MINUTES

MONTANA HOUSE OF REPRESENTATIVES
53rd LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN RUSSELL FAGG,** on February 15, 1993, at 8:00 a.m.

ROLL CALL

Members Present:

Rep. Russ Fagg, Chair (R)
Rep. Randy Vogel, Vice Chair (R)
Rep. Dave Brown, Vice Chair (D)
Rep. Ellen Bergman (R)
Rep. Jody Bird (D)
Rep. Vivian Brooke (D)
Rep. Bob Clark (R)
Rep. Duane Grimes (R)
Rep. Scott McCulloch (D)
Rep. Jim Rice (R)
Rep. Angela Russell (D)
Rep. Tim Sayles (R)
Rep. Liz Smith (R)
Rep. Bill Tash (R)
Rep. Howard Toole (D)
Rep. Tim Whalen (D)
Rep. Karyl Winslow (R)
Rep. Diana Wyatt (D)

Members Excused: None

Members Absent: None

Staff Present: John MacMaster, Legislative Council
Beth Miksche, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing: HB 559, HB 555, HB 554, HB 561, HB 562, HB 597, HB 551, HB 570
Executive Action: HB 559, HB 482

HEARING ON HB 559

Opening Statement by Sponsor:

REP. SHIELL ANDERSON, HD 81, Livingston, addressed the main change in the bill which is the way fees are collected for application to the State Bar. Fees originally collected by the Supreme Court will now go directly to the State Bar. Subsection (3) of the bill states that all money collected and spent from fees provided must be accounted for annually in a report by the State Bar of Montana to the Supreme Court.

Proponents' Testimony:

Patrick Chenovick, Supreme Court Administrator, said the essence of HB 559 means the clerk does not collect fees for character witness investigations. The money, instead, goes to the State Bar. This bill deletes the Supreme Court and the clerk from having general fund appropriations. It decreases the need for approximately $26,000 from the general fund. The system will operate the same. The applicants will be controlled by the Supreme Court because the court has direct supervision over all charged investigated attorneys that apply to the Bar.

Opponents' Testimony: None.

Questions From Committee Members and Responses:

CHAIRMAN FAGG confirmed with **REP. ANDERSON** that this bill was introduced January 22, 1993, to the committee by former **Rep. Garry Spaeth**, who drafted the bill.

Closing by Sponsor: None

HEARING ON HB 555

Opening Statement by Sponsor:

REP. ROBERT PAVLOVICH, House District 70, Butte, made no opening.

Proponents' Testimony:

Lori Maloney, Clerk of District Court, Butte-Silver Bow. Ms. Maloney referred to page 2, line 14, subsection (h), "for filing and docketing a transcript of judgement or abstract of judgement (abstract of judgement is being deleted from the bill), transcript of the docket from all other courts, $25 (being deleted) the fee for entry of judgment provided for in subsection

(1) (c)." The fee this section is referring to is a uniform fee for all judgments and, as it stands now, the judgment in district court is $45. The clerks of court are asking that the fee be uniform with all regular filing fees.

Opponents' Testimony:

Anne Gilkey, Chief Counsel, Department of Family Services (DFS), said that DFS opposes section 2, page 6 due to the fiscal impact on the agency.

Questions From Committee Members and Responses:

REP. SAYLES asked **Ms. Gilkey** whether the bill would be acceptable to DFS if the word "certification" were taken out of section 6. **Ms. Gilkey** confirmed it would be acceptable.

REP. SMITH asked **Mr. Gilkey** to explain how this bill would fiscally affect DFS. **Ms. Gilkey** said that, for each case DFS handles, 4,520 certified copies are sent to various places. Right now, DFS counsels 2,013 families throughout the state, generating thousands of pages of paperwork, costing DFS thousands of dollars it doesn't have. **REP. SMITH** asked who is paying for this paperwork, and
Ms. Gilkey said the county picks up some of the fees.

Closing by Sponsor:

REP. PAVLOVICH had not received a fiscal note and would prefer that it be presented before the committee makes a decision on the bill.

HEARING ON HB 554

Opening Statement by Sponsor:

REP. BOB CLARK, HD 31, Ryegate, said HB 554 came about as a result of HB 81 which was tabled February 2, 1993. **REP. BROWN** was surprised to see that the penalty for deliberate homicide is 10 years. This bill would increase the minimum sentence to 50 years for deliberate homicide. The average years served to be eligible for parole in a 50-year sentence would be 32 years.

Proponents' Testimony: None

Opponents' Testimony:

Bob Campbell, American Civil Liberties Union of Montana, stated ACLU's belief that one of the main reasons this bill is wrong is

cost. It costs $16,000 a year to house inmates, and it will cost $100,000 a year if duration continues into the future. This bill is contrary to old policy as it tries to minimize and reduce the number of inmates in prison. He pointed out that homicide has one of the highest rates of completion of rehabilitation of offenses. Many times the crime is emotional or due to being under the influence of a person or an illegal substance, and importantly, many times, these offenses do not occur again from the same person.

Questions From Committee Members and Responses:

REP. BROWN asked to hear from someone from the prison system, specifically, **Mickey Gamble, Administrator, Department of Corrections**, before the committee votes on this bill. No one from the DOC was available to speak.

Closing by Sponsor:

REP. CLARK reminded the committee that this bill would not affect any people serving prison terms now. It would not become effective until October 1993.

HEARING ON HB 561

Opening Statement by Sponsor:

REP. DAVE BROWN, House District 72, Butte, said the purpose of this bill is to amend the definition of employer so that an agent of an employer, specifically management of an employee, can be held liable, either jointly with the employer, but more importantly, independently. Under the present statutory scheme, only the employer is liable for the actions of the management of the employee.

Proponents' Testimony:

Anne MacIntyre, Administrator, State Human Rights Commission, presented written testimony. **EXHIBITS 1 and 2**

David Owen, Executive Director, Montana Chamber of Commerce, presented written testimony. **EXHIBIT 3**

Opponents' Testimony: None

Questions From Committee Members and Responses:

REP. GRIMES asked **REP. BROWN** to address the concerns of **Mr.**

Owen's testimony (see **EXHIBIT 3**). **REP. BROWN** said one of **Mr. Owen's** concerns is whether an employer has responsibility for a contractor, and the answer is no. Contractors are covered by their own rights and shouldn't affect the relationship between the employer and the contractor's company.

Addressing the question, **Ms. MacIntyre** said that, in general, the company determines liability of an employer for any act of discrimination that occurs in the work place. It is general liability law to establish liability in the situation described.

Closing by Sponsor:

REP. BROWN said that this provision has been in federal law for 39 years and hasn't been affected by the above concern.

HEARING ON HB 562

Opening Statement by Sponsor:

REP. JIM RICE, House District 43, Helena, said that HB 562 is an effort to make child pornography illegal. Currently, Montana does not have such a law. HB 562 expands the current statute regarding special abuse to children by expanding the definition to include having a child photographed. Currently it is illegal to have a child photographed while engaged in activity which is thought to be sexual contact with another person. **EXHIBITS 4, 5, 6, and 7**

Proponents' Testimony:

John Conner, Montana County Attorney's Association, related that in his experience working with sexually abused children, he has found that, almost universally, people who engage in homophiliac type of behavior also frequently possess materials depicting children involved in sex acts. The MCAA has obtained search warrants so they can search out the houses of those people accused of those offenses for purposes of determining whether or not the evidence is available. It is difficult, however, to get that information before the court because it's not directly relevant to the charge itself unless law enforcement can establish, through an expert witness, the fact that this kind of behavior is happening. If this bill were passed, even though the offense is a misdemeanor, it would allow the charge of that misdemeanor to work in conjunction with felony offenses of child sexual abuse. That material can be brought before the court, and the connection can be made much more easily.

