MINUTES OF THE MEETING
TAXATION COMMITTEE
MONTANA STATE SENATE

February 8, 1979

The twenty-second meeting of the committee was called to order on the above date in Room 415 of the State Capitol Building by Chairman Turnage.

ROLL CALL: Roll call found all members present with the exception of Senator Roskie, who was excused. Witnesses listed on enclosed Register.

CONSIDERATION OF SENATE BILL 244: Senator Towe said this bill was approved by the Coal Tax Oversight Committee who wanted to help young businessmen of the state, as well as farmers and ranchers, who already can obtain agricultural loans. He said the bill deals with equity capital and explained how the legislation would be implemented. The bill would create a corporation, composed of five members, which would select the products or the inventions to be funded. There were certain criteria the individual would have to meet before he would receive the loan; however, if he met these conditions he would receive the financial assistance from the board. In return the board would get either a percentage of the royalties or stock from the new company, or similar interest. The finances would be made available from interest from the Coal Tax Trust Fund.

Senator Towe then introduced other proponents, the first of which was Mr. Bathra who said there are many problems industry faces in this state but one of the most serious is lack of financial capital, particularly equity capital. He said he felt there were two major problems in regard to the bill: to find capable administration and also to convince people that this is truly a self-help program. Mr. Plunkett also spoke in support of the bill. He mentioned that a similar program is in operation in England where it was very successful. He had a number of points he wished to stress: 1. Preference should be given to agricultural products; 2. Renewable energy technology ought to be encouraged; 3. Encourage assembly and light manufacturing; 4. Believed there should be participation by local banks; and 5. Matching funds from both private and federal should be considered as part of the program.

Other proponents also included Mr. Austin, who had 21 years of banking experience and agreed with previous testimony on the lack of equity capital in Montana. Mr. Buttress also spoke and agreed with Mr. Austin's statements about lack of capital in the state. There were no other proponents.

The Chairman called for opponents, or other witnesses who wished to speak on the bill, and there being none, closed hearing on SB244, informing Senator Towe he would be able to answer committee questions at an executive meeting of the committee.

CONSIDERATION OF SENATE BILL 245: Senator Towe had this bill to present as well, and stated it dealt with a recording fee of $1 and registration fee of 5¢ per acre for persons with mineral interests. He said often the surface owner no longer owns or controls the interests, and often people who own the severed mineral interests make no contributions to the local governments. He said his idea is to levy a fee for the privilege of severing the mineral interests from the surface, thus helping the counties. He went through the bill and explained portions of it, including the repealer of the right of entry tax. He said other states have had this problem and taxes were levied with a preference to surface owners. He introduced Representative Hirsch, who also is a supporter of the bill. He said the Department of Revenue has introduced the right of entry tax repealer in the House . He said the committee found problems in the bill that they provide for the recordation provision of the bill.

Following conclusion of his testimony the Chairman called for other proponents, and there being none, permitted opposition to testify.

First to testify was Mr. Schaenen who had lengthy testimony to present but gave his main reasons for opposing the bill orally. His written testimony is attached, see Exh. #1. He said he did support the elimination of the right of entry tax, saying it had been unworkable. He felt some of the bill was discriminatory and believed there would be problems with it. He mentioned how many times mineral interests are fractionalized and it is most difficult to find the interest holders.

Other opponents testifying included Mr. Jackson, also Mr. Williams, who distributed his statement, see Exh. #2, attached. Mr. Loble also spoke as an opponent and stated his agreement with previous comments, and said one other point he noted in the bill, that if interest holders pay the fee, they then have to pay the surface owner his fee plus 10%. He said also that SB88, as referred to in Mr. Williams' testimony as being favored, is preferable to SB245 in his opinion as well. Mr. Peete spoke also as an opponent and said he felt there would be substantial litigation and also there would be problems with fractionalized minerals. Mr. Gannon also spoke briefly, agreeing with previous opposition testimony, as did Mr. Dunkle and Mr. Boedecker who said Mr. Loble had spoken for his organization, Tenneco Coal. Also in opposition was Charlotte Edwards who said she did not know why the assessors had to be involved in the search for the mineral owners as oil and gas companies usually manage to find the mineral interest owners.

