

MINUTES OF MEETING  
SENATE NATURAL RESOURCES  
January 31, 1981

The sixth meeting of the Natural Resources Committee was called to order by Senator Harold Dover, Chairman, at 10:15 A.M., on the above date in Room 405 of the State Capitol Building.

ROLL CALL: Upon roll call, all members were present with the exception of Senator Elliott, who arrived late.

EXECUTIVE SESSION - DISPOSITION OF SB 123: Senator O'Hara will not be able to stay for the meeting and would like to register his vote as a "yes" for SB 123.

Senator Etchart made a motion that we accept the amendments to SB 123. The motion passed unanimously with those present.

Senator Etchart moved that SB 123 be passed as amended.

Senator Van Valkenburg made a substitute motion to amend SB 123 by striking the present Section 8, which provides for a criminal penalty. If we are going to pass this bill, then we should at least pass it in a way that will cost the state the least amount of money and maintain credibility nationwide.

Senator Brown concurs with this motion.

Senator Etchart explained why the penalty was in the bill. If we are going to claim the federal lands and have no penalty, it will be impossible to get the federal land managers to get in touch with the state of Montana and we will not have control of the lands. The state has to claim these lands and the federal land managers will have to make contact with the state until it is finally settled.

Senator Brown said that until this matter is resolved, this provision will never stand. There is no way you will find any federal judge who will allow you to prosecute under this section so long as there is the legal question of constitutionality.

Senator Keating said there is still a period of transmission of title and with this penalty clause it would appear that anybody could bring charges against any federal employee in the course of his position. This would lessen the chances of acquiring title to the land. The intent of the bill will be lost.

Chairman Dover asked for a vote on this motion. The motion failed with a vote of 5 for and 6 against.

Senator Brown made a motion that we amend SB 123 by striking lines 9 through 12 on Page 4, Section 3 in its entirety, and then amend Page 3, following line 19, by inserting a new subsection, which would read as follows: "(e) resource land in the state that has been administered by the United States under international treaties or interstate compacts."

Senator Etchart and Senator Keating stated their agreement with this amendment.

Chairman Dover asked for a vote on this motion. The motion passed unanimously.

Senator Van Valkenburg made a motion that we amend SB 123 by striking the words "comparable to present federal rates" on Page 5, lines 16 and 17, and insert "that will result in management of such lands without a loss of general fund revenue to the state; and", to insure federal rates are subsidized.

Senator Manley said that what this amendment says is that when this does come to pass, when the state takes over the tremendous operation of these lands, that we will not get general fund monies to get it off the ground - to establish leases and timber programs.

Senator Elliott said that this paragraph is being amended only in reference to the plan that will be presented to the legislature by January, 1983. What we are amending is to have the plan show that it is going to be self sufficient.

Senator Etchart said it should be left at "comparable to present federal rates".

Senator Keating said the amendment should clarify that the plan for funding SB 123 should not attempt to change existing contracts.

Senator Brown pointed out that the amendment should give that information.

Senator Elliott said it is still just a plan and it will show whether it is not going to be a financially feasible provision. The way that the existing bill is written will provide the information that Senator Van Valkenburg wants - what it might cost the General Fund.

Senator Van Valkenburg said it will not provide information of what it will cost the land users if we don't go into the general fund.

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Senator Keating said that he had some figures of federal ownership within the state of Montana as follows: BLM controls 8 million acres, Forest Service controls 16.7 acres, and National Parks, which is exempt from this bill, comprises 1.2 million and Federal Fish and Wildlife is 1.1 million. There is a total of 25 million acres of BLM and Forest Service land in the state that would be effected by this bill. The figures that Senator Keating has demonstrates that the income from these lands under the federal government is more than efficient <sup>subsidies</sup> to pay for the management of these lands and the state manages their lands much better than the federal government.

Chairman Dover asked for a vote on Senator Van Valkenburg's motion. The motion passed with a vote of 8 for and 3 opposed.

Senator Elliott made a motion that we strike the words "of this state" on page 4, line 6 of the bill.

Senator Keating explained that perhaps there are some leases that are signed by out of state resident's and this amendment would clarify that we intend to protect all of the rights and privileges of the existing leasee.

Senator Etchart supports this motion.

Chairman Dover asked for a vote on Senator Elliott's motion. The motion passed unanimously.

Senator Keating made a motion that we amend Page 3, Section (3) to read as follows: "(3) "Resource Land" means all land, water and minerals, including oil and gas, not previously appropriated, within the boundaries of the state of Montana except:". Sub-sections (a) through (d) to be amended to read properly in conjunction with this section.

Chairman Dover asked for a vote on Senator Keating's motion. The motion passed with two votes opposed, Senator Van Valkenburg and Senator Ryan.

