

## MINUTES

### MONTANA SENATE 51st LEGISLATURE - SPECIAL SESSION

#### COMMITTEE ON FINANCE AND CLAIMS

Call to Order: By Vice-Chairman Gary Aklestad, on July 1, 1989, at 9:30 a.m., Room 108, Capitol

#### ROLL CALL

Members Present: Senator Gary Aklestad, Senator Loren Jenkins, Senator Esther Bengtson, Senator Matt Himsel, Senator Paul Boylan, Senator Tom Keating, Senator Judy Jacobson, Senator Swede Hammond, Senator Pat Regan, Senator Larry Tveit, Senator Fred Van Valkenburg, Senator Dennis Nathe, Senator Greg Jergeson, Senator Gerry Devlin, Senator Richard Manning, Senator Sam Hofman, Senator Lawrence Stimatz, Senator Ethel Harding

Members Excused: Senator Pete Story

Members Absent: None

Staff Present: None

#### Discussion: HB 46

Chairman Aklestad reminded the committee that a joint hearing on HB46 was held with the House Committee on Appropriations, and that the bill is to transfer the Litigation and Analysis Bureau of the Department of Commerce to the Department of Justice.

Senator Hofman offered a motion that HB46 be not concurred in.

Senator Jergeson offered a substitute motion that HB46 be concurred in. He stated that he knows this bill, perhaps, puts some members of this committee on a certain hot seat, and he appreciates that, but indicated that, nevertheless, he thinks it is terribly important because the stakes are so high. He pointed out that it is the perception of farmers throughout the State of Montana that there is a risk the

SENATE COMMITTEE ON FINANCE AND CLAIMS

July 1, 1989

Page 2 of 7

Mccarthy Farms case will be somehow weakened by the reorganization taking place within the Department of Commerce.

Senator Jergeson stated that he is, frankly, as concerned as they are about it, that his greatest concern is that the rail planning functions and the litigation functions will be joined together into one bureau, and he is not satisfied that there has been a showing of how those functions are going to be separated. He stated that he thinks it is critically important that, where necessary, the Department of Transportation work cooperatively with the Burlington Northern Railroad, but it is also critically important that there be absolutely nothing done which would ever prejudice the Mccarthy Farms case, if they are, as everyone has stated, determined that the plaintiffs be backed up one hundred percent. He added that, if both functions are together in one bureau, with frankly a very small staff, he does not believe it is possible that it will be clear at all times that those functions are always separate, that the case, on one hand, would not be prejudiced, or, on the other hand, BN would not want any information they may have to give to the Department of Commerce for the rail plan, or would refuse to cooperate with the rail planning process because they would be afraid that information would get into the hands of the plaintiffs' attorneys.

He indicated he thinks that both sides and both responsibilities have to be kept separate, somehow, that he sees no movement on the part of the Department to make a separation and clearly delineate what that separation is, so he would like to keep this bill moving through the legislative process until that, at least, has occurred. He added that some argument was made that the Department of Justice is not necessarily the appropriate place for this, but that he thinks it can work well there, that they have confidence in the Attorney General and his staff to make sure it works well there and that the cooperation which has to take place can occur. He asked for the committee's support for this bill, so that it can be brought up on the floor for debate on second reading.

Senator Nathe indicated he is still making up his mind how to vote on this bill, but would like to have it in the record that he is really disgusted with what happened and, if this does screw up the Mccarthy Farms case, no matter which way he votes, by God that Department of Commerce director will; what the Democrats have had to say in the past is going to be damned slight with what he will do in the future. He stated that he really feels strongly about this, that he really feels strongly about the effort which has been put in by the farmers

SENATE COMMITTEE ON FINANCE AND CLAIMS

July 1, 1989

Page 3 of 7

and the State of Montana, and that he is just damned irritated, reiterating that he wanted that as part of the record. Senator Nathe then indicated he is still determining how to go on that, noting that he will probably vote to retain this where it is, that he is trying to balance between interfering with a department head on the executive side, and whether they should be doing that, inhibiting any efficiencies which are attempting to be made. He apologized to the chairman, indicating he is angry and irritated.

Senator Keating stated that Senator Nathe makes an excellent point, but indicated that the Mccarthy Farms litigation, which is really what is at stake, is not going to be affected by the movement of this little bureau from one department to another. He pointed out that the Mccarthy Farms litigation is actually being handled by contracted services, that any effects on the Mccarthy Farms case will be by the director of the Department of Commerce and that, if he chooses to become lax on that, it will not make any difference where this bureau is because those contracted services are still with the Department of Commerce. He indicated this is a statistical gathering bureau and, if they put it in the Attorney General's office, it does not mean there will be any litigation at all from this bureau, that it is a misnomer to call it a litigation bureau. He added that the effect of this move really has nothing to do with Mccarthy Farms, that it is the attitude of the director of the Department of Commerce which will have the effect.