Sharon Hoff, Montana Catholic Conference, presented written testimony. **EXHIBIT 8.**

Father Jerry Lowney, Chairman, Social Customs Committee and Priest Council. Father Lowney also holds a doctorate in criminology and human behavior. He has worked with **REP. RICE** on child labor laws and was available for questioning.

Gail Hellander, President, The Primary Organization of Stevensville Stake of the Church of Jesus Christ of Latter-day Saints, presented written testimony. **EXHIBIT 9**

Opponents' Testimony: None

Questions From Committee Members and Responses:

CHAIRMAN FAGG asked **Dr. Mark Moser, child psychiatrist,** if there is a cure for these people. **Dr. Moser** said there is no scientific evidence of a cure to homophilia. He has evaluated several hundred sex offenders and said there's no question in his mind that child pornography contributes to the development of homophilia.

REP. BROOKE asked **Ms. Gilkey, Department of Family Services,** if DFS can handle an expansion of its budget to protect children from child pornography. **Ms. Gilkey** said there is no fiscal note on this bill, and that protecting the children, i.e., foster care and investigations, will not have a great impact on this bill.

Closing by Sponsor: None

HEARING ON HB 597

Opening Statement by Sponsor:

REP. TIM WHALEN, House District 93, Billings, said he believes a person ought to have the right to be tried by a jury of their peers without having to pay the costs of that jury if he/she loses.

Proponents' Testimony: None

Opponents' Testimony:

Bob Wood, Assistant City Attorney, City of Helena, said that, although the city agrees with **REP. WHALEN'S** concept, there is a problem with the bill. Over the last couple of years the city of Helena city court has assessed, roughly, $3,000 in costs. That may seem like a minor amount, but it can have quite an impact on the court's jurisdiction. **Mr. Wood** also pointed out that current statute states the court may require defendants to pay costs. He

said there are persons who ask for a jury trial to serve as a soapbox upon which to speak.

Greg Hoppe, Montana Magistrates Association, said he doesn't know of any judge who routinely requires a payment of jury fees when the defendant is found guilty. He said that, if this law is enacted, many courts would not be able to operate on a limited budget. A jury trial runs in excess of $400 per trial.

Closing by Sponsor:

Addressing **Mr. Hoppe's** testimony, **REP. WHALEN** said that people have to draw the line at some point for the sake of saving costs. The fact of the matter is that the court has this authority and shouldn't. The suggestion has been made that people are not abusing this authority, but **REP. WHALEN** believes that just because some people have the ability to pay for a jury, it shouldn't happen as a matter of course. for the jury.

HEARING ON HB 551

Opening Statement by Sponsor:

REP. JOHN COBB, House District 42, Augusta, said this bill requires a person convicted of a dangerous drug offense to attend a dangerous drug information course.

Proponents' Testimony:

Darryl Bruno, Administrator, Alcohol and Drug Abuse Division, Corrections and Human Services, said that the Alcohol and Drug Abuse Division supports HB 551 as amended; this requires state-approved drug abuse information courses added to the bill.

Opponents' Testimony: None

Questions From Committee Members and Responses:

REP. BROWN asked **Mr. Bruno** if the courses currently being taught will be slightly altered if they are already teaching drug and alcohol abuse courses. **Mr. Bruno** said they will be changed at a very minimal cost to the state, and the offenders will be charged for the course.

Closing by Sponsor: None

HEARING ON HB 570

Opening Statement by Sponsor:

REP. LARRY GRINDE, House District 30, Lewistown, noted that HB 570 is an act requiring an assessment of governmental actions that affect the use of private property; requiring an assessment of the constitutional implications of government actions; requiring private property assessments to be submitted to the Governor and the legislature; and providing an effective date. **REP. GRINDE** clarified the bill, proposed amendments, and discussed the Private Property Assessment Act. **EXHIBITS 10 and 11.**

Proponents' Testimony:

John Bloomquist, Attorney, Special Assistant for the Montana Stockgrowers Association, presented written testimony. **EXHIBIT 12**

David Owen, Montana Chamber of Commerce, stated that due to this bill, Montana Chamber members face more regulations, more restrictions, and more rules, especially for those doing business near waterways. He and Chamber members ask that the committee understand the effect of this law on people who own or do business on that property. **Mr. Owen** reminded the committee that talking about private property rights means talking about people's futures, jobs, small communities being dependent on farms and timber.

Hertha Lund, Journalist and Law Student, University of Montana, presented written testimony. **EXHIBIT 13**

Dave McClure, President, Montana Farm Bureau Federation, presented written testimony. **EXHIBIT 14**

Peggy Wagner, Director, Montanans for Multiple Use, presented written testimony. **EXHIBIT 15**

Tom Hopgood, Montana Association of Realtors, said one of the cornerstones of the Montana Association of Realtors is protecting the rights of private property owners. The organization believes it is a sad commentary that HB 570 is even necessary.

Jim Peterson, Montana Stock Growers Association and Wool Growers Association, presented written testimony. **EXHIBIT 16**

Robert G. Natelson, Professor of Law, University of Montana, presented written testimony. **EXHIBIT 17**

Opponents' Testimony:

Bob Barry, Montana Alliance for Progressive Policy, presented written testimony. **EXHIBIT 18**

Christine Mangiantini, League of Women Voters, stated that the intent of HB 570 is to protect the interest of private property owners, the interest of the general public, and to fiscally help the state by requiring effective governmental actions on constitutionally protected private property interests. The federal constitution protects private property rights. The courts have consistently held the states' broad powers to regulate private property in the public interest for a wide range of environmental, human rights, and historic preservation intentions. The constitution of the state of Montana assures the people that private property shall not be taken or damaged for public use without just compensation to the full extent of the law.

Beth Baker, Attorney, Department of Justice, said that department has serious concerns about this legislation because of the potential increases in administrative and litigation costs to the agency. Three functions of the DOJ are potentially impacted by this legislation: Fire Prevention and Investigation Program, Motor Vehicle Division, and Gambling Control Division. Because of the broad definition of government action, DOJ suggests that they be required to conduct an assessment in these operations and each time a license is issued or revoked.

Valorie Drake, concerned citizen, Belgrade, presented written testimony. **EXHIBIT 19**

Russell Hill, Executive Director, Montana Trial Lawyers Association, representing himself as a concerned citizen, believes that government has imposed on private property owners. He said that government will act as a buffer to private property owners, and HB 570 will impose a gridlock on the system whereby government will try to administrate a balancing act between private property interests and funding.

Don Judge, Montana State AFL-CIO, presented written testimony. **EXHIBIT 20**

Stan Bradshaw, Montana Trout Unlimited, stated that traditionally private property rights have been constrained by considerations of public health, safety and welfare. The right to do with one's property is constrained by the effects of bureaucracy upon the public at large. **Mr. Bradshaw** emphasized an economic loss to private property owners, no matter how small. Requiring a state agency to assess the amount of what that loss is going to be is open invitation to litigation. **Mr. Bradshaw** urged the committee to wait for a fiscal note before they vote on the bill.