Senator Etchart motioned that SB 123 "DO PASS" as amended. The motion passed with a vote of 9 to 3.

Senator Van Valkenburg thinks the adoption of this bill amounts to a declaration of civil war against the other states. We have been through this once in this country over the issue of slavery and we do not need to again over this.

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Senator Keating said that almost all of the western states, California, Oregon, Alaska, Utah, and Wyoming, are working in this regard either through the courts or through congress. Support also comes from some eastern states, Nebraska, Maryland, and New Jersey.

ADJOURNMENT: There being no further business, the meeting adjourned at 11:30 A.M.

  
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HAROLD DOVER, Chairman

ROLL CALL

NATURAL RESOURCES COMMITTEE

47<sup>th</sup> LEGISLATIVE SESSION - - 1981

Date 1/31/81

NAME	PRESENT	ABSENT	EXCUSED
Harold Dover, Chairman	✓		
Mark Etchart, Vice Chairman	✓		
Thomas Keating	✓		
Roger Elliott	Arrived late ✓		
Larry Tveit	✓		
Jesse O'Hara	✓		
John Manley	✓		
William Hafferman	✓		
Steve Brown	✓		
Dave Manning	✓		
Patrick Ryan	✓		
Fred Van Valkenburg	✓		

Each day attach to minutes.

Amendments to SB 123

1. TRG, 10.1.77  
24.11: "ADMINISTRATED"  
2.11.11: "AUTHORIZATION"

1. Page 3, line 3.  
Following: "all land,"  
Strike: "including all"
2. Page 3, line 4.  
Following: "and"  
Strike: "mineral"  
Insert: "minerals, including oil and gas"
3. Page 3, line 4.  
Following: "gas"  
Strike: "rights appurtenant thereto and"
4. Page 3, line 5.  
Following: "appropriated"  
Strike: ", "
5. Page 3, line 6.  
Following: "except"  
Strike: "land"
6. Page 3, line 7.  
Following: "(a)"  
Insert: "that"
7. Page 3, line 9.  
Following: "(b)"  
Insert: "that"
8. Page 3, line 11.  
Following: "that"  
Insert: "which"
9. Page 3, line 12.  
Following: "defense"  
Insert: "or buildings and appurtenant structures together with  
sufficient lands to accommodate the same used and occupied  
by the United States for necessary governmental functions"
10. Page 3, line 13.  
Following: "that"  
Insert: "which"
11. Page 3, line 16.  
Following: "to"  
Strike: "December 31, 1976"  
Insert: "the effective date of this act"

- 13 12. Page 3.  
Following: line 19  
Insert: "(e) resource land in the state that has been administered by the United States under international treaties or interstate compacts."
- 14 13. Page 4, lines 6 and 7.  
Following: "people"  
Strike: "of this state"
- 15 14. Page 4, lines 9 through 12.  
Strike the entire subsection (3).
- 16 15. Page 5, lines 5 and 6.  
Following: line 4  
Strike: subsection (b) in its entirety.  
Renumber: subsequent subsections.
- 17 16. Page 5, lines 16 and 17.  
Following: "rates"  
Strike: "comparable to present federal rates"  
Insert: "that will result in management of such lands without a loss of general fund revenue to the state"
- 18 17. Page 5, lines 20 through 23.  
Following: "Section 5."  
Strike: balance of section in its entirety.  
Insert: "Sale, transfer, or exchange of land prohibited. Any sale, transfer, or exchange of resource land vested in the state of Montana under the terms of [this act] is void unless such sale, transfer, or exchange is made strictly in conformity with and pursuant to:  
(1) laws, rules, and regulations of the United States governing the sale, transfer, and exchange of resource lands when the title thereto was vested in the United States; or  
(2) there shall have been first established by a preponderance of the evidence at public hearings held in each county wherein such land is located, that the sale, transfer, or exchange is established as necessary for a compelling public need and is not in any manner directly or indirectly for private gain or profit; and  
(3) no sale, transfer, or exchange of resource lands shall be made without an act of the legislature approving the sale, transfer, or exchange."
- 19 18. Page 5, line 24 through line 12 on page 6.  
Following: line 23  
Strike: section 6 in its entirety.  
Renumber: subsequent sections.

20. ~~19~~. Page 6, line 15.

Following: "use"

Strike: ", "

Insert: "or"

21. ~~20~~. Page 6, line 16.

Following: "management"

Strike: ", or disposal"

22. ~~21~~. Page 7, line 5.

Following: "5"

Strike: "or 6"

23. ~~22~~. Page 7, lines 20 through 23.

Following: line 19

Strike: section 10 in its entirety.