Senator Himsl indicated he is not very conversive with this whole thing, but understands Senator Jergeson's concerns and can appreciate it. He asked Senator Jergeson if this bureau deals primarily with transportation problems and rate studies, and that, if there is a violation, since they have no attorneys as was testified to, they would notify the Attorney General, who would come in with the legal forces. Senator Jergeson indicated that Senator Nathe has his hand up, that maybe he would like to respond first, and he would then discuss the functions there, as well. Senator Himsl pointed out that they testified they had no attorneys. Senator Jergeson responded that they have no attorneys there, with respect to how Mccarthy Farms is handled in this whole thing, that the law firm out of Denver is under contract and expert witnesses do a lot of number crunching back in Washington, D. C., but this bureau operates as a nerve center to keep all that coordinated.

Senator Himsl then indicated that, if this is a policing agency in that sense, it seems to him there would be a conflict of interest, and it should not be in the same tent

SENATE COMMITTEE ON FINANCE AND CLAIMS

July 1, 1989

Page 4 of 7

as the Attorney General. He again stated that he thinks it would be a conflict of interest, indicating that he is not so concerned about this particular case, but that, in the operation of the bureau, they must do more than this McCarthy Farms case. He further indicated that he understands the decision has been made on it, that now they are negotiating the amount of money and, as far as the case is concerned, it is not in jeopardy, that it is a question of negotiations for the payments. He asked if that is correct. Senator Jergeson responded that, at this point, they are in settlement conference, or had been, in Billings, to determine if they can come to an out-of-court settlement as to the amount of reparations to make. He added that, however, in the figures presented to the ICC, BN claimed that they only owe on the order of \$9 million, and the plaintiffs are suggesting they owe \$84 million, which indicates there is still considerable controversy between the two sides, and it is a terribly important and sensitive area that they are working on.

Senator Himsl stated that he, for one, shares sympathy with Senator Nathe, that he does not care if the director is the devil, himself, it should not be transferred to the Attorney General's office, that it is a rate study program dealing with transportation, a field entirely separate from him, and he should be in the position where cases or violations are brought to him to prosecute. He stated that he would think it should stay where it is and, if there is any lack of performance, he would think it is time to tear down the tent.

Senator Hammond indicated he hesitates to take up the committee's time, but that he has to echo Senator Nathe's remarks. He reported that he and his brother were some of the first people to put money into this thing, that he has some real close feelings about the outcome, and has talked to Mr. Letson and given him his ultimatum as to what could happen if he does not serve them in the proper way. He added that he thinks Senator Himsl put it very clearly that moving this thing is not, in any way, going to influence the outcome, and he does not see where it has any real result by moving it. He reported that he has had telephone calls from many very excited people who are terribly misinformed, and who have been led to believe this is a maneuver on the part of Mr. Letson to let this thing go down the drain, noting that he does not believe that. He added that he would hope the committee does not use this case as an excuse to move this department.

Senator Tveit reported that he has been involved, very much, in this case, that he put money in it way back when it started, that he also served as director of the grain growers,

SENATE COMMITTEE ON FINANCE AND CLAIMS

July 1, 1989

Page 5 of 7

and that they meet with the principal lawyers out of Denver and Omaha on a regular basis, noting that is outside this division, like Senator Himsl said. He indicated that, basically, the State was brought into this through the funding process and, naturally, it falls in that area. He stated that he has mixed emotions about comments made by the present director in testimony, and also some of the newspaper clippings, coming through the Department of Commerce, thoughts, slants or ideas which were counter to what they would like to see in this Mccarthy Farms case. He indicated the case is totally outside, more or less, the Department of Commerce, with the lawyers and the principal plaintiffs, that the State has been involved, actually, with money, and he is sure they are involved on behalf of the State. He pointed out that moving that to the Attorney General's office is not going to do anything to Mccarthy Farms, but, certainly, the Department of Commerce has to be a friendly player in this, on a cooperative basis.

Senator Tveit stated that he started on this for some concerns and has some mixed emotions regarding leaving the litigation bureau, or the combination, here, and whether it weakens it, noting that the attitude was such at the time that really did cause this. He reported that he checked on a lot of things, that it is not changing on the main scene, with the lawyers, that he talked to them in Great Falls last month on the case.

Senator Devlin asked Senator Jergeson if the main reason he is doing this is out of a fear there will be a settlement for far less than what the people expect. Senator Jergeson responded that was the first fear expressed by a lot of producers, which is why he decided to get involved in the issue. He indicated that some people questioned the director's motives when he did this, and he has made his personal assurances but, because two very different functions are now combined within one bureau, he thinks there is tremendous potential for some sort of inadvertent slip-up which could prejudice the case on the one hand, or could cause more difficult situations in the development of rail plan on the other hand, and he wants to keep those two functions separate so that everyone is absolutely assured that, institutionally, they have made sure the case is not prejudiced.

