MINUTES OF THE MEETING SENATE NATURAL RESOURCES COMMITTEE MONTANA STATE SENATE March 25, 1985

The twenty-fifth meeting of the Senate Natural Resources Committee was called to order by Chairman Dorothy Eck on March 25, 1985, Room 405, State Capitol Building.

ROLL CALL: All members of the Senate Natural Resources Committee were present.

ACTION ON HJR35: Senator Christiaens moved HJR35 BE CONCURRED IN. The motion carried.

ACTION ON HJR27: Senator Gage moved HJR27 NOT BE CONCURRED IN. The motion carried with Senator Fuller abstaining and Senators Eck, Weeding and Mohar voting in opposition.

CONSIDERATION OF HB750: Representative Bardanouve, sponsor of HB750, introduced Mr. Larry Fasbender, Department of Natural Resources and Conservation (hereafter DNRC).

PROPONENTS: Mr. Larry Fasbender, Director of DNRC, submitted written testimony (Exhibit 1) in favor of HB750.

Mr. Russ Brown, representing Northern Plains Resource Council, submitted written testimony (Exhibit 2) in favor of HB750. Mr. Brown proposed changing "uncontested" to "contested" on page 5, line 4.

Mr. Dan Heinz, representing the Montana Wildlife Federation, supports HB750 with Mr. Brown's proposed amendment.

Mr. Wilbur Rehman, former director of the Montana Wildlife Federation, feels DNRC should be able to negotiate with the federal government. Mr. Rehman had experiences working with the federal government on the Kootenai Falls project and stated working with a federal agency on a project of this size is difficult. Mr. Rehman urged the committee for a do pass recommendation, so the citizens of Montana will be adequately represented in the federal process.

Mr. Don Reed, representing the Environmental Information Center, testified that Montana does not recognize total preemption with regard to the Facility Siting Act, and needs to have control over facilities like Kootenai Falls. Mr. Reed feels Montana's evaluation of this project was much better than the federal government's and contained more information. Mr. Reed supports HB750 and the amendment proposed by Mr. Brown.

Mr. Lee Tavenner, an interested citizen from Maxville, Montana, supports HB750 and the amendment proposed by Mr. Brown. Mr. Tavenner feels the people who are most affected by these projects are the least informed. Mr. Tavenner also feels the people should have the opportunity to become involved in the federal process.

There being no further proponents, the hearing was opened to opponents.

<u>OPPONENTS</u>: Mr. Michael Zimmerman, representing The Montana Power Company, submitted written testimony (Exhibit 3) in opposition to HB750.

There being no further opponents, the hearing was opened to questions from the committee.

Upon question from Senator Gage as to whether DNRC would object to amending Section 2 to make Montana responsible for costs incurred, Mr. Fasbender stated DNRC would object, and these costs would be a burden for the State of Montana.

Senator Fuller inquired how the State would get involved without duplicating the work of the federal government. Mr. Fasbender gave Kootenai Falls as an example of the way the State would get involved, unless the State passes legislation requiring its involvement in the hearing process. The State can only become involved in the hearing process at its own expense.

Senator Weeding stated a case questioning whether the Bonneville Power Administration was required to abide by the Major Facility Siting Act had gone to federal court. It was this court's decision that the federal government had to abide by the substantive parts of the Major Facility Siting Act.

Senator Weeding questioned whether a joint Environmental Impact Statement prepared by the State and federal governments would be a possibility. Mr. Zimmerman said this was a possibility, illustrated by the Kootenai Falls project. Mr. Zimmerman asked the committee to remember this cooperation took place without the requirements of Section 2.

Senator Mohar questioned Mr. Zimmerman whether he really believed the State would proceed as an intervenor without conducting a study prior to filing. Mr. Zimmerman stated he believes this study should be done at the State's expense.

Senator Weeding questioned how people's concerns would be addressed. Mr. Zimmerman informed the committee the State would be able to participate in the licensing proceeding as they have always done. Mr. Zimmerman feels HB750 would not make a difference. _____

There being no further questions from the committee, Representative Bardanouve closed the hearing by stating the people of Montana want to be a part of the federal process.