Amy Kelley, Common Cause of Montana, presented written testimony. **EXHIBIT 21**

Janet Ellis, Montana Audubon Legislative Fund, read a list of regulations that she interprets, from the bill, which would be affected by this law. They are: building codes, regulations for

guidance and outfitters, plant inspection, pesticide regulations, oil and gas regulations, flood plane regulations, conservation district regulations, water rights, water well regulations, game farms, every hunting regulation in the state, underground tanks, water quality, air quality, hazardous waste, stream-type management zone laws, mining laws, zoning sanitation laws, liquor licenses, handicap access things, and workers' safety laws. **Ms. Ellis** urged the committee to wait for the fiscal note before voting on the bill.

Richard Parks, business owner, Missoula, representing Page Carroccia, attorney, Missoula, presented **EXHIBIT 22.**

Bill Verwolf, City Manager, Helena, said he is opposed to HB 570 because it opens up extensive possibilities for the amount of review required on every action the city takes. A prime example of that may be that Helena building codes are not on a national scale; they are adopted on a state of Montana scale. He asked the committee to imagine the amount of review of that one particular action if the city were to adopt building codes on the national scale.

Questions From Committee Members and Responses: None

Closing by Sponsor:

REP. GRINDE admitted that the opponents had legitimate concerns and said he has no intentions of creating the "monster" that's being portrayed in this bill. **REP. GRINDE** stated he is trying to protect the property rights of the citizens of the state of Montana so that, when an action is taken by government, it immediately shows it's going to affect them. He also addressed **Ms. Ellis'** testimony and emphasized that it is not HB 570's intention to wrongly affect those regulations and rights in any way; he will personally speak with the opponents to clear that up after the hearing.

REP. GRINDE said there was no fiscal note at the time of the hearing because the bill was introduced late; he is waiting on the fiscal note himself. There will be fiscal impact on agencies; but it's not going to require hiring economists, attorneys and lay people to implement this legislation.

REP. GRINDE also addressed costs of litigation mentioned numerous times by opponents. He asserted that that is exactly what he is trying to prevent though this bill. If an agency of the government is going to take an action that could be challenged in the court system at a later date, he believes those agencies ought to know the consequences of their actions. That's what this bill is about - knowing up front what is going to happen so that the government can in some way adjust to it.

REP. GRINDE emphasized that HB 570 does not change anything that is not in current law. All this bill does is get state agencies involved, how their actions could affect private property, and that the state could be liable if this is impacted.

EXECUTIVE ACTION ON HB 559

Motion/Vote: **REP. GRIMES MOVED HB 559 DO PASS.** Motion carried unanimously.

EXECUTIVE ACTION ON HB 482

Motion: **REP. BROWN MOVED HB 482 DO PASS.**

Discussion:

REP. WYATT discussed a conceptual amendment. **CHAIRMAN FAGG** and **MR. MACMASTER,** not aware of any amendments, asked her to explain it to the committee.

Motion: **REP. WYATT** moved an amendment which refers to the insurance company paying medical coverage on children. In the case of an absent parent, specifically female, who is working and is not covered by health insurance, that parent can be held responsible for paying for health insurance.

Mr. MacMaster asked **REP. WYATT** to explain whether the courts order these agencies to pay for children's insurance or whether this bill would be used as a vehicle to enforce an already existing court order that the parent pay for insurance. Currently, during a divorce, often a judge orders as part of a parent's support obligation, that a parent keep up existing medical insurance on the child.

REP. BROOKE spoke to **Paulette Coleman**, attorney at law, who specializes in children and families in Missoula. **CHAIRMAN FAGG** suggested holding off on **REP. WYATT'S** amendment and having **Ms. Coleman** talk to **REP. BOHLINGER** and **Mr. MacMaster** and add this during House floor debate. The concept amendment is not that complicated, but the wording should be drafted by someone who understands it.

Motion: **REP. VOGEL**, referring to page 12, line 4, moved that language be amended to "administrator or his designee."

REP. WINSLOW spoke to **Mr. Ahrens** and **Mr. MacMaster** about the amendments specifically. **Mr. MacMaster** told **Mr. Ahrens** and **REP. WINSLOW** that when a bill is drafted, it is understood that the person in charge of a company/organization delegates it to anybody he wants to, and **Mr. Ahrens** agreed with that. While it doesn't hurt to put the amendment in, that is normally not done when a bill is drafted.

REP. VOGEL withdrew his amendment.

REP. RICE does not like the idea of suspending someone's license to a business or profession. He said it's a bad approach to take away somebody's livelihood to get money from them. He is concerned that would drive people out of the state.

Motion: **REP. RICE** moved a concept amendment to strike sections 6 through 10.

Discussion:

REPS. BROOKE and **TOOLE** do not think it's necessary to take away someone's drivers license. They feel it would make more sense to suspend the license for a probationary period of time

Motion: **REP. BROWN MOVED HB 482 BE TABLED.**

Discussion:

REP. BROWN added that he made the motion to table HB 482 because there are two other introduced bills which attempt to enforce child support. This bill has too many flaws and too little time to correct them.

REP. WINSLOW asked if anyone knew how many cases of unpaid child support there currently are in Montana, and **CHAIRMAN FAGG** said there are 38,000 cases of unpaid child support in the state of Montana. Delinquent parents owe their children an estimated $100 million.

REP. BIRD said she does not think a person who is a new hire in Montana should be subject to the $5 fee whether it applies to that person or not. She also pointed out that some of these "deadbeat" dads do see their children, although they do not pay child support. If they are driven out of the state because of the threat of losing their licenses or for some other reason, there is a possibility that those children would not see their fathers at all.

CHAIRMAN FAGG is against the table motion. He said that this issue came up during his campaign, right behind the business, sales tax and abortion issues. It was very clear to him that the current laws are immense but are not working. He said Montana needs a "hammer," i.e., the threat of loss of license or loss of license; if, at that point, the father is still not making every effort to pay his child support, then he ought to lose his license.

Vote: HB 482 BE TABLED. Motion failed 5-13. Those voting to table HB 482 were **REPS. BROWN, BIRD, SAYLES, WHALEN** and **WINSLOW.** Those voting not to table HB 482 were **CHAIRMAN FAGG, REPS. VOGEL BERGMAN, BROOKE, CLARK, GRIMES, MCCULLOCH, RICE, RUSSELL, SMITH,**

TASH, TOOLE and **WYATT.**

REP. VOGEL asked **REP. COBB** about the fiscal note, and **REP. COBB** assured **REP. VOGEL** there was not money in a fund that could be used elsewhere. He said it was a contract of labor or services and would not be drawn from the general fund.

REP. GRIMES asked **Mr. MacMaster** if the state could take away a federal license. As **Mr. MacMaster** understands the bill, the only licenses to be suspended are those granted by state agencies.

REP. RICE clarified what license means. According to the bill, it means any license, i.e., a drivers license, a permit to use water rights, or a permit to carry concealed weapons. He said this is an extremely broad-based situation.

Motion/Vote: **REP. WHALEN** moved to strike sections 6-10, page 9. Motion carried 12-6 with **CHAIRMAN FAGG, REPS. WYATT, TOOLE, VOGEL, MCCULLOCH** and **WHALEN voting no.**

Motion: **REP. BIRD** moved to amend $5.00 to $1.00 on page 11, line 21.

Discussion:

REP. BROWN reminded the committee that they had discussed whether it really does cost $5.00 to file this kind of report with the employer.