Senator Van Valkenburg asked the committee members, as they decide how to vote on this motion, to think back to when this committee considered the Department of Commerce budget in HB100, noting they were about in the second or third week of April, and he asked the director of the department, at that time, what the department's commitment was towards the

SENATE COMMITTEE ON FINANCE AND CLAIMS

July 1, 1989

Page 6 of 7

Mccarthy Farms litigation, and further asked him questions about reorganization within that department, which was followed-up by questions from Senator Nathe, Senator Hammond, Senator Tveit, Senator Jergeson; that they went around the table asking the director about that commitment. He indicated that, if the committee members are relying on personal commitment from him, now, in terms of how they vote on this bill, they should think about what he told them in April about that whole thing, because he had been in the job since January, this was the third week of April, that he walked into this committee and said nothing at all about any of this kind of stuff. Senator Van Valkenburg stated that he wishes the committee were not voting on this bill, as it is, that he wishes they were voting on a motion to reconsider their confirmation of that director, that one vote difference on the motion to confirm that director would have never put them in this position. He indicated that it is not just Mccarthy Farms he is concerned about, that he is concerned about Montana's relationship with Japan, with the Far East, and that they have a director here who can destroy an awful lot.

Chairman Aklestad indicated to the committee that they should kept the subject matter to the bill, itself. Senator Van Valkenburg responded that he is, that he is talking to people about their vote on this bill.

Senator Nathe pointed out that, as a point of clarification on how this got put together, the State filed a case that the base rates were too high, in March, 1981, and Mccarthy Farms, the farmers and producers, filed that the rates were unreasonable from 1978 to 1980. He reported that the State's case was before the ICC, that Mccarthy Farms was before Judge Hatfield, that Judge Hatfield referred part of the Mccarthy Farms case to the ICC, and that, at some point, the ICC and the federal court merged these two cases. He added that he got the impression, from testimony, that Mike Ogborn, as the principal lawyer for the plaintiffs, has, because of the combination of cases, special status as a special Attorney General, functioning, in this case, to represent the State's interests.

Senator Nathe indicated that he is probably going to vote against this bill, apologizing to Senator Jergeson, and explained that he has to give the guy the benefit of the doubt.

Senator Jergeson noted that he thinks he can count votes as well as anybody, but that he really does think it is an important issue which should be continued through to third

SENATE COMMITTEE ON FINANCE AND CLAIMS

July 1, 1989

Page 7 of 7

reading, in any case. He reported that, in testimony, the director indicated he had come to members of the Legislature this winter, when it became apparent a supplemental was needed to continue the Mccarthy Farms case, that it was not the director who came to Senator Nathe and himself, it was the staff people who have now been reorganized into a different bureau, and who have been given indications they will no longer be involved in the case. He reported that they worked out the numbers so they, in the Legislature, knew what was going on, that these are the people who have been with it and who they can have confidence in. He then indicated that Mr. Letson has lots of responsibilities in the department, and does not need to get bogged down in something experts are involved in. Senator Jergeson noted that he knows where the votes probably are, and he really does urge the committee's vote for this bill.

DISPOSITION OF HB46

Chairman Aklestad called for a roll call vote on the substitute motion by Senator Jergeson that HB46 be concurred in. Motion failed and, by voice vote, the committee voted to reverse the vote and report that HB46 be not concurred in.

ADJOURNMENT

Adjournment At: 10:05 a.m.

  
\_\_\_\_\_  
GARY C. AKLESTAD, Vice-Chairman

GCA/mhu  
F&CHB46.071

# DAILY ROLL CALL

FINANCE AND CLAIMS

COMMITTEE - 1989

DATE 7/1/89

NAME	PRESENT	ABSENT	EXCUSED
Senator Gary Aklestad	✓		
Senator Loren Jenkins	✓		
Senator Esther Bengtson	✓		
Senator Matt Himsel	✓		
Senator Paul Boylan	✓		
Senator Tom Keating	✓		
Senator Judy Jacobson	✓		
Senator H.W. "Swede" Hammond	✓		
Senator Pat Regan	✓		
Senator Larry Tveit	✓		
Senator Fred Van Valkenburg	✓		
Senator Dennis Nathe	✓		
Senator Greg Jergeson	✓		
Senator Gerry Devlin	✓		
Senator Richard Manning	✓		
Senator Sam Hofman	✓		
Senator Lawrence Stimatz	✓		
Senator Ethel Harding	✓		
Senator Pete Story			✓



## ROLL CALL VOTE

## FINANCE AND CLAIMS

DATE: 7/1/89 BILL NO. HB46 TIME: 10:00 AM

NAME	YES	NO
SENATOR GARY AKLESTAD		✓
SENATOR LOREN JENKINS		✓
SENATOR ESTHER BENGTON		✓
SENATOR MATT HIMSL		✓
SENATOR PAUL BOYLAN	✓	
SENATOR TOM KEATING		✓
SENATOR JUDY JACOBSON	✓	
SENATOR H.W. "SWEDE" HAMMOND		✓
SENATOR PAT REGAN	✓	
SENATOR LARRY TVEIT		✓
SENATOR FRED VAN VALKENBURG	✓	
SENATOR DENNIS NATHE		✓
SENATOR GREG JERGESON	✓	
SENATOR GERRY DEVLIN		✓
SENATOR RICHARD MANNING	✓	
SENATOR SAM HOFMAN		✓
SENATOR LAWRENCE STIMATZ	✓	
SENATOR ETHEL HARDING		✓
SENATOR PETE STORY		

Mary Lynch  
Secretary

Ray C. Aklestad  
Chairman  
*Fulk*

MOTION: THAT HB 46 BE CONCURRED IN