim file, to see if the stipulation can be supported. When they can't find the necessary information to approve the stipulation, they need to consider the third parties who are not at the table. There are many third parties on the stream that are not aware of the stipulations. This is particularly important since there is only one objection period. The Water Court issues a decree and gives notice. If the objections are resolved by stipulation, the other parties are unaware of the situation. Section 85-2-301 states the DNRC shall provide such information and assistance as may be required by the Water Judge to adjudicate claims of existing rights. In 1985, the Montana Supreme Court held that while they recognize the Water Use Act places no limits on the manner in which the Water Court utilizes the information, they will not presume any improper application, actual violations of procedural due process, and other issues regarding the Act as applied may be reviewed on appeal after a factual record is established. Under Rule 614, Rules of Evidence, all district courts may call expert witnesses on their own. Doing so does not turn the judge into a prosecutor or an adversary.

The Water Court requests the DNRC to review statements of claim. Not one case has gone to the Supreme Court that challenges the way DNRC information is used.

Most of the water users who come before the Water Court do not have an attorney. They are a user friendly court and go out of their way to help people. They have a close relationship with the DNRC because they believe that is the intent of the legislature. When asking the DNRC to review stipulations, they are looking for evidence which supports the stipulations. Most stipulations are from people who have not retained lawyers and the legal descriptions are usually not properly drafted. This bill has the potential to complicate problems for many water users.

***{Tape : 1; Side : B; Approx. Time Counter : 10.53}***

**Wally Congdon, Rancher and Lawyer**, remarked that he sees no reason for the bill. There are rules at the Water Court regarding DNRC participation. Rules can be promulgated without this legislation. Approximately 80% of the participants in this process are pro se individuals. If the rules regarding DNRC participation become more complicated, the more difficult it becomes for the pro se individuals to have fair access to participate in the process. The Water Court has taken notice of the issue remarks which DNRC handled under the old statute before that process became too expensive. By taking note of those issue remarks, the Water Court then raises questions about stipulations. On every particular drainage on which there is an adjudication process, a person may object to their own claims or to any other person's claim. If a person does not object to water rights within that basin, those individuals are free to amend, stipulate, make settlement agreements, etc., and the person has nothing to say about it. The Water Court reviews the issue remarks and if there is a problem with the stipulation, the Water Court addresses the issues. If no one can participate in that process except adverse parties, this means that the only persons who could object to a stipulation are the persons signing the stipulation.

If this legislation passes and the Supreme Court does not promulgate rules he agrees with, he will need to tell every client to object to every water right on their drainage. The only way they can participate and make sure there are no stipulations is to appear and object to every single water right.

He further remarked that an effective date which would allow everyone enough time to make sure that this is handled properly is important. He suggested that the effective date be July of 2001. The legislature will have met once more to make sure that something was done and it would also make sure that if the Supreme Court and Water Court do not promulgate a set of rules by that time, there will not be a wild rush of people filing bogus stipulations with court.

***{Tape : 1; Side : B; Approx. Time Counter : 11.02}***

**Tracy Turek, Citizen**, remarked that she has worked in the DNRC Missoula Office for 10 years. They have assisted the Court in issuing three decrees in the Bitterroot Valley. If the amendments go into effect, the individual water users may be hurt. This will especially hurt the persons who do not retain attorneys.

**Questions from Committee Members and Responses**:

**SEN. DOHERTY** related that he has not seen any Court, in dealing with a personal injury situation, accept a stipulation without a full examination. He has also seen a court, on its own motion, throw out a settlement agreement. **Mr. Mackay** responded that courts should not be deprived of the authority to look at settlement agreements. Rules need to be promulgated to deal with this issue in a fair manner which everyone understands. The supporters of the bill are not asking the legislature to hold that the court does not have the authority to review stipulations. There are serious equity issues which need to be addressed. The process needs to be clear enough so the participants know where they stand.

**SEN. DOHERTY** questioned a separation of powers problem in having the legislature tell the Supreme Court to prepare rules on when a court can make a motion on an issue before the court. **Judge Loble** affirmed that this could be problematic. He questioned how the Supreme Court would come up with different rules than what the legislation has already addressed when claims can be called in and when this can not be done. The typical standard of review is whether a court has abused its discretion.

**SEN. DOHERTY** asked how many decisions the Montana Supreme Court has rendered dealing with the issue of the Water Court throwing out a stipulating agreement between parties. **REP. YOUNKIN** responded that there have not been any Supreme Court appeals based on procedural matters.