There being no further questions from the committee, the hearing on HB750 was closed.

CONSIDERATION OF HB396: Representative Spaeth, sponsor of HB396, is introducing this bill at the request of the DNRC. The DNRC wants authority to determine when an application for water rights is not made in good faith. Representative Spaeth feels if the DNRC does not make this determination, it will have to be done by the courts.

PROPONENTS: Mr. Larry Fasbender, representing DNRC, submitted written testimony (Exhibit 4) in favor of HB396.

Mr. Russ Brown, representing Northern Plains Resource Council, supports HB396.

There being no further proponents and no opponents, the hearing was opened to questions from the committee.

Chairman Eck questioned what types of applications to appropriate water would be deemed speculative by the DNRC. Mr. Gary Fritz, DNRC, stated the DNRC would evaluate closely applications which want to take water out of state or tie up water for long periods of time. These applications are often not submitted in good faith.

Senator Gage inquired why the DNRC could not turn down any application submitted which would not "beneficially" use water. Representative Spaeth stated speculation adversely affects those who wish to use the water beneficially, but because there are proper procedures which the DNRC must adhere to, the DNRC often cannot limit speculation.

There being no further questions from the committee, the hearing on HB396 was closed.

CONSIDERATION OF HB859: Mr. Don MacIntyre introduced HB859 at the request of the sponsor, Representative Ramirez. HB859

would give the DNRC the ability to certify to the district courts certain matters dealing with adjudication of certain rights. HB859 provides that in a situation where the applicant or objector determines there are legal issues with the water right which need to be addressed, they may send that issue to the district court for a determination. HB859 would apply to any case pending before the DNRC at the present time, but would exempt cases which have already been submitted for a proposal for decision. Mr. MacIntyre submitted a proposed amendment (Exhibit 5) for the committee's consideration.

PROPONENTS: Mr. Ted Doney, representing the Montana Water Development Association, supports HB859 with the proposed amendment. Mr. Doney feels the proposed amendment is very important because without the amendment, every charged application proceeding would go to court.

Mr. Don MacIntyre, representing DNRC, supports HB859 and the proposed amendment.

There being no further proponents, no opponents and no questions from the committee, the hearing on HB859 was closed.

ACTION ON HB859: Senator Fuller moved the amendment proposed by Mr. MacIntyre to HB859 BE ADOPTED. The motion rarried. Senator Fuller moved HB859 BE CONCURRED IN AS AMENDED. The motion carried.

ACTION ON HB638: Senator Halligan moved HB638 BE CUMCURRED IN. The motion carried.

ACTION ON HB396: Senator Gage moved HB396 BE CONCURRED IN. The motion carried.

ACTION ON HB912: Mr. Thompson submitted a proposed amendment to HB912 for the committee's consideration (Exhibit 6)). Senator Shaw moved the proposed amendment BE ADOPTED. The motion carried. Senator Shaw moved HB912 BE CONCUERED DN AS AMENDED. The motion carried.

FURTHER CONSIDERATION OF HJR25: Senator Mohar stated there was broad support for this bill, even though it is generally recognized there is a problem and the delegation has already been asked to resolve the issue. Senator Mohar feels passage of HJR25 will not add any incentive for resolving the wilderness area issue. Chairman Eck wondered if by not passing HJR25, the delegation may determine the legislature is not concerned about designating wilderness areas.

ACTION ON HJR25: Senator Tveit moved HJR25 NOT BE CONCURRED IN. Senator Shaw made a substitute motion HJR25 BE CONCURRED IN. The motion carried by roll-call vote (Exhibit 7).

There being no further business to come before the committee, the meeting was adjourned.