Motion/Vote: **REP. CLARK** moved a substitute motion to amend the $5.00 to $3.00. Amendment carried 10-7 with **REPS. BROWN, BIRD, MCCULLOCH, RICE, WHALEN, WINSLOW** and **WYATT** voting no.

Motion/Vote: **REP. WHALEN** moved to strike section 8 from the bill. Amendment failed 15-3.

Motion/Vote: **REP. BIRD** moved a conceptual amendment on page 10, lines 5-11 so that the information may be made confidential. Amendment carried unanimously.

Motion/Vote: **REP. BIRD** moved a conceptual amendment after reimbursement on line 17, page 12, to insert the words "by the department" after the word "reimbursement." Amendment failed 13-5.

Vote: **HB 482 DO PASS.** Motion carried 12-6. Those voting do pass were **CHAIRMAN FAGG, REPS. VOGEL, BERGMAN, BROOKE, CLARK, GRIMES, MCCULLOCH, RUSSELL, SMITH, TASH, TOOLE,** and **WYATT.** Those voting do not pass were **REPS. BROWN, BIRD, RICE, SAYLES, WHALEN,** and **WINSLOW.**

ADJOURNMENT

Adjournment: 12:00 p.m.

Russell Fagg

REP. RUSSELL FAGG, Chairman

Beth Mikssche

BETH MIKSCHE, Secretary

RF/bcm

HOUSE OF REPRESENTATIVES

Judiciary COMMITTEE

ROLL CALL DATE 2-15-93

NAME	PRESENT	ABSENT	EXCUSED
Rep. Russ Fagg, Chairman	✓		
Rep. Randy Vogel, Vice-Chair	✓		
Rep. Dave Brown, Vice-Chair	✓		
Rep. Jodi Bird	✓		
Rep. Ellen Bergman	✓		
Rep. Vivian Brooke	✓		
Rep. Bob Clark	✓		
Rep. Duane Grimes	✓		
Rep. Scott McCulloch	✓		
Rep. Jim Rice	✓		
Rep. Angela Russell	✓		
Rep. Tim Sayles	✓		
Rep. Liz Smith	✓		
Rep. Bill Tash	✓		
Rep. Howard Toole	✓		
Rep. Tim Whalen	✓		
Rep. Karyl Winslow	✓		
Rep. Diana Wyatt	✓		

HR:1993
wp.rollcall.man
CS-09

HOUSE STANDING COMMITTEE REPORT -

February 15, 1993

Mr. Speaker: We, the committee on Judiciary report that House Bill 559 (first reading copy -- white) do pass .

Signed: _____

Russ Fagg, Chair

Committee Vote:
Yes 11, No 5.

3716396C.Hss

HOUSE STANDING COMMITTEE REPORT

February 15, 1993

Mr. Speaker: We, the committee on Judiciary report that House Bill 482 (first reading copy -- white) do pass as amended .

Signed: _____
Russ Fagg, Chair

And, that such amendments read:

1. Page 9, line 2.
Strike: "subsections (2) and (3)"
Insert: "subsection (2)"

2. Page 9, lines 14 through 16.
Strike: subsection (3)
Renumber: subsequent subsections

3. Page 10, line 8.
Following: "person."
Insert: "The information must be kept confidential by the department and may not be disseminated by it."

4. Page 11, line 21.
Strike: "$5"
Insert: "$3"

5. Page 16, line 10.
Strike: "providing"
Insert: "that provides"

6. Page 16, line 12.
Following: "obligation"
Insert: "and that may include payment of a determinable or indeterminable amount for insurance covering the child"

Committee Vote:
Yes 13, No 4.

HOUSE OF REPRESENTATIVES

Judiciary COMMITTEE

ROLL CALL VOTE

DATE 2/15/93 BILL NO. HB 482 NUMBER 18

MOTION: HB 482 DO Pass as amended 12-6

NAME	AYE	NO
Rep. Russ Fagg, Chairman	✓	
Rep. Randy Vogel, Vice-Chair	✓	
Rep. Dave Brown, Vice-Chair		✓
Rep. Jodi Bird		✓
Rep. Ellen Bergman	✓	
Rep. Vivian Brooke	✓	
Rep. Bob Clark	✓	
Rep. Duane Grimes	✓	
Rep. Scott McCulloch	✓	
Rep. Jim Rice		✓
Rep. Angela Russell	✓	
Rep. Tim Sayles		✓
Rep. Liz Smith	✓	
Rep. Bill Tash	✓	
Rep. Howard Toole	✓	
Rep. Tim Whalen		✓
Rep. Karyl Winslow		✓
Rep. Diana Wyatt	✓	
	12	6

HOUSE OF REPRESENTATIVES

Judiciary COMMITTEE

ROLL CALL VOTE

DATE 2/15/93 BILL NO. HB 482 NUMBER 18

MOTION: Rep. Bird's concept Amendment after reimbursement on lines 17, page 12 to insert the words: "by the department." Amendment failed 13-5

NAME	AYE	NO
Rep. Russ Fagg, Chairman		✓
Rep. Randy Vogel, Vice-Chair	✓	
Rep. Dave Brown, Vice-Chair	✓	
Rep. Jodi Bird		✓
Rep. Ellen Bergman		✓
Rep. Vivian Brooke		✓
Rep. Bob Clark		✓
Rep. Duane Grimes	✓	
Rep. Scott McCulloch		✓
Rep. Jim Rice		✓
Rep. Angela Russell		✓
Rep. Tim Sayles		✓
Rep. Liz Smith		✓
Rep. Bill Tash		✓
Rep. Howard Toole		✓
Rep. Tim Whalen	✓	
Rep. Karyl Winslow	✓	
Rep. Diana Wyatt		✓

HOUSE OF REPRESENTATIVES

Judiciary COMMITTEE

ROLL CALL VOTE

DATE 2/15/93 BILL NO. HB482 NUMBER 18

MOTION: HB482 Be Tabled Failed 13-5

NAME	AYE	NO
Rep. Russ Fagg, Chairman		✓
Rep. Randy Vogel, Vice-Chair		✓
Rep. Dave Brown, Vice-Chair	✓	
Rep. Jodi Bird	✓	
Rep. Ellen Bergman		✓
Rep. Vivian Brooke		✓
Rep. Bob Clark		✓
Rep. Duane Grimes		✓
Rep. Scott McCulloch		✓
Rep. Jim Rice		✓
Rep. Angela Russell		✓
Rep. Tim Sayles	✓	
Rep. Liz Smith		✓
Rep. Bill Tash		✓
Rep. Howard Toole		✓
Rep. Tim Whalen	✓	
Rep. Karyl Winslow	✓	
Rep. Diana Wyatt		✓
	5	13

HOUSE OF REPRESENTATIVES

Judiciary COMMITTEE

ROLL CALL VOTE

DATE 2/15/93 BILL NO. HB 482 NUMBER 17

MOTION: Rep. Wyatts Amendment passes 17-0

NAME	AYE	NO
Rep. Russ Fagg, Chairman	✓	
Rep. Randy Vogel, Vice-Chair	✓	
Rep. Dave Brown, Vice-Chair	NO VOTE	
Rep. Jodi Bird	✓	
Rep. Ellen Bergman	✓	
Rep. Vivian Brooke	✓	
Rep. Bob Clark	✓	
Rep. Duane Grimes	✓	
Rep. Scott McCulloch	✓	
Rep. Jim Rice	✓	
Rep. Angela Russell	✓	
Rep. Tim Sayles	✓	
Rep. Liz Smith	✓	
Rep. Bill Tash	✓	
Rep. Howard Toole	✓	
Rep. Tim Whalen	✓	
Rep. Karyl Winslow	✓	
Rep. Diana Wyatt	✓	

