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THE WATER USE ACT

Gary Wicks

When I took over as the first director of the Department of Natural Resources in December of 1971, I reviewed all the natural resource problems that the State faced in light of the projected development of Montana's enormous coal reserves. Of course, the condition of Montana's water laws was appalling and obvious, regardless of prospective development. There was no recognition in law of the State's ownership of water, no system for administering applications for water, no permitting or recording requirements, no method for adjudication except through the courts by a limited and complicated process initiated by current users and not the State, no reservation for municipal or other purposes, etc. Montana's water law was in worse condition than just about any other state in the West.

Included in this review are discussions I had with known experts in the area, including Al Stone from the law school, Bill Groff, Gordon McGowan in the Montana Senate, and many others. They were not only knowledgeable about the shortcomings and need for change, but also were aware of the previous attempts to change the law (all of which had failed), the political reasons for the failures, and the principal opponents. Based on this history, no one was very optimistic that anything could be done.

Because of my lack of experience, naive belief that something could be done, and recognition that we absolutely needed to do something in light of the development being projected for Eastern Montana that came from, in part, a Bureau of Reclamation study, I decided that we needed to give it a try. That study projected massive coal, coal gasification, power plant development, etc., with huge requirements for Montana's water. With nothing to prevent, limit, or even record the use of water, all that was necessary was for someone to start using it. It scared the hell out of anyone who looked at our situation and the law. It created great concern among farmers and ranchers in the eastern part of the State as well as with environmental groups.

My first important step was to get Forrest Anderson's OK to take on this issue. If you ever worked for Forrest, you would know that an issue of this magnitude could never be undertaken without his approval and support. One of Forrest's major characteristics, one for which he never received enough recognition, was his willingness to take risks, and his understanding of the many parts of Montana government that needed to be reformed. He was responsible for putting in motion the initiatives

that led to Executive Reorganization, professional management of Montana's investments, the Constitutional Convention, and more. He was unafraid of quietly championing changes that he thought were the right things to do.

Even though he was not optimistic—because he understood better than I the political obstacles—he was supportive of giving me the go-ahead, simply because he believed it needed to be done. He gave me many useful and important suggestions on how to proceed, as did Ron Richards, Forrest's executive assistant and one of Montana's smartest political minds. One critical idea was to establish an advisory committee that was bipartisan and composed of respected citizens from key areas of the State who were knowledgeable of the problems and supportive of taking action. Without the Governor's and Ron's support and advice, there would not have been a Water Use Act of 1973.

Many of the people suggested for advisors were the best of what Montanans used to be—leaders interested in doing what was right for the State regardless of partisan politics. I don't remember everyone I ultimately appointed, but Bill Lowe, a Republican Senator from Billings, and Bill Bertsche, a Democratic Senator from Great Falls, were among the best. The importance of this diverse and smart group from many parts of the State and from the many different interest groups cannot be exaggerated. Without their hard work, support, community standing, and wisdom, we would not have succeeded.

I hired Ted Doney in 1972, when his work in the Executive Reorganization Office was winding down, and I was putting in place the structure and staff of the new Department of Natural Resources.

I assigned Ted to help staff the advisory committee. We also used Al Stone from the law school, and any others of a very few who actually understood Montana's water law.

The committee met a number of times during the first seven or eight months of 1972. After many drafts and revisions suggested by the participants, I was ready to present the proposed Act at a series of public meetings we held in the fall of that year, prior to submitting a specific legislative proposal.

Although support was growing for modernizing the water law as development proposals grew and environmental issues crystalized, the opposition also became more intense and widespread. The main pockets of opposition were in the Dillon, Bitterroot, and Bozeman areas. The opposition in Dillon was led by a lawyer/sheep rancher who considered himself an expert on water law, and indeed had been involved in one of the very few adjudication processes that had occurred under the old law. He organized opposition in many parts of the State, principally in the

agriculture community. He argued that the State would take ranchers' water away and that changes to the law were unnecessary because the current law wasn't broken.