Mr. Barry of the Department of State Lands then spoke and distributed a copy of his testimony, see Exh. #3, attached. In it he stated the bill conflicts with Montana's constitution and the Department at present has a system to maintain a record of all interests administered by the Department.

Following his statement Chairman Turnage permitted a limited questioning period for committee members, due to conflict with other scheduled committee meetings.

Following brief questioning by several committee members, Senator Towe was permitted to close. The Chairman reminded the committee they could question him further, during executive action meetings in the future.

Senator Towe, in his closing remarks said he saw no conflict with SB88, as other witnesses had stated. He stated also, that he believed the counties should get some revenues from those people who hold severed mineral interests, not just after production on their interests had begun.

Following his brief closure, meeting was adjourned.

Jean A. Turnage

JEAN A. TURNAGE - CHAIRMAN

Date FEB. 8, 1979

ROLL CALL

SENATE TAXATION COMMITTEE

46th LEGISLATIVE SESSION - 1979

NAME	PRESENT	ABSENT	EXCUSED
SEN. GOODOVER (Vice Chairman)	✓		
SEN. BROWN	✓		
SEN. HAGER	✓		
SEN. MANLEY	✓		
SEN. MANNING	✓		
SEN. McCOLLUM	✓		
SEN. NORMAN	✓		
SEN. ROSKIE			✓
SEN. SEVERSON	✓		
SEN. TOWE	✓		
SEN. WATT	✓		
CHAIRMAN TURNAGE	✓		

Each Day Attach to Minutes.

SENATE _____ COMMITTEE

BILL _____ VISITORS' REGISTER DATE _____

Please note bill no.

NAME	REPRESENTING	BILL #	(check one) SUPPORT	OPPO
Bruce McGinnis	D.C.R.			
Pat Stewart	W.R. Coal Council	SB 245		✓
Frank Dubble	Nat. Mining Assn	SB 245		✓

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY

SEN

SENATE TAXATION COMMITTEE

BILL 244, 245 VISITORS' REGISTER DATE 2-8-77

Lee Heinick House of Representatives 245 X

NAME	REPRESENTING	BILL #	(check one) SUPPORT	OPPO
Robert A Hendricks	Tenneco Coal Co	245		X
Les Lobe	Tenneco Coal Co Amax Oil & Util	245		X
Leo Berry	Dept State Lands	245	amend	
Raymond K Peete	Chas. W. Austin Guthrie Oil & Gas	245		X
Stephen M. Williams	ANACONDA Co.	245		X
Lloyd Crippen	" "	245		X
Richard W Gilbert	SELF	300 347		
Bob Topp	Self	245		X
Jayelle Fallon	Mont. Chamber			
Steve Buttress	Econ Devel Corp of GF	244	X	
Mary Bethea	Mont. Mfg Assoc	244	X	
Dan Weber	self	244		
			X	
Bob Gannon	Mont Power	245		X
Ben J. Alke	Montana Petroleum Assn.	245		X
David Schaeren	Hancock Enterprises	245		X
Gene Jacobsen	Water Mont	SB245		X
[illegible]	Pollution Cont	SB 244		
Charles Edwards	Dept. of Agriculture	245		X
Shirley Thompson	Montana Mining Assoc	245		X
Howard Austin	Financial Services Corp	244	X	
Eric Hanson	UPO			
EUGENE SPILDE	S.G.P.A.	245		X
B G Hardisty	Conoco	245		X

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY

Exh. #2

COMMENTS OF THE ANACONDA COMPANY

Before Senate Taxation Committee

RE: SENATE BILL 245

My name is Stephen M. Williams from Butte, Montana, representing The Anaconda Company.

1) One of the stated purposes of SB 245 is to solve a problem that has developed with fractionalized mineral interests over the past several decades. "This obscure and fractionalized ownership often makes it difficult to identify and locate the owners of severed mineral interests, thus impairing the development of this state's mineral deposits in a period of increasing demand for the development of new mineral sources." (p. 1, l. 21) If this assumption is accurate, SB 245 does not correct this problem. All SB 245 calls for is the recording and registration of severed minerals with the eventual adverse possession of those minerals by the surface owner where the mineral owner fails to record.