## Constitutionality of SB 123

The following is a very brief discussion of the constitutional questions which arise from proposed state legislation such as SB 123. As a preface, it is useful to note that four other western states have adopted similar legislation and of these, one state, the State of Nevada, will be in a posture this spring of litigating against the United States -- barring any Congressional action under bills such as the Hatch or Santini bills, which in effect cede more control to the states. I spoke with the Attorney General of Nevada about the constitutional barriers and he agrees that a fair characterization of the constitutional precedent which exists in reference to legislation such as SB 123 is that at this point it is unevolved; the degree of control by states over "public land" can only at this point be defined in terms of historical and political evolution, not legal evolution. (See the dates of the cases cited below.) In short, there has been almost no resolution of the constitutional problems attendant to state control of public lands. The field of litigation is wide open.

The list of constitutional issues in reference to state control is long and all questions will have to be resolved in court. As an initial matter, jurisdiction of a state to sue the federal government normally is barred by the doctrine of sovereign immunity. Without its consent, the government cannot be sued. Arguably under a recent act, 42 U.S.C. §2409(a), in suits to quiet title, the United States may be named as a defendant. The complication here is that the act does not apply to "trust" lands; however, the avenue of suing federal agents or private claimants to federal lands is available and would avoid any sovereign immunity questions.

The remaining multiple constitutional issues involve questions such as the application of (1) the property clause, Article IV, section 3, clause 2, (Congress shall have the power to dispose of and make rules and regulations ... respecting property belonging to the U.S.), of (2) Article VI, clause 2, ("... the laws of the United States ... made under the authority of the United States shall be the supreme law of the land"), of (3) the cession clause, Article I, section 8, clause 17, ("Congress shall have the power to exercise authority over all places purchased by the consent of the Legislature") of (4) the "necessary and proper clause" of the same Article, ("Congress shall have the power to make all laws which shall be necessary and proper" to carry out the Constitution); of (5) the 10th Amendment (powers not delegated to the U.S. are delegated to the states). All of these Constitutional mandates can be reduced, when trying to conceptualize their application to the state and federal conflict, into two broader constitutional questions: 1) Does the U.S. have any power to retain public land, or must it dispose of any public land? and, is retention breach of a trust agreement under Article IV, section 3, clause 2? (see Pollard's Lessee v. Hagan 44 U.S. (3 How.) 238 (1845)); or 2) Does the Constitution establish the federal government's absolute jurisdiction or sovereignty over public lands?

As to this second question, it has been established that at least with respect to the acquisition of private title and of other rights in federal land obtained from the federal government that, because the property clause includes a right of ownership as well as the right to regulate, the availability of these rights is governed exclusively by federal law. This is an exception to the principle of state governmental jurisdiction over Article IV property. No state law of limitations, no state law creating or disregarding equitable or inchoate rights, and no state law ranking competing claimants to federally owned land is given any application, and rights in federal land can be acquired as federal law allows. E.g., *Broder v. Natoma Water Co.*, 101 U.S. 274 (1879); *Gison v. Chouteau*, 80 U.S. (13 Wall.) 92 (1872); *Irwine v. Marshall*, 61 U.S. (20 How.) 558 (1858); *Jourdan v. Barrett*, 45 U.S. (4 How. 169, 185 (1846)); *United States v. Gratiot*, 39 U.S. (14 Pet.) 526 (1840); *Wilcox v. Jackson*, 38 U.S. (13 Pet.) 498, 516-17 (1839); *Bagnall v. Broderick*, 38 U.S. (13 Pet.) 436, 450 (1839). These cases are distinguished by National League of Cities v. Usery 426 U.S. 833 (1976) (recognizing a federalism limitation on congressional exercise of the commerce power under the 10th Amendment).

To combat these inherent property rights of the federal government in Articles IV and I, states must make the argument that under no circumstances was state sovereignty to be interfered with. Assuming that state sovereignty would be recognized by courts as an area not to be interfered with, a state would have to show in order to invoke the 10th Amendment that exercise of the Congress' power directly impairs states' sovereignty -- that there has been an adverse economic, political, and social impact due to federal proprietary regulation. Under Usery, *supra*, the showing would involve a greater burden, a showing of increased financial burden as a result of federal ownership. This showing will be difficult and perhaps speculative. Thus a court ordered land transfer under state legislation, given multiple unsettled constitutional issues, would probably be very difficult to obtain.

# STANDING COMMITTEE REPORT

January 31

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**PRESIDENT**

MR. ....

**NATURAL RESOURCES**

We, your committee on .....