Consequently, many of the hearings or informational meetings were rancorous, heated, and on some occasions, threatening, especially those in Bozeman, Dillon, and Hamilton. I tried to conduct all the Department of Natural Resources presentations at these meetings because, as a political appointee, I believed I should bear the political consequences of what we were proposing. Ted Doney, as principal legal staff, was with me at most, if not all, of these meetings.

Following these meetings, we made revisions to the proposal. Some were significant to allay fears and make sure current users were protected, and some were exceptionally innovative—like allowing the reservation of water by local governments.

We then proceeded to find sponsors and get a formal legislative bill drafted. This was of course critical. Bill Groff in the Senate was absolutely critical. Without him there never would have been a Water Use Act. Groff was the acknowledged water law expert in the Senate (even though he was occasionally mistaken) and was from the Bitterroot, where opposition was significant. He was also well respected by his Republican and Democratic colleagues. He was essential to getting other senators' support and passing the Bill through the Senate.

I had developed a strong relationship with Groff on a number of other issues that we had worked on prior to my taking over the DNR, including the sales tax. This relationship and trust were an enormous help in developing the political and legislative strategy that we needed to overcome major opposition.

It was around this time that Governor Anderson decided that he was not going to run for a second term, but he continued to support the changes we were proposing. Tom Judge, his Lieutenant Governor, was the Democratic nominee, and Bill Christensen was to be his Lieutenant Governor. Both supported the proposed Water Use Act and were very helpful building public support and masterminding the legislative process. Before and after they were elected in November 1972, they insisted that its passage was a high priority. They are among those deserving credit for the ultimate success.

When the 1973 session started, we were in fairly good shape in the Senate. Of course, there were many hearings, where I again laid out the need for the changes that were supported by many groups, but still faced opposition in the public meetings. I cannot recall all the Senators who helped, but we had a majority.

The House was more difficult. Although there was much support, (Francis Bardanouve, Dorothy Bradley, Norris Nichols, and many others were particularly helpful) the opposition tended to concentrate there. One particularly concerned legislator was Jim Flynn from Dillon. That was understandable given his constituency. But he listened to us and was finally convinced that we were doing what needed to be done. He voted for the Bill, demonstrating legislative courage that is now rare, and making it far easier to get it through the House. Interestingly, later, as the Fish and Game Director during Governor Ted Schwinden's administration, he relied on the Water Use Act to help protect fish and wildlife habitat.

Other relatively standard changes were made during the legislative process, some with a great deal of nail biting, but the Bill ultimately passed, and Tom Judge signed it into law.

This is a short history of a very collaborative endeavor. Many now forgotten citizens, statesmen, and government employees were the leaders. While Ted Doney deserves immense credit for the Bill draft, the most crucial part of the process was getting it appropriately amended and passed into law. Much of the motivation was the perceived danger to Montana's water from powerful outside interests. That sense of urgency in the face of our unpreparedness made it possible for leadership to successfully drive the political process. Without it, and without those willing to stand up and take the consequences, the Water Use Act would not have passed. It was a unique combination of people and circumstances. It couldn't be done before, and it sure as hell couldn't be done now.

Some Additional Points of Interest

First, discussions on water and natural resources also took place during the Constitutional Convention. Some of our theories about water law were incorporated directly into the new Constitution, such as state ownership of water.

Second, passage of the Water Use Act in 1973, gave Montana the authority and framework to adopt the Yellowstone Moratorium on major water right applications in 1974. Based on the growing number of applications and projected applications, I approached Tom Judge during the session in 1974 and recommended that we implement a moratorium until we could analyze the effects on current users and get Montana's administrative house in order. To his credit, Governor Judge supported this effort and we were, again with diverse and knowledgeable support, able to get the legislation passed into law.

Finally, a disclaimer. It would require a major review of bill introduction, votes, and hearing records, to come up with a definitive history of all those who were instrumental in passing the Water Use Act. In the interest of making a record and honoring the success, this is an abbreviation. But the passage of the Water Use Act was a major achievement in the history of natural resources law in Montana. It significantly changed the State's ability to protect those who used water at the time and provided critical and creative tools for future generations to address water needs of humans, fish and wildlife. I am fortunate that I was given the opportunity to play a part.