SB 88, which has passed the Senate, corrects the problem with unlocatable severed mineral owners, by allowing the other mineral owners to petition the District Court to create a trust on behalf of the unlocatable owner. Eventually, if the benefits of the trust are not claimed, the monies are credited to the State of Montana accounts after following procedures set forth in the Uniform Disposition of Unclaimed Property Act, Title 70, Chapter 9.

SB 88 corrects the problems noted by SB 245. SB 245 will not correct those problems.

2) SB 245 requires all severed minerals be recorded with the county

clerk and recorder. The recording fee is $1 (p. 2, l. 20). Certainly this recording fee will not adequately compensate the county for the work required in recording each one of these interests.

(3) After recording, the mineral owner must then annually register his severed minerals with the county clerk and recorder and pay a fee of 5 cents per acre plus $1 for each single description of contiguous land where a mineral interest is claimed (p. 2, l. 22). Once the mineral interest is properly recorded, there is no need for the additional annual registration requirement and payment of an annual fee. Just like real property, once an ownership is recorded, there is a record where the owner of that interest or his beneficiaries can be found. The 5 cent per acre fee is not justified and is not necessary in light of the previous recordation requirement.

4) Under SB 245, Section 4, the county assessor is given the discretion of conducting a title search to determine the owners' severed mineral interests. If the fees to be potentially paid to the county don't exceed the cost of the search, then the county assessor doesn't have to conduct the search (p. 3, l. 22). There are two potential problems with this section. First, it allows the county assessor the discretion of performing or not performing the search; and, secondly, if SB 245 corrects a problem with fractionalized mineral owners, why is a search ever required? Later in the bill, the surface owner of the property over which the interest is claimed can acquire the mineral rights by adverse possession after five years and payment of the fees, so Section 4 of the bill is not needed. The county assessor is providing a title search where one is not necessary.

(5) Section 5 of this bll allows the surface owner over which

severed minerals are located to adversely possess and claim title to those minerals after five years and payment of the fees due to the county. There are several major problems with this section:

a. It allows the surface owner exclusively to secure severed minerals under the surface without public sale, public notice, or the opportunity of other parties to bid to secure these minerals.

b. The surface owner could potentially receive a windfall after being originally compensated for the minerals at the time of the severance.

c. This provision of adverse possession may directly conflict with the provisions of SB 88, where a trust is created and the funds, if not claimed, escheat to the state and all the people of Montana become the beneficiaries of the trust. In the case of the trust created by SB 88, notice by publication and other legal notice is given before the monies are removed from the trust. SB 245 has none of those requisites and allows only the surface owner to adversely claim the minerals.

(6) SB 245 professes to facilitate mineral development. However, the earlier provisions discussed indicate that this bill will not correct any of the problems noted. It simply adds another layer of expenses which are not justified, and another annual registration filing and fee payment which is neither necessary nor justified.

(7) Finally, SB 88 creates a mineral trust which will promote development of mineral resources where a mineral owner is not able to be located. The benefits of this trust, if not claimed, will benefit all citizens of the state. SB 245 conflicts with the provisions of SB 88 in that respect, and allows a potential windfall to the surface owner.

For these reasons, it is respectfully recommended that the Senate Taxation Committee recommend a DO NOT PASS to Senate Bill 245.

Respectfully submitted this 8th day of February, 1979.

STEPHEN M. WILLIAMS
ATTORNEY
THE ANACONDA COMPANY
2030 Eleventh Avenue, Suite 22
Helena, Montana 59601

Exh. #3

TESTIMONY
SB 245
DEPARTMENT OF STATE LANDS

The state of Montana owns over one million acres of severed mineral interests. This ownership interest is the result of prior sales in which certain minerals were reserved as required by law. SB 245 would have an adverse effect on state-owned severed mineral interests and, as currently written, is contrary to the Constitution and state and federal law in its application to state land.