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Senator Dorothy Eck, Chairman

ROLL CALL

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NAME	PRESENT	ABSENT	EXCUSE
ECK, Dorothy (Chairman	~		
HALLIGAN, Mike (Vice Chairman			
WHEELING, Cecil			
MOHAR, John	V		
DANIELS, M. K.			
FULLER, David	V		
CHRISTIAENS, Chris	V		
TVEIT, Larry	V		
GAGE, Delwyn	- V		<i>z</i>
ANDERSON, John			
SHAW, James			
HARDING, Ethel			

Each day attach to minutes.

COMMITTEE ON NAT Resources HB396, 759, 859

VISITOR9' REGISTER				
NAME	REPRESENTING	BILL #	Check Support	
RUSS BROWN	N.P.R.C. Helin	HØ750		
DON REED	MEIC	43750	\checkmark	
Dan Heinz	Mont. Wildlife Fer	HB750	V	
Wilber Rehmen	MMF-Self	H-1378		
Milce Zimmerman	mpco D	48750		V
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DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

ENERGY DIVISION



TED SCHWINDEN, GOVERNOR

(406) 444-6697 ADMINISTRATOR & PLANNING AND ANALYSIS BUREAU (406) 444-6696 CONSERVATION & RENEWABLE ENERGY BUREAU (406) 444-6812 FACILITY SITING BUREAU TEST I MONY ON HOUSE BILL 750

HELENA, MONTANA 59620

32 SOUTH EWING

My name is Larry Fasbender and I am Director of the Department of Natural Resources and Conservation. The Department supports House Bill 750.

As part of the recent rulemaking process, the Department thoroughly studied the Major Facility Siting Act. This in-depth study, combined with our experience in administering the Siting Act, plus recent litigation, has resulted in identification of several areas of the Act that need to be clarified. The purpose of this proposed bill is to clear up these areas and facilitate better administration of the Siting Act. I would like to outline and describe the major changes to the Act proposed in this bill.

In 1983 the Board of Natural Resources and Conservation adopted rules for exempting certain facilities from review as provided for in the Siting Act. These rules require the Department to do an evaluation of an exemption application. Section 1 provides reasonable funding for the Department if it incurs expenses in processing an exemption application. The Department's only experience with an exemption required expenditure of state general funds, which the applicant was willing to reimburse, but there was no statutory provision for such an arrangement.

Section 2 of this bill concerns energy facilities that are subject to Federal Energy Regulatory Commission (FERC) jurisdiction. Over the past decade the Department has taken a position that it has limited jurisdiction under the Major Facility Siting Act in regulating facilities that are also covered by the Federal Power Act. Proponents for the development of hydroelectric facilities in the State of Montana have argued that because of the Federal Power Act, the State of Montana has no jurisdiction under the Siting Act. To litigate this matter would be costly and time consuming. The purpose of this amendment is for the legislature to precisely define how the State of Montana will involve itself in facility siting projects that are subject to regulation by the Federal Energy Regulatory Commission.

Under Section 2 an applicant who proposes to construct a facility that is subject to the jurisdiction of the FERC must file an application and pay a filing fee as is presently required by the Siting Act. The Department will then complete the study required under the Siting Act. The change is that rather than the SENATE NATURAL RESOURCES COMMITTEE

EXHIBIT NO ._.

BILL NO.

032585

HB750

AN EQUAL OPPORTUNITY EMPLOYER

Department simply making a recommendation to the Board of Natural Resources and conducting a hearing under the contested case provisions of the Siting Act, the Department will also be required to participate in the Federal Energy Regulatory Commission proceedings and make a state recommendation based on the study to the FERC. By making this change in the Siting Act the State will be assured that it can have input in the decisionmaking process whether it be at the state or federal level.

Section 3 provides for monitoring the site for a facility that has been certified prior to construction. Currently, the Act provides that sites can only be monitored once construction begins. A number of years may lapse between certification and actual construction and, in this time frame, environmental conditions in the area surrounding a facility can change considerably. The Department's recent experience near Bozeman, Ennis, and Missoula indicates that such monitoring is important to prevent costly mitigation for impacts that could not be fully anticipated at the time of certification.