**SENATE**

having had under consideration ..... Bill No. **123**

**SENATE**

Respectfully report as follows: That..... Bill No. **123**

be amended as follows:

1. Page 3, line 3.

Following: "all land,"

Strike: "including all"

2. Page 3, line 4.

Following: "and"

Strike: "mineral rights appurtenant thereto and"

Insert: "minerals, including oil and gas"

3. Page 3, line 5.

Following: "appropriated"

Strike: ", "

4. Page 3, line 6.

Following: "except"

Strike: "land"

~~EXHIBIT~~

(continued)

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..... 19 .....

5. Page 3, line 7.  
Following: "(a)"  
Insert: "that"
6. Page 3, line 9.  
Following: "(b)"  
Insert: "that"
7. Page 3, line 11.  
Following: "that"  
Insert: "which"
8. Page 3, line 12.  
Following: "defense"  
Insert: "or buildings and appurtenant structures together with  
sufficient lands to accommodate the same used and occupied by  
the United States for necessary governmental functions"
9. Page 3, line 13.  
Following: "that"  
Insert: "which"
10. Page 3, line 16.  
Following: "to"  
Strike: "December 31, 1976"  
Insert: "[the effective date of this act]"
11. Page 3.  
Following: line 19  
Insert: "(e) resource land in the state that has been administered  
by the United States under international treaties or interstate  
compacts."
12. Page 4, lines 6 and 7.  
Following: "people"  
Strike: "of this state"
13. Page 4, lines 19 through 12.  
Strike the entire subsection (3)
14. Page 5, lines 5 and 6.  
Following: line 4  
Strike: subsection (b) in its entirety.  
Reletter: subsequent subsections.
15. Page 5, lines 16 and 17.  
Following: "rates" on line 16.  
Strike: "comparable to present federal rates"  
Insert: "that will result in management of such lands without a  
loss of general fund revenue to the state"

(continued)

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19.....

16. Page 5, lines 20 through 23.

Following: "Section 5."

Strike: balance of section in its entirety.

Insert: "Sale, transfer, or exchange of land prohibited. (1) Any sale, transfer, or exchange of resource land vested in the state of Montana under the terms of [this act] is void unless:

(a) such sale, transfer, or exchange is made strictly in conformity with and pursuant to laws, rules, and regulations of the United States governing the sale, transfer, and exchange of resource lands when the title thereto was vested in the United States; or

(b) there has been first established by a preponderance of the evidence at public hearings held in each county wherein such land is located, that the sale, transfer, or exchange is established as necessary for a compelling public need and is not in any manner directly or indirectly for private gain or profit.

(2) No sale, transfer, or exchange of resource lands may be made without an act of the legislature approving the sale, transfer, or exchange."

17. Page 5, line 24 through line 12 on page 6.

Following: line 23

Strike: section 6 in its entirety.

Renumber: subsequent sections.

18. Page 6, line 15.

Following: "use"

Strike: ", "

Insert: "or"

19. Page 6, line 16.

Following: "management"

Strike: ", or disposal"

20. Page 7, line 4.

Following: "provisions of"

Strike: "[section 5 or 6]"

Insert: "[section 5]"

21. Page 7, lines 20 through 23.

Following: line 19

Strike: section 10 in its entirety.

And, as so amended,

DC PASS

B.G.

HAROLD L. DOVER

Chairman.

SENATE COMMITTEE Natural Resources

Date January 31, 1981 Bill No. SB 123 Time 10:30 A.M.

NAME	YES	NO
Harold Dover, Chairman		✓
Mark Etchart, Vice Chairman		✓
Thomas Keating	✓	
Roger Elliott		✓
Larry Tveit		✓
Jesse O'Hara	—	—
John Manley		✓
William Hafferman		✓
Steve Brown	✓	
Dave Manning	✓	
Patrick Ryan	✓	
Fred Van Valkenburg	✓	

Agnes Hamilton  
Secretary

Harold Dover  
Chairman

Motion: Strike Section 8, Page 7.

(include enough information on motion--put with yellow copy of committee report.)

SENATE COMMITTEE Natural Resources

Date January 31, 1981 Bill No. SB 123 Time 11:30 A.M.

NAME	YES	NO
Harold Dover, Chairman	✓	
Mark Etchart, Vice Chairman	✓	
Thomas Keating	✓	
Roger Elliott	✓	
Larry Tveit	✓	
Jesse O'Hara	✓	
John Manley	✓	
William Hafferman	✓	
Steve Brown		✓
Dave Manning	✓	
Patrick Ryan		✓
Fred Van Valkenburg		✓

Agnes Hamilton  
Secretary

Harold Dover  
Chairman

Motion: SB 123 "DO PASS" as amended

(include enough information on motion--put with yellow copy of committee report.)