HOUSE OF REPRESENTATIVES

Judiciary COMMITTEE

ROLL CALL VOTE

DATE 2/15/93 BILL NO. HB 482 NUMBER 18

MOTION: Amendment fails to strike section 6

12-6

NAME	AYE	NO
Rep. Russ Fagg, Chairman		✓
Rep. Randy Vogel, Vice-Chair		✓
Rep. Dave Brown, Vice-Chair	✓	
Rep. Jodi Bird	✓	
Rep. Ellen Bergman		✓
Rep. Vivian Brooke		✓
Rep. Bob Clark		✓
Rep. Duane Grimes		✓
Rep. Scott McCulloch		✓
Rep. Jim Rice	✓	
Rep. Angela Russell		✓
Rep. Tim Sayles		✓
Rep. Liz Smith		✓
Rep. Bill Tash	✓	
Rep. Howard Toole		✓
Rep. Tim Whalen	✓	
Rep. Karyl Winslow	✓	
Rep. Diana Wyatt		✓
	6	12

HOUSE OF REPRESENTATIVES

Judiciary COMMITTEE

ROLL CALL VOTE

DATE 2/15/93 BILL NO. HB 482 NUMBER 17

MOTION: Rep. Clark's amendment to change $5.00 to $3.00 passed 10-7

NAME	AYE	NO
Rep. Russ Fagg, Chairman	✓	
Rep. Randy Vogel, Vice-Chair	✓	
Rep. Dave Brown, Vice-Chair		✓
Rep. Jodi Bird		✓
Rep. Ellen Bergman	✓	
Rep. Vivian Brooke	✓	
Rep. Bob Clark	✓	
Rep. Duane Grimes	Abstained	
Rep. Scott McCulloch		✓
Rep. Jim Rice		✓
Rep. Angela Russell	✓	
Rep. Tim Sayles	✓	
Rep. Liz Smith	✓	
Rep. Bill Tash	✓	
Rep. Howard Toole	✓	
Rep. Tim Whalen		✓
Rep. Karyl Winslow		✓
Rep. Diana Wyatt		✓
	10	7

HOUSE OF REPRESENTATIVES

Judiciary COMMITTEE

ROLL CALL VOTE

DATE 2/15/93 BILL NO. HB 482 NUMBER 18

MOTION: Rep. Whalen's amendment Failed

NAME	AYE	NO
Rep. Russ Fagg, Chairman		✓
Rep. Randy Vogel, Vice-Chair		✓
Rep. Dave Brown, Vice-Chair	✓	
Rep. Jodi Bird	✓	
Rep. Ellen Bergman		✓
Rep. Vivian Brooke		✓
Rep. Bob Clark		✓
Rep. Duane Grimes		✓
Rep. Scott McCulloch		✓
Rep. Jim Rice		✓
Rep. Angela Russell		✓
Rep. Tim Sayles		✓
Rep. Liz Smith		✓
Rep. Bill Tash		✓
Rep. Howard Toole		✓
Rep. Tim Whalen	✓	
Rep. Karyl Winslow		✓
Rep. Diana Wyatt		✓
	3	15

HOUSE OF REPRESENTATIVES

Judiciary COMMITTEE

ROLL CALL VOTE

DATE 2/15/93 BILL NO. HB 482 NUMBER 18

MOTION: Rep. Bird's amendment so that information can be confidential on p. 10, lines 5-11. Motion carried unanimously.

NAME	AYE	NO
Rep. Russ Fagg, Chairman	✓	
Rep. Randy Vogel, Vice-Chair	✓	
Rep. Dave Brown, Vice-Chair	✓	
Rep. Jodi Bird	✓	
Rep. Ellen Bergman	✓	
Rep. Vivian Brooke	✓	
Rep. Bob Clark	✓	
Rep. Duane Grimes	✓	
Rep. Scott McCulloch	✓	
Rep. Jim Rice	✓	
Rep. Angela Russell	✓	
Rep. Tim Sayles	✓	
Rep. Liz Smith	✓	
Rep. Bill Tash	✓	
Rep. Howard Toole	✓	
Rep. Tim Whalen	✓	
Rep. Karyl Winslow	✓	
Rep. Diana Wyatt	✓	

HOUSE OF REPRESENTATIVES

Judiciary COMMITTEE

ROLL CALL VOTE

DATE 2/15/93 BILL NO. HB 559 NUMBER 18

MOTION: HB559 DO Pass Unanimously

NAME	AYE	NO
Rep. Russ Fagg, Chairman	✓	
Rep. Randy Vogel, Vice-Chair	✓	
Rep. Dave Brown, Vice-Chair	✓	
Rep. Jodi Bird	✓	
Rep. Ellen Bergman	✓	
Rep. Vivian Brooke	✓	
Rep. Bob Clark	✓	
Rep. Duane Grimes	✓	
Rep. Scott McCulloch	✓	
Rep. Jim Rice	✓	
Rep. Angela Russell	✓	
Rep. Tim Sayles	✓	
Rep. Liz Smith	✓	
Rep. Bill Tash	✓	
Rep. Howard Toole	✓	
Rep. Tim Whalen	✓	
Rep. Karyl Winslow	✓	
Rep. Diana Wyatt	✓	

EXHIBIT 1
DATE 2-15-93
SB HB 561

TESTIMONY OF ANNE MACINTYRE - HB 561
BEFORE THE HOUSE JUDICIARY COMMITTEE
February 15, 1993

The Human Rights Commission proposed this bill because of a specific sexual harassment case it heard several years ago. The case arose in Butte and involved a 20 year old woman who worked in a casino there. During the 10 months of her employment, the manager of the casino made many sexual advances toward her, including brushing the front of his body against her buttocks when he passed her behind the bar or in the hallway, putting his hand up her skirt, running his finger over the nipple of her breast, grabbing her breast, pinching her buttocks, attempting to grab her crotch, and making numerous sexually explicit remarks. She objected to his conduct and eventually was fired. The complainant brought her complaint against both the owner of the business for which she worked and the manager responsible for the sexual harassment. Because the manager was not an "employer" for purposes of the Human Rights Act, the Commission was not able to assign any of the responsibility for the harassment to the manager, however. In appropriate circumstances, the Commission or the courts should be able to assign liability against the individual responsible for discriminatory conduct in addition to or in place of the employer.

It is not the intent of this bill to expand the liability of employers for the acts of persons for whom they would not now be liable. The general principles of agency will continue to define the liability of the employer in situations such as these. Thus, a management employee who did not in fact commit a discriminatory practice is not subject to liability under this proposal. Further, the bill does not extend the liability of the employer to the acts of non-management employees or independent contractors when the employer did not have actual or constructive knowledge of their discriminatory acts.

Thank you for your consideration of HB561. I hope you will give it a do pass recommendation. I will be happy to respond to your questions.