It appears that the purpose of SB 245 is to provide a system for locating severed mineral interests. The Department has no objection to the intent of the act. However, that is not a problem with state mineral interests since the Department maintains a complete record of all interests administered by the Department. In addition, SB 146, currently in the House, requires other state agencies to file mineral interests with the Department. As a result, all state severed mineral interests will be locable within the Department, and such records are completely open to the public. There appears to be no reason to duplicate such an index system within the counties.

SB 245 conflicts with Montana's Constitution. Article X, Section 11(2) states:

> *No such land or any estate or interest therein shall ever be disposed of except in pursuance of general laws providing for such disposition, or until the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, has been paid or safely secured to the state.*

This provision, when coupled with the state's Enabling Act, makes it clear that the state cannot dispose of mineral interests without receiving the full market value for those interests. SB 245 however establishes a system of adverse possession by which a surface owner could acquire state mineral interests without compensating the state.

In addition to the constitutional and Enabling Act conflicts, the bill runs

contrary to state and federal law. The state school trust acquired many of its miner interests through a federal act of 1927 (43 USC 870, 44 Stat. 1026). When the surface is sold, the act specifically requires the state to reserve all minerals and the right to prospect for, mine, and remove those minerals. This act has been codified in 77-2-304 MCA. To dispose of severed mineral interests through adverse possession would conflict with these federal and state laws and could cause forfeitur of state trust lands back to the United States under the terms of the 1927 Act.

For these reasons the Department recommends that Section 2 of SB 245 be amended to exclude state-owned lands. Such an exclusion would not thwart the intent of the bill but would eliminate the mentioned conflicts.

If the legislature passes SB 245 in its current form, the Department would requ a $50,000 to $60,000 general fund appropriation to comply with its provisions.

Exhib. #1

Mr. Chairman, my name is _____, representing the Montana Petroleum Association which is a division of the Rocky Mountain Oil and Gas Association, Inc. As you know, the Montana Petroleum Association is composed of persons engaged or interested in the exploration and development of Montana's mineral resources. We are pleased to have this opportunity to present our views on Senate Bill No. 245 as introduced by Senator Tom Towe, ~~which vitally affects the petroleum industry~~. At the outset, we understand that Senate Bill No. 245 is similar to a bill introduced in the 1977 legislative session which was defeated, and is also similar to a bill Senator Towe attempted to have the Interim Revenue Oversight Committee approve, which effort also proved unsuccessful. We also testified at these Oversight Committee hearings.

According to its preamble, Senate Bill No. 245 is designed to eliminate the problems engendered by fractionalized severed mineral interests. The preamble concludes that such fractionalization impairs development of Montana's mineral deposits and that the owners of such severed mineral interests are not paying their fair share for the cost of legal recognition of separate mineral interests.

To these ends, the bill proposes procedures to clarify the ownership of severed mineral interests and to levy a fee on the privilege of maintaining a severed mineral interest separate from the surface interest, and to provide for a method of vesting title to dormant and unclaimed mineral interest in the owner of the surface which overlies the mineral interests.

Under Section 2 of the proposal, owners of severed mineral interests are required to record such interests and to register them annually with the county clerk of the county in which the mineral interest is situated. Annual fees for such registration and recording are imposed. Failure to pay such fees results in such fees being considered delinquent, but the owner of a severed mineral interest may pay such delinquent fees at any time. All such fees are deposited to the credit of the general fund of the county in which they are collected.

Section 4 of the bill allows the county to determine whether title searches should be instituted to discover ownership of severed mineral interests. Provision is made for the county assessor to evaluate whether the cost of conducting a title search to determine the owner of a severed mineral interest would exceed the amount of fees required to be paid to the county under Section 2. If the cost is excessive, the assessor may, with the approval of the county commissioners, decline to conduct a title search.

Sections 6 and 7 of the bill propose to eliminate the right of entry tax presently imposed by Montana law. Section 9 amends present Montana law to permit quiet title actions to be filed regarding severed mineral interests.