**SEN. HALLIGAN** related that since a large number of participants are pro se participants the argument can be made that institutional objectors are needed as well as the DNRC to verify the claims. **REP. YOUNKIN** explained that rules are needed in the situation where the Water Court sends a stipulation to the DNRC and the DNRC contacts one party to the action, but none of the others. The parties are not notified that the DNRC is reviewing the stipulation. She has had several cases where she did not know the DNRC was involved until after the report was prepared which called many items into question.

**SEN. HALLIGAN** asked for more information regarding the institutional role played by the Forest Service as an objector. **Bill Putnam, Water Rights Program Manager, U.S. Forest Service,** explained that the Forest Service has over 10,000 state-based water rights that are a part of the adjudication. They are active in most basins in the state. The cases they have been able to settle have not been reviewed by the court. They agree

that the role of the court and the DNRC need to be clearly defined.

**SEN. HALLIGAN** asked whether the Forest Service worked with pro se litigants who may not be sophisticated enough to exercise their rights. **Mr. Putnam** responded that they are continually dealing with pro se litigants. They file hundreds of objections and approximately two-thirds of the time they are dealing directly with the claimant rather than with an attorney.

**SEN. HALLIGAN** asked the DNRC the same question. **Ms. Turek** explained that there have been several occasions when their office was asked to review stipulations. They have microfilm copies of the original claim files, water resource surveys, historical documents, district court decrees, etc. The Water Court has not asked them to contact any claimants but simply to review the stipulations to see if any issues are raised or to resolve the issues which have been identified.

***{Tape : 1; Side : B; Approx. Time Counter : 11.14}***

**SEN. HALLIGAN** asked **Jody Miller, U.S. Forest Service Attorney,** if they were pro-active in contacting parties who may be represented by counsel or otherwise, if they saw problems with stipulations or statements of claims. **Ms. Miller** responded that they acted as an adversary and filed objections to the claims of others. Since they have resources that the typical claimant may not have, they are able to provide fact finding. The stipulations they review are usually the stipulations they prepare or are a party to the document. If stipulation has been reached by other parties and they were not privy to all the negotiations but were also an objector, they would let the Court know that they do not agree with the stipulation and are allowed to proceed on their own objection or they may be able to negotiate with the parties to reach an agreement.

**SEN. BARTLETT** asked for an example of an instance where a stipulation was sent to the DNRC and they contacted only one party. **REP. YOUNKIN** explained that this usually happens when they are questioning the claim of one party. They go to that person but do not necessarily find out what the objector has to say about the claim.

**SEN. HOLDEN** asked **Mr. Bloomquist** to respond regarding pro se litigants. **Mr. Bloomquist** remarked that the Water Court does have many pro se parties. The intent of this bill is not to force the Water Court to accept stipulations prepared by lawyers. The intent of the bill is to have the Water Court prepare rules that describe the interface between the Water Court and the DNRC

on how settlement agreements and/or stipulations will be handled by the Water Court. When the DNRC reviews a claim, many times they will add issue remarks to the claim. These remarks may come from documents where the information included provides a guess. The party with the actual knowledge may be the ones who prepared the stipulation. Guidelines need to be provided for DNRC staff when contacting parties to the litigation.

**SEN. DOHERTY** asked the DNRC for their view of the process. **Don MacIntyre, DNRC,** responded that is a question of legitimate concern by members of the state bar regarding experiences they have had in attempting to resolve issues. The problem is with the system. Initially there was an administrative system. Due to concerns over that system, a purely judicial system was then used. The DNRC was put into multi-faceted roles. Funding was not provided for those roles. Currently the situation is that there is no institutional objector. The Court needs to use its inherent powers to review stipulations. The DNRC is neutral on this issue and will do as told by the Legislature and the Water Court.

**SEN. DOHERTY** asked if there would be an effort to promulgate rules regarding this issue without this legislation. **Judge Loble** stated that hearings are not always held but the DNRC report is provided to the parties. Hearings are held when they believe there is a difference between the stipulation and the DNRC report. When the DNRC is requested to review a stipulation, the parties should be receiving copies of the request. If the Committee wants the Water Court to provide rules addressing these concerns, the rules will be developed.

**CHAIRMAN GROSFIELD** questioned whether this would affect the Forest Service's reserved rights or other rights. **Mr. Putnam** responded that this legislation would not affect those rights because that process is handled through negotiations with the Montana Reserved Rights Compact Commission. They would like to provide the Committee with written comments regarding this matter, **EXHIBIT(jus58a01).**

***{Tape : 2; Side : A; Approx. Time Counter : 11.30}***

**Closing by Sponsor:**

**REP. YOUNKIN** maintained that an institutional objector is an arm of the State of Montana to look out for the public interest. This means the institutional objector would need to be either the DNRC, the Department of Justice, or a newly created arm of the government. Water users will not allow another water user to have an incorrect or bogus claim. The people downstream have an

opportunity to participate by filing a notice of intent to appear. A third party can come in after the objection period is over and file a notice of intent to appear. Water rights are ever changing and are dependent upon climatic factors, the economy, etc. The Water Court should consider the evidence before it and not go out and find evidence to contradict agreements of the parties. If the Court does go out and find evidence, the parties want to know the parameters involved.