EXHIBIT 9
DATE 2-15-93
SB HB 561

49-2-303. Discrimination in employment. (1) It is an unlawful discriminatory practice for:

(a) an **employer** to refuse employment to a person, to bar him from employment, or to discriminate against him in compensation or in a term, condition, or privilege of employment because of his race, creed, religion, color, or national origin or because of his age, physical or mental handicap, marital status, or sex when the reasonable demands of the position do not require an age, physical or mental handicap, marital status, or sex distinction;

(b) a labor organization or joint labor management committee controlling apprenticeship to exclude or expel any person from its membership or from an apprenticeship or training program or to discriminate in any way against a member of or an applicant to the labor organization or an **employer** or employee because of race, creed, religion, color, or national origin or because of his age, physical or mental handicap, marital status, or sex when the reasonable demands of the program do not require an age, physical or mental handicap, marital status, or sex distinction;

(c) an **employer** or employment agency to print or circulate or cause to be printed or circulated a statement, advertisement, or publication or to use an employment application which expresses, directly or indirectly, a limitation, specification, or discrimination as to sex, marital status, age, physical or mental handicap, race, creed, religion, color, or national origin or an intent to make the limitation, unless based upon a bona fide occupational qualification;

(d) an employment agency to fail or refuse to refer for employment, to classify, or otherwise to discriminate against any individual because of sex, marital status, age, physical or mental handicap, race, creed, religion, color, or national origin, unless based upon a bona fide occupational qualification.

(2) The exceptions permitted in subsection (1) based on bona fide occupational qualifications shall be strictly construed.

(3) Compliance with 2-2-302 and 2-2-303, which prohibit nepotism in public agencies, may not be construed as a violation of this section.

(4) The application of a hiring preference as provided for in 2-18-111 and 18-1-110 may not be construed to be a violation of this section.

EXHIBIT 3
DATE 2-15-93
SB HB 561

MONTANA CHAMBER OF COMMERCE

P. O. BOX 1730 • HELENA, MONTANA 59624 • PHONE 442-2405

January 25, 1993

Ann McIntyre, Administrator
Human Rights Commission
P.O. Box 1728
1236 6th Avenue
Helena, MT 59624

Dear Ms. McIntyre:

Thank you for the opportunity to review LC 0329; an act prohibiting discrimination by an agent of an employer.

There does not seem to be a high level of opposition to this draft. The language proposed has been described as similar to that found in other states. Several concerns have surfaced and I wanted to pass those along to you in written form.

The business community hopes this change in language will not increase exposure through lawsuit or action of the Commission to more people in the "chain of command" by defining everyone as an agent.

There is concern that this language could hamper an employers defense based on lack of awareness or knowledge of the violations.

There is also concern about applying the concept of agent to independent contractors or other contractual relationships a business may have with suppliers or other businesses. It has been suggested that agent be defined or limited by using terms such as "designated agent", "agent in fact", or established and recognized agent. This would help assure that the application of the act would continue to be focused on the immediate employee and person guilty of the violation.

Thank you again for the opportunity to review this draft, I am happy to report that I have found significant support for the concept of making individuals, who violate human rights, responsible for their actions.

Respectfully,

David Owen
President

EXHIBIT 4
DATE 2-15-91
SB HB562

House Judiciary
Capital Building
Helena, Montana

RE: For HB562, J. Rice, prohibit sexual exploitation of childern

I am giving my opinion on this bill as a private citizen. I am a licensed social worker in the State of Montana, I helped to establish the Sexual Offenders Program in Helena.

In doing intakes on sexual offenders it became evident that many of them used and even made pornography with minors. Sexual conditioning is one of the strongest reinforcers and one of the hardest to alter once a pattern is set. Any law that restricts the use of minors or the theme of a minor being used is a positive protection for childern. Unfortunately one female in four and one male in six will have been molested by an adult. These offenders are often victims of molestings themselves.

Our society is seeing a frightening change as groups are attempting to remove the age of consent. One of the stated objectives of the National Gay Task Force is to remove the age of consent, 1972 Gay Rights Platform, drawn up at the National Coalition of Gay Organizations Convention. Cameron, P. has done research published in Psychological Reports, 1986, 58, pp. 327-337, Psychological Reports, 1985, 5 pp. 1227-1236 which state that homosexuals were 18 times more apt to incorporate minors into their sexual practises. This is not to say that only homosexual men sexually exploit childern, my experience in working with the Sexual Offender Program was that there were also hetrosexual offenders. What concerns me is that offenders begin with fantasies about age inappropriate childern and then progress to actual molestings.

In treatment, one has to alter the inappropriate sexual fantasies to more age apprpriate fantasies. The arousal patterns of offenders is much different then the population at large. These patterns are reinforced by child pornography.

I would strongly recommend that HB562 be supported. Thank you for your attention in this matter.

Michael T. Stevenson

Michael T. Stevenson, MSSA
PO Box 122
Ft. Harrison, Montana 59636

EXHIBIT 2
DATE 2-15-93
SB HB 562

Enough is Enough Campaign
800 Compton Road Suite 92
Cincinnati, Ohio 45231

February 15, 1993

The Honorable Russell Fagg
House Judiciary Committee
Capitol Station
Helena, Montana 59620

Chairman Fagg and members of the committee:

I welcome the opportunity to send you testimony on behalf of the Enough is Enough Campaign in support of HB 562 - the Sexual Exploitation of Children bill.

The Enough is Enough Campaign was begun in 1992, by women, for the purpose of eliminating the exploitation of children connected to the production, distribution and use of child pornography. The campaign has the support of women across the nation including Barbara Bush, Hillary Clinton and Tipper Gore.

The immediate goal of the

Group is to enact or strengthen child pornography laws in states where there are no laws, or laws are poorly written, providing little or no protection for children. Montana is one of seven such states.

On behalf of Enough is Enough may I say that there are <u>more than enough</u> facts to prove that:

1. one in three girls in this nation will be sexually abused in some way by age 18.

2. The production and use of visual pornographic material provokes the sexual exploitation and abuse of children by pornographers and pedophiles.

3. Pedophiles use pornographic material to remove a child's inhibitions making the child more vulnerable to exploitation and abuse.

4. Pedophiles use child porn to learn and practice the sexual abuse of children. Let's get rid of their instruction booklets!

3.

EXHIBIT #5
DATE 2-15-93
HB-562

It is the charter of government
To protect its' citizens. Our
children need protection from
exploitation and molestation
by pornographers and pedophiles.

I believe HB 562 would help
provide this protection. Therefore
I urge you to support and work
toward passage of this bill. Thankyou.

Mrs. Wilma Wortman
2021 Hwy 141
Helmville, Mt 59843
(406) 793-5825

EXHIBIT 6
DATE 2-15-93
SB HB 562

Montana Citizens for Decency through Law, Inc.

P.O. Box 4071 • Missoula, Montana 59806 • (406) 777-5025 or (406) 777-5862 Fax: (406) 777-5150

February 14, 1993

The Honorable Russell Fagg, Chairman
House Judiciary Committee
Capital Station
Helena MT 598620

Dear Chairman Fagg,

I am here to testify for HB562, a bill that would strengthen the laws in Montana against the sexual exploitation of children. I testify as president of Montana Citizens for Decency through Law and as a father of nine children.

The present Montana Law called Sexual Abuse Of Children (45-5-625 with definition of "sexual contact" at 45-2-101 [60]) is very limited in its protection of children against those who would exploit them for sexual purposes. Under the present law the following activities, on video or photographs, would be legal to distribute:

* Children involved is sexual conduct of any type with animals
* Children masturbating
* Lewd exhibition of children's genital's, pubic or rectal area's
* Children simulating sex
* Sadomasochistic abuse involving children
* Children defecating or urinating for the purpose of sexual stimulation of the viewer

Under the present law it is legal to possess <u>any type</u> of child pornography if intent to sell can not be proven. It therefore is legal for a pedophile to possess the photo's of himself molesting children if the identity of the children could not be made and intent to sell could not be proven.