We certainly support the proposition that the right of entry tax should be eliminated as proposed by this bill. This tax, from a practical standpoint, has proved wholly unworkable in that assessment of undeveloped minerals for taxation purposes is for all intents and purposes impossible. However, this practical approach is not carried throughout the bill. Several other parts of Senate Bill No. 245, if applied as introduced, result in duplication and confusion. Moreover, we are troubled by the discriminatory nature of many features of the bill and thus have serious doubts concerning its constitutionality. It is for these reasons, as detailed more specifically in the discussion which follows, that we must oppose enactment of Senate Bill No. 245.

In analyzing this proposal, we must first challenge the underlying assumptions contained in its preamble. The preamble leaves the impression that because of the passage of time mineral interests become more and more fractionalized. ~~This is directly contrary to our experience.~~ It is important to emphasize that mineral interests are only severed either through reservation in deeds or by conveyances from persons owning mineral rights. These instruments are obviously recorded. Consequently, the problem is

not with the lack of recording such instruments but with locating the owners of such interests after recordation. The bill's emphasis, however, is on recording rather than upon unlocatability. Its entire focus, therefore, is misdirected, and as a consequence the bill, in our opinion, creates more problems than it solves. Viewed in this light, we can only conclude that the bill is most purely and simply a taxation device disquised as a recordation and registration measure. If taxation is the bill's purpose, it should be presented as such and the regulatory fiction discarded. Obviously, such fictions have been resorted to here in an attempt to circumvent the long standing policy embodied in Montana history of ~~eschewing~~ forgoing the taxation of mineral interests until production of such minerals occurs.(1) It is unnecessary, for present purposes, to detail all of the problems associated with taxation of minerals in place. Suffice it to say, the Montana legislature has consistently recognized such problems and has assiduously avoided entering that labyrinth.

Turning to the specific recordation and registration provisions of the bill, we are immediately struck by their ambiguity and lack of clarity. For example, nowhere in the bill is the concept of severed minerals defined. Does severed minerals mean only those created by reservation or those also created by conveyance? Each transaction form has it own problems. Moreover, it is difficult to determine exactly what minerals are covered in the terms of a severed mineral interest. As you know, courts have long struggled with defining what is exactly encompassed within the term "mineral". Oil, gas and coal have traditionally been considered to be minerals. However, some states characterize sand and gravel as minerals whereas others do not. When recordation of such minerals is required as proposed in this bill at the risk of loss of those rights, it is essential to know exactly what property rights are involved. We therefore suggest at a minimum that the term mineral and the concept of severed be clearly defined.

Apart from these definitional problems, the whole recordation and registration scheme needs clarification. For example, in Section 2 any owner of a severed mineral interest must record such interest with the clerk in the county in which the land is situated and also register that ownership annually. This provision fails to take into account the realities of a mineral transaction. As explained above, severed mineral interests are created either through reservation or by conveyance. Under present Montana law such interests, to be effective, must be recorded. Accordingly, all of the interests which the bill seems to be concerned with have been recorded. We must therefore ask whether Section 2 is designed to require a new recording of a previously recorded instrument, or is it intended to apply only to previously unrecorded instruments, or, as a third alternative, is it intended to require a positive statement of a claimed mineral interest? The burden created by a system of requiring double recording is obvious. Additionally, if such interests are recorded, title to such mineral interest is not obscure or clouded as suggested by the bill's preamble. With the underpinning of such legislation emasculated, one is left with facing the question as to why such registration measures should not be applied against surface owners as well as mineral owners. If notice of unclaimed mineral interests is important for land title purposes, obviously such registration is important for the same reasons with regard to surface ownership.

Section 4 of the bill must be similarly criticized. As now drafted, it is totally impractical and appears at first glance to be a land examiner's or abstracter's relief act. How, for example, can the county assessor determine that the cost of conducting a title search to determine the owner of a severed mineral interest would exceed the amount of fees required to be ~~made by~~ paid to the county by the owner of the severed mineral interest without in fact conducting a title search? This provision is a classic example of putting the cart before the horse. Section 4 is totally silent as to when

the assessor is to act. Must he perform the assessment on his own motion or at the insistence of the surface owner? Moreover, it is unclear what happens if the county assessor declines to perform a title search. Is adverse possession then foreclosed? In short, Section 4 appears to be a perfect example of Catch 22 legislation.