Section 4 codifies the centerline process the Board has been using since 1976 into the statutes. A recent court case challenged the validity of the Board's process but was dismissed for other reasons. To avoid any future litigation over the current process, and to clarify the Board's authority, it is necessary to make the process explicit in the statute.

The Siting Act implicitly and the current Board policy explicitly requires the Board to certify a route which is a strip of land within which the actual transmission line will be located. The applicant then comes back to the Board and has a final centerline approved within the route prior to construction. The centerline is the exact location for the transmission line. This process is extremely practical since many opportunities for minimizing and mitigating impacts are apparent only when a centerline is selected. It also saves both the applicant and the department time and money because a smaller area is examined for specifics such as pole and tower placement. Without this type of a centerline process, the applicant would have to provide more information. Much of this information would be unnecessary because it would not be specific to finally locating the line and would be a waste of time and effort to collect and to review. In addition, the Board's centerline process reduces the applicant's right-of-way acquisition costs and mimics their internal routing processes.

A primary issue raised in this section is whether the Board should have a contested case hearing or a noncontested case hearing for the centerline process. The Department feels the current process of a contested case hearing at the route

- 2 -

level and a noncontested case hearing at the centerline approval stage provides several opportunities for public involvement and involvement of those impacted by the line without duplicative contested case hearings. An additional contested case hearing would substantially increase the costs to the Department and the applicant, with no commensurate benefits. A contested case hearing at the centerline process would jeopardize the applicants' likelihood of being able to build a transmission line at reasonable costs, with reasonable certainty and within a reasonable time period.

Section 4 also limits fees paid by applicants for centerline review to 25 percent of the original filing fee paid. The Board has been requiring applicants to reimburse the department for centerline expenses, but has not-put an upper limit on these fees. The Department feels the 25 percent limit is reasonable.

Section 6 exempts lines 230 kV or less from the requirement that they must be in long range plans at least two years prior to acceptance of an application by the Department. It is the Department's experience that the current requirement is unnecessarily burdensome for small transmission lines. There is adequate public notice of these facilities in the certification process and the Department does not need two years advance notice to process a small transmission line application. This change will shorten the regulatory timeframe for siting smaller transmission lines.

Section 8 repeals the notice of intent provisions and the five percent filing fee reduction for filing such a notice. This provision is not used because it requires applicants to pay the entire filing fee at the time of application. Applicants have been contracting with the Department for reimbursement of actual expenses as they are incurred, which is much better from their cash flow perspective than a lump sum payment.

House Bill 348 makes several changes to the Major Facility Siting Act. We feel these changes improve the siting Act and avoid future litigation that could be very costly to the state. I urge the committee to give House Bill 348 a "do pass" recommendation.

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TO: SENATE NATURAL RESOURCES COMMITTEE 3-21-85 FR: RUSS BROWN

RE: PROPOSED AMENDMENT TO HB 750 (before Senate Natural Resources Committee Monday, March 25th)

Dear Members of Senate Natural Resources Committee,

We would like to propose an amendment to House Bill 750. We have informed the sponsor and the Department of Natural Resources of our intentions;

AMEND HB 750 SO THAT: On page 5, line 4, we would like to change the word <u>"uncontested"</u> to <u>"contested"</u>

The present siting act sections dealing with powerline siting, allow for a contested case hearing at the time that a siting corridor is selected. These corridors can be two miles or greater in width.

Our concern for the property owner facing condemnation is that: A. Twomo miles is an awfully large path in which the landowner must make his case concerning the least damaging route. Further, years may pass between the time a corridor is selected and the final centerline location. This uncertainty would make it difficult if not impossible for a farmer, rancher or other property owner to plan and manage their property with any degree of certainty.

We feel that by only allowing the opportunity to have a contested case hearing at the time of corridor selection, denies the property owner the ability to address the site specific concerns that will be more readily identifiable when a final centerline is determined.

This would not be an opportunity for a landowner to stop any construction, but would provide them with the chance to have their concerns weighed against the proposed location.

We will try and contact you prior to the hearing. We support HB 750 with this amendment.