There was a question regarding the separation of powers issue. This was also raised in the House Committee. She then talked to Chief Justice Turnage of the Supreme Court about this issue. He stated that it was a good idea, but they would not go forward with the process unless the legislature told them to do so.

She provided written testimony from **Katharine Jones, Florence, MT** **EXHIBIT(jus58a02).**

***{Tape : 2; Side : A; Approx. Time Counter : 11.43}***

**HEARING ON HB 283**

**Sponsor:** **REP. CINDY YOUNKIN, HD 28, Bozeman**

**Proponents:** None

**Opponents:** None

**Opening Statement by Sponsor:**

**REP. CINDY YOUNKIN, HD 28, Bozeman,** pointed out that this bill involves one matter. It raises the amount on a small estate that involves only personal property which may be distributed by affidavit rather than the probate process. This amount is raised from $7,500 to $20,000. This statute has not been changed since 1981.

**Proponents' Testimony:** None

**Opponents' Testimony:** None

**Questions from Committee Members and Responses:** None

**Closing by Sponsor:**

**REP. YOUNKIN** closed on HB 283.

**HEARING ON HB 593**

**Sponsor:** **REP. HAL HARPER, HD 52, Helena**

**Proponents:** **Carson Taylor, Montana Mediation Association**
**Ann Gilkey, Supreme Court - Court Assessment Program**
**Ross Cannon, Montana Mediators Association**

**Opponents:** None

**Opening Statement by Sponsor:**

**REP. HAL HARPER, HD 52, Helena,** introduced HB 593 which deals with confidentiality in mediation. There is currently a provision in law which relates to mediator privilege that is being repealed in this bill. This bill is not only for attorneys but includes psychologists, social workers, and others who engage in mediation. Mediation is founded on two key principles. One is that the parties feel free to speak their mind. The other is that their confidence will be maintained. The House adopted an amendment on page 2, line 13.

Upon further review, it became apparent that an amendment could also be used on page 1, line 18, **EXHIBIT(jus58a03).** Currently the bill states that mediation proceedings must be held in private except upon written agreement of the parties. This should apply to (a)(b) and (c).

This bill was requested by the Dispute Resolution Committee of the Montana State Bar.

***{Tape : 2; Side : A; Approx. Time Counter : 11.50}***

**Proponents' Testimony:**

**Carson Taylor, Montana Mediation Association,** remarked that during the past several years mediation has grown as a method of resolving disputes, before they are filed in court, after they are filed in court but before trial, and after the trial during the pendency of an appeal. The key to mediation is that people are free to say what they like. The bill also makes mediators' notes free of subpoena. This could be embarrassing to the mediators as well as the parties to the mediation. They have no objection to the amendment suggested by **REP. HARPER.**

**Ann Gilkey, Supreme Court - Court Assessment Program,** stated that they have been working on pilot projects across the state to use mediation in child abuse and neglect cases. This has been very successful. There is a real need for statutory protection of the mediators and the parameters regarding confidentiality.

**Ross Cannon, Montana Mediators Association,** rose in support of HB 593.

**Opponents' Testimony**: None

**Questions from Committee Members and Responses**:

**SEN. BARTLETT** remarked that she is carrying a bill which deals with employment related disputes and encourages the use of mediation all of which would be accomplished within the context of a public agency and includes the mediation requirements of the Workers' Compensation Court. She questioned whether those settings would be covered by HB 593. **Mr. Taylor** affirmed that they would be covered and that is the intent of the bill. The written agreement, in given circumstances, might be a necessity to carry out the mediation.

**SEN. HOLDEN** remarked that in insurance mediation situations the mediator is given an incredible amount of leeway in speaking to both parties. He was especially concerned with the wording stating that the mediator does not have authority to compel a resolution or to render a judgment on any issue. He believed that a mediator does render a judgment. He will tell a party that they are way off in their demands. **Mr. Taylor** explained that only a judge renders a judgment. The mediator may give an opinion. Every mediation ends with the parties signing off on it. Arms can be twisted, but this is not the same as compelling something.

**Closing by Sponsor**:

**REP. HARPER** closed on HB 593.

**ADJOURNMENT**

Adjournment: 12.00 A.M.

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SEN. LORENTS GROSFIELD, Chairman

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JUDY KEINTZ, Secretary

LG/JK

**EXHIBIT(jus58aad)**