In 1982, the Supreme Court in New York v. Ferber 458 U.S. 747 (1982), legally distinguished child pornography from obscenity. The court in Ferberfocused on the harm to the victim rather than the effects of the material on the audience. In essence, child pornography became "obscene per se" because of the harm its production and distribution has

upon the child victim. The court concluded that if the material depicted children in lewd sexual conduct, the material was subject to regulation. The bill that you have before you reflects the Ferberprinciples.

To some degree the market of child pornography has changed in the last decade or so. Today the child pornography market primarily consists of clandestine activities that result in materials being sold and traded among individuals through private communications. These transaction may involve no money, thereby eliminating the commercial motivation for much of the production and distribution of child pornography. This is not to say, however, that there are not individuals who participate in the distribution of child pornography purely for the monetary gain they may realize. In 1982, in another state, Catherine Wilson was prosecuted and convicted for distributing child pornography. At the time of her arrest she had a mailing list of 5000 names.

In Montana there is not a major problem with child pornography but as you will note from the enclosed newspaper clippings there have been times when charges could have been made if there had been a good law. The U.S. Attorney has handled two or three cases of child pornography but I believe that they happened in areas of Federal jurisdiction.

One of the most vivid memories of my law enforcement years was of photo's taken by a father as he sexually molested his 12 month old daughter in front of his other children and then photographed them in sexually suggestive positions. He was charged with the molestation but if it had been a situation where the children could not have been identified then he would have gotten away with the crime.

You may say, there isn't a problem in Montana so why bother with this law? Who is going to sacrifice their children to make it a problem? Will you?

Some may say that there is a federal law against this material so why do we need a state law? Why don't we do away with all our laws. Should we have to rely on the Federal Government for the protection of our children?

Although the ACLU is opposed to the production of child pornography, they support the free flow and display of child pornography once it has been produced. I believe that 99% of Montanans are totally opposed to it and I hope that your actions will reflect their desires.

Sincerely

Dallas D. Erickson

EXHIBIT #6
DATE 2-15-93
HB-562

Pornography poses an even greater threat to the child victim than does sexual abuse or prostitution. Because the child's actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place. A child who has posed for the camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography.

(Shouvlin, "Preventing the sexual Exploitation of Children: A Model Act," 17 Wake Forest L. Rev. 535, 545 (1981))

Children involved in pornography can be psychologically scarred and suffer emotional distress for life. They may see themselves as objects to be sold rather than people who are important.

(U.S. General Accounting Office, SEXUAL EXPLOITATION OF CHILDREN - A PROBLEM OF UNKNOWN MAGNITUDE iii (1982))

EXHIBIT 7
DATE 2-10-93
SB HB562

169 Cedar Lane
Florence, MT. 59833
Feb 14, 1993

The Honorable Russell Fagg
Chairman, House Judiciary Committee
Capital Station, Helena, MT. 59620

Dear Chairman Fagg,

Two years ago the Boy Scouts of America identified four unacceptables in our society, which they have vowed to take a stand against. Those unacceptables are Child Abuse, drug abuse, illiteracy, Hunger and Homelessness.

As part of their attack on child abuse, they developed a training program to help leaders identify signs of child abuse as well as some of the characteristics and typical behaviors of child abusers. They also instituted policies to deny child abusers access to Scouting positions on B.S.A. thereby preventing access to our youth. As a volunteer serving as Cub Scout Roundtable Commissioner and Day Camp Director, it became my responsibility to conduct this training and help implement the new policies in the Bitterroot District of the Montana Council. I still continue to conduct that training. As a result of this training I have developed an increasing awareness of the pervasiveness of child abuse and its effects on the youth of our nation. I have therefore made it part of my personal agenda to take a stand on the issues of child abuse.

One of those issues is child pornography. There is a connection between child abuse as well as the types of abuse, and pornography. It is an area that I feel

that child pornography is a staple of pedophiles. Pedophiles are habitual abusers, who literally can victimize hundreds of children in a lifetime. They use pornography to manipulate their victims and break down the child's natural resistance. Pedophiles are generally patient in their process of seduction, because they are interested in long-term abusive relationships.

Statistically, one in four girls and one in seven boys will be sexually abused before the age of eighteen. (Law enforcement officials believe that the number of boy victims is much higher, and that boys tend to report less frequently than girls.) I personally find these statistics to be extremely alarming and unacceptable, as a society we must protect our children.

Even more alarming than the statistics is the reality of this problem. The devastation caused in the lives of victims and their families is almost incomprehensible. I am personally acquainted with seven victims of child abuse. Some of these victims are longtime friends or children of friends. Each one of these individuals and their families have suffered incredibly as a result of their abuse. Each one has undergone extensive therapy, but not one of them is cured at this time.

As I stated before, we know there is a link between pornography and child abuse as well as other types of abuse. Pornography has no redeeming qualities. It has no worthwhile purpose. It is an evil in our society that we should obliterate as aggressively as we would cut out a

EXHIBIT # 7
DATE 2-15-93
HB-562

cancerous growth that might
invade a child's body, or an adult's
for that matter.

Child pornography is totally
unacceptable. There should be no
question about that. Therefore
support House Bill 562 and all
of Youth Protection guidelines put
out by Boy Scouts of America are
in alignment with my position.

Yours truly,

Kathleen D. Holmes
Cub Scout Day Camp Director
Bitterroot District
Montana Council B.S.A.

EXHIBIT 2
DATE 2-15-93
SR HB 562

Montana Catholic Conference

February 15, 1993

HOUSE BILL 562 - EXPANDING THE SCOPE OF THE CRIME OF SEXUAL ABUSE OF CHILDREN: PROVIDING THAT POSSESSION OF CERTAIN MATERIAL IS A CRIME: AND AMENDING SECTION 45-5-625 MCA

My name is Sharon Hoff, representing the Montana Catholic Conference. As Conference director, I am liaison for the two Montana Catholic Bishops in matters of public policy.

The Conference stands in support of HB562.

In late 1991 the U. S. Catholic bishops wrote a statement called "Putting Children and Families First". This document calls for public policy supporting children and families.

In this document the bishops state:

> Physical and sexual abuse of children constitutes terrible betrayal of trust, a threat to their emotional and physical health, and a challenge for every institution that serves children.
>
> Child pornography represents a particularly terrible threat to children. They serve as subjects in the production of pornography and sex objects for those who make use of pornographic materials. This illegal and immoral use of children for sexual purposes and profit must be confronted and stopped.

Children are a gift to the community, not a commodity to be used and exploited. They are the future of our country and deserve to be loved and cherished. Please support HB562.

a program

Tel. (406) 442-5761 P.O. BOX 1708 530 N. EWING HELENA, MONTANA 59624

CARE & SHARE

EXHIBIT 9
DATE 2-15-97
~~SB~~ HB 562

the CHURCH of
JESUS CHRIST
of LATTER-DAY
SAINTS

STEVENSVILLE MONTANA STAKE

The Honorable Russell Fagg, Chairman
House Judiciary Committee
Capital Station
Helena, Montana 59620

Dear Mr. Fagg,

As the President of the Primary Organization of the Stevensville Montana Stake of the Church of Jesus Christ of Latter-day Saints, I speak for the 5,000 Primary children in the State of Montana. The Primary Organization is composed of all LDS children 1½ years of age and older.