Russ Brown NPRC Staff

SENATE	NATURAL	RESOURCES	COMMITTEE
EXHIBIT	NO	2	
DATE	03	32585	
		HR751	2

3/25/85

HB 750 - Extension of DNRC Jurisdiction

When the Major Facility Siting Act was enacted, the legislature recognized that construction of some facilities would be subject to regulation by the federal government. Acknowledging that federal regulation preempts state regulation and that federal regulation is subject to the stringent requirements of the National Environmental Policy Act, the legislature exempted "any aspect of a facility over which an agency of the federal government has exclusive jurisdiction." An example is a hydroelectric facility subject to FERC regulation under the Federal Power Act.

This exemption was deleted in 1983. HB 750 takes another step away from rationality. MPC objected to the action of the 1983 legislature. Likewise, we object to this proposal.

The DNRC has testified that HB 750 is necessary so that the state may participate in federal license proceedings and endeavor to protect the state's concerns for the environment and efficient use of its natural resources. How could this proposal be objectionable?

It is objectionable because it is not necessary. It is objectionable because it attempts to layer another level of bureaucracy and cost on top of existing federal bureaucracy and cost. A brief examination of the bill will illustrate.

HB 750 proposes that any person wanting to construct a facility that would be subject to federal jurisdiction must (1) file an application with the DNRC and (2) complete a study as provided in sections 75-20-211 through **SENATE-NATURAL RESOL**?

EXHIBIT NO ._ 032585 DATE HRJSD

routine tasks. In fact, they are the very tasks that would be required of any applicant subject to the Major Facility Siting Act. The applicant must:

. describe the facility

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- . describe the proposed location
- . summarize environmental studies
- . explain the need for the facility
- . describe alternate locations and the relative merits of each
- . provide baseline data for each location
- . outline an environmental study plan
- . fund the DNRC's subsequent study and evaluation

The information required of the applicant is duplicative of information prepared and filed as part of the federal licensing proceeding. It is information the DNRC may obtain through intervention in the federal proceeding. There is, therefore, no justification for the cost and burden of a second filing with the state.

In proposing HB 750, the DNRC discounts the influence it may exert through intervention in the federal proceeding. As an intervenor, the DNRC may obtain data and studies prepared and accomplished by the applicant. It may examine the applicant's witnesses and present witnesses of its own. It may recommend conclusions of fact and law. It may suggest conditions and modifications. It may object to decisions made by the federal agency. Finally, it may appeal and seek legal redress if the

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federal agency errors. Clearly, HB 750 adds nothing to this list of existing authority.

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In my opinion, HB 750 is based on unacceptable logic. The logic recognizes that the siting and construction of the proposed facility is subject to federal regulation. The logic recognizes that the State's participation in the federal decision making process is not hindered. Nevertheless, the logic requires the non-jurisdictional applicant to fund the state's study and preparation for the participation. This result is fundamentally wrong and should not be condoned by this legislature.

> For: The Montana Power Company By: Michael E. Zimmerman

HB NO. 396

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TESTIMONTY OF THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

BY REQUEST OF THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION: A BILL FOR AN ACT ENTITLED: "AN ACT CLARIFYING THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION'S AUTHORITY TO DETERMINE THAT AN APPLICATION FOR A BENEFICIAL WATER USE PERMIT IS NOT IN GOOD FAITH OR DOES NOT SHOW A BONA FIDE INTENT TO APPROPRIATE WATER FOR A BENEFICIAL USE; AMENDING SECTION 85-2-31, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND AN APPLICABILITY DATE."

The Department of Natural Resources and Conservation is proposing through this bill amendment to have the authority of the Department <u>clarified</u> as to the determination of a non-bona fide or speculative application to appropriate water for a beneficial use.

The present law simply provides that, "The department may cease action upon an application for a permit and return it to the applicant when it finds that the application is not in good faith or does not show a bona fide intent to appropriate water for a beneficial use."