Section 5, providing for adverse possession of a severed mineral interest, is also misconceived and misguided. Under this scheme, a surface owner may adversely possess a severed mineral interest by paying the annual registration fee for a period of five years. Such adverse possession, however, will not run if the severed mineral interest (a) has been recorded, or (b) the annual registration fee has been paid. As noted above, virtually every instrument creating the severed mineral interest will have been recorded and thus, under the terms of the provision, adverse possession will never lie. Moreover, Section 5 in this regard is inconsistent with Section 2(3), which provides that the owner of a severed mineral interest may pay delinquent fees at any time. It is also inconsistent with Section 9(2) of the bill, which provides that in a quiet title action the defendant, who most likely will be the owner of the severed mineral interest, can simply defeat the action by appearing and presenting evidence of his ownership of the interest and also presenting evidence that the fees have been paid. Section 9(3) specifically provides that if the plaintiff has paid the fees required, the defendant must reimburse the plaintiff for the fees paid plus interest at the rate of 10% per year. Taking these provisions together, it would appear that adverse possession could not run against a severed mineral owner and be conclusive in any fashion and that the severed mineral owner could recoup title to the land merely by paying the delinquent fees. If the bill is to have any substance, such incongruities must be eliminated. Finally, in this connection, there are other questions raised by adverse possession which must be answered if the consequences of the bill are to be fully appreciated. Does, for example,

the adverse possession scheme engendered in this section preclude adverse possession of a severed mineral estate by other mineral cotenants? Under present Montana law, it is clear that a mineral cotenant can adversely possess the mineral rights of another cotenant. Is it the intent of this legislation that such adverse possession be henceforth declared illegal? Similarly, under this scheme, would a person who is adversely in possession of the land also be considered as adversely possessing all severed mineral interests? Again, we have no answers to these questions but only raise them to demonstrate the ambiguity of the proposed legislation.

Lastly, we feel compelled to point out to the committee that notwithstanding the practical problems we have mentioned with the proposal, it is extremely doubtful whether such legislation will pass constitutional muster. It would appear to represent an unconstitutional impairment of the right to contract and also an unlawful interference with private property rights. In this connection, we direct the committee's attention to a recent case decided by the Wisconsin Supreme Court (Chicago and North Western Transportation Company et al v. Pedersen et al, 259 N.W.2d 316 (1977)) in which a recordation and registration scheme remarkably similar to that contained in Senate Bill No. 245 was declared unconstitutional. The Wisconsin statute required ~~several~~ severed mineral interest owners to pay annual fees of 15 cents per acre and failure to do so resulted in a reversion of such rights to the surface owner. The court specifically held the statute unconstitutional because its enforcement provisions denied procedural and substantive due process. It specifically found, as the courts of Montana have found, that where a mineral right is severed from the surface fee such a right is held to be property distinct from the land itself and such right is saleable, inheritable and taxable. However, as the Wisconsin court noted, before a person could be deprived of such property, that person has a right to a hearing. Quoting from the decision, the

court concluded:

> "In this case, the plaintiffs' mineral rights will revert to the surface owner if they are not registered or taxes are not paid on them. At the least, the plaintiffs must have a hearing where they can question the determination of the register of deeds that the registration has not been done or that the taxes have not been paid. Implicit in the right to a hearing is adequate notice of the hearing. ... Where a person's location is known or easily ascertainable personal service is also required. ... But for, '... persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits ...'. For such persons publication is adequate notice."

Since the Wisconsin court found that no notice was required to be given before the reversion to the surface owner would occur, the law unconstitutionally allowed for the deprivation of property without due process.

Moreover, the court found that such a statutory scheme denied substantive due process by an unreasonable use of the police power because of the reversion to the surface owner provision. The court specifically found that:

> "This statute not only provides for forfeiture of unregistered mineral rights, it also provides that the forfeited rights revert to the surface owner. This procedure violates the rule that the legislature cannot take private property from one person for the private use of another."

These same infirmities exist in Senate Bill No. 245. Because of these legal impediments, as well as the impracticality of the proposal, we strongly urge that Senate Bill No. 245 not be recommended by this committee for enactment.