A problem with the present law is that it gives no criteria or guidance to the Department (nor to the applicant) to determine if and when an application is non-bona fide or speculative and not in good faith. Due to the lack of specific criteria in the

SENATE	NATURAL	RESOURCES	COMMITTEE
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		HB396	

present law on which to judge non-bona fide or speculative applications, the Department must turn to and rely on its interpretation of case law.

The proposed criteria as set forth on pages 3 and 4 of this bill is the result of legal research of existing case law by the Department on this subject matter. The proposed criteria is based on existing case law and is the criteria the Department would rely on in the absence of specific legislative direction.

This proposed amendment allows the Legislature to set the criteria it feels is important for the Department to rely on when making decisions on non-bona fide or speculative applications.

It is assumed that the permit processing activity would remain about the same with or without this amendment, except that the additional costs of resolving specific problems with non-bona fide or speculative applications would cost considerably more in rule-making and court litigation without this amendment. This amendment would actually bring about a monetary savings to the state in the long run.

AMENDMENT HB 859 (BLUE COPY)

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Proposed Amendment to HB 912 Third Reading Copy March 22, 1985

1. Page 8, line 20
Following: "period."
Insert: "A mining operation that would qualify as a large-scale
mineral development under this subsection is not a
large-scale mineral development if the mine owner and
operator are small miners as defined in 82-4-303."

SENATE	NATURAL	RESOURCES	COMMITTEE
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ROLL CALL VOTE

SENATE COMMITTEE Natural Resources

Date	032585	HJR	Bill No.	25	Time	2:26 p.	m
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NAME	YES	NO
ANDERSON, John	x	
CHRISTAENS, Chris		<u>N</u> -2
DANIELS, M. K.		X
FULLER, David		x
GAGE, Delwyn	x	
HALLIGAN, Mike (Vice Chairman)	x	
HARDING, Ethel	X	
MOHAR, John		x
SHAW, Jim	X	
TVEIT, Larry		X
WEEDING, Cecil	x	
ECK, Dorothy (Chairman)	x	

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Eak Chairman

Secretary

Motion: Senator Shaw moved HJR25 BE CONCURRED IN.

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MR. PRESIDENT				
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TO REVISE LAW REGARDING SMALL MINER EXEMPTIONS

BE CONCURRED IN

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SENATOR DOROTHY ECK Chairman

	MARCH 26	
MR. PRESIDENT		
We, your committee on		
having had under consideration		No 912
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REVISES THE HARD-ROCK MINING IMPACT ACT AND RELATED STATUTES

be amended as follows:

1. Page 8, line 20. Pollowing: "period." Insert: "A mining operation that would qualify as a large-scale mineral development under this subsection is not a large-scale mineral development if the mine owner and operator are small miners as defined in 82-4-303."

AND, AS AMENDED BE CONCURRED IN

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SENATOR DOROTHY ECK

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MR. PRESIDENT		
We, your committee on	NATURAL RESOURCES	- 15.
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ALLOWS TRANSFER OF CERTAIN WATER USE PERMIT CASES TO THE DISTRICT COURT

be amended as follows:

1. Page 5, line 6. Pollowing: "<u>department</u>" Strike: "<u>shall</u>" Insert: "may in its discretion"

AND, AS AMENDED BE CONCURRED IN

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SENATOR DOROTHY ECK

Chairman.

	NARCH 25. 1985
MR. PRESIDENT	
We, your committee on	5
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DNRC TO DETERMINE WHEN APPLICATION FOR WATER PERMIT NOT IN GOOD PAITS

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SENATOR DOROTHY ECK

Chairman.

MARCH 25 19.85

MR. PRESIDENT

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REQUESTING MONTANA CONGRESSIONAL DELEGATION SUBMIT WILDERNESS BILL IN 1985

BE CONCURRED IN

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SENATOR DOROTHY ECK

Chairman.

	MARCH 25	₁₉ 85
MR. PRESIDENT		
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SENATOR DOROTHY ECK

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SUPPORTING FEDERAL MAGNETOSYDRODYNAMICS (MUD) PROGRAMS

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SENATOR DOROTHY ECK

Chairman.