I urge you to pass HB 562 on the Sexual Exploitation of Children. Please pass this bill to protect our innocent children from those who would exploit them for sexual purposes. Thank you.

Sincerely,

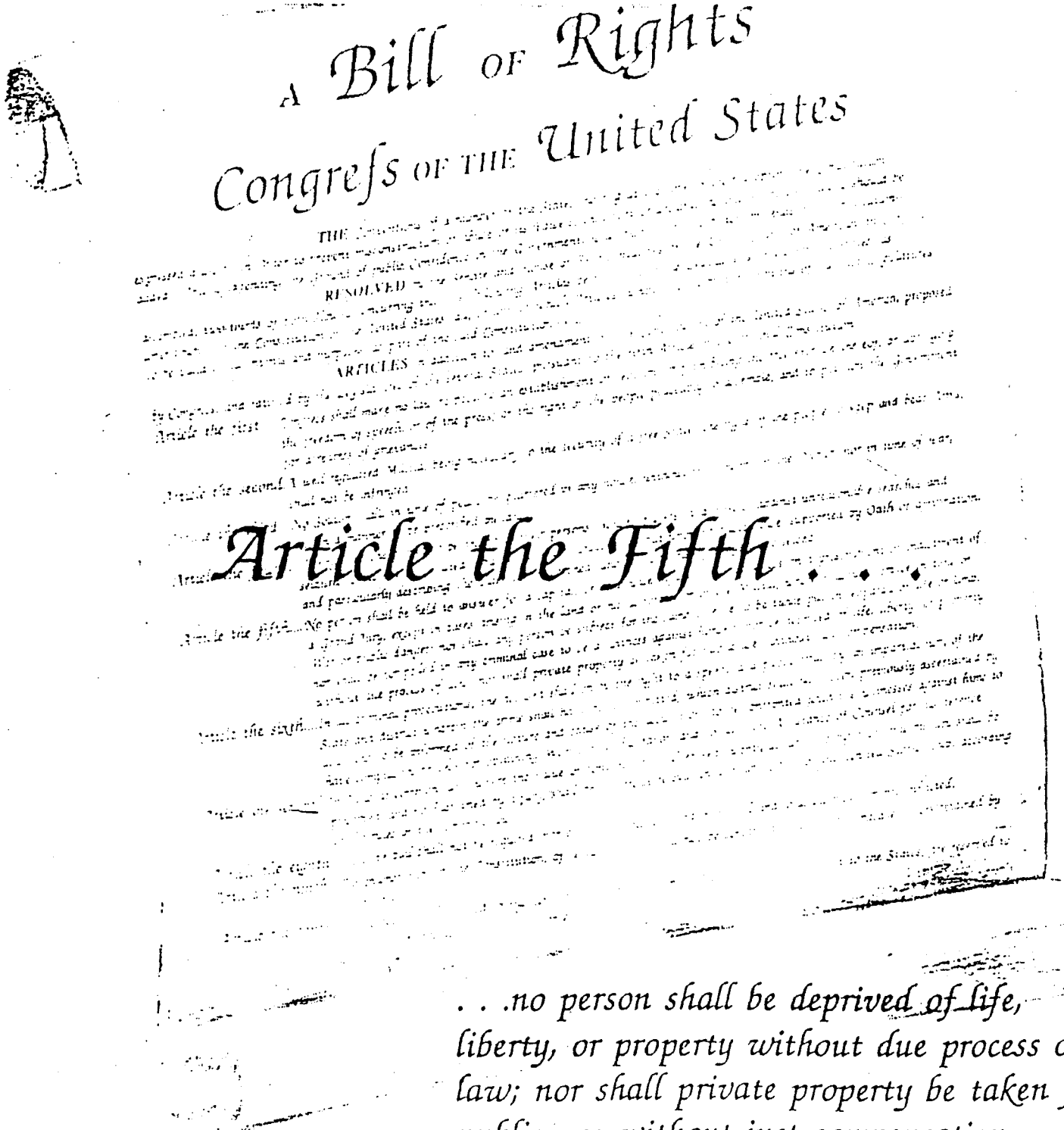
Gail M. Hellander

Gail M. Hellander
600 Main Street
Stevensville, Montana 59870
(406) 777-5605

The

PRIVATE PROPERTY ASSESSMENTS ACT

EXHIBIT 10
DATE 2-15-93
SB HB 570



. . .no person shall be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

The Montana Private Property Assessment Act

INTRODUCTION: Private property is protected by the Fifth Amendment of the United States Constitution and Article II, Section 29 of the Montana Constitution. Recent United States Supreme Court and past Montana Supreme Court decisions have ruled that in some instances government regulation is compsensable when a regulation violates either the Fifth Amendment or Article II, Section 29 of the Montana Constitution..

PURPOSE: To establish a process that mirrors other established reviews of government actions. It would provide an assessment of the impact of governmental actions on private property rights, protected and established by the United States and Montana Constitutions. The process would help insure that government would assess actions affecting private property. This would protect governmental fiscal soundness and safeguard against an unplanned burden on the public treasury.

PROCESS: The legislation would create a process, much similiar to MEPA, requiring government entities to assess private property implications before enacting regulation that could potentially impact property rights and require compensation.

*** This bill is a common sense approach to ward off future lawsuits and unwanted, unplanned spending of government funds.

*** This legislation would require an assessment by government entities prior to any action that may result in a compensable taking of private property.

*** This bill does not define what a taking is or when one occurs. That determination is a judicial function provided in both the U.S. and Montana Constitution.

*** This legislation will not strengthen existing takings law. It will simply protect governments and individuals from the unplanned takings of private property.

*** This bill will not weaken governmental regulation.

*** This legislation would merely require an assessment of potential impacts of government regulations on private property.

EXHIBIT #10
DATE 2-15-93
HB-570

Synopsis of the Montana Private Property Assessment Act

INTRODUCTION: Private property is protected by the Fifth Amendment and Fourteenth Amendment of the United States Constitution and Article II, Section 29 of the Montana Constitution. Recent United States Supreme Court and past Montana Supreme Court decisions have ruled that in instances where government regulation violates either the U.S. Constitution or the Montana Constitution, just compensation is required to be paid to the property owner.

PURPOSE: To establish a process that mirrors other established reviews of government actions. It would provide an assessment of the impact of government actions on private property rights, protected and established by the United States and Montana Constitutions. The process would help ensure that government would assess actions affecting private property. This would protect the fiscal health of government and safeguard against an unplanned burden on the public treasury.

PROCESS: The legislation would create a process, much similar to MEPA, requiring government entities to assess private property implications before enacting regulation that could potentially impact property rights and require compensation.

*** This bill is a common sense approach to ward off future lawsuits and unwanted, unplanned spending of government funds.

*** This legislation would require an assessment by government entities prior to any action that may result in a compensable taking of private property.

*** This bill does not define what a taking is or when one occurs.

*** This legislation will not strengthen existing takings law. It will simply protect governments and individuals from the unplanned takings of private property.

*** This bill will not weaken governmental regulation.

*** This legislation would merely require an assessment of potential impacts of government regulations on private property rights.

*** Legislation similar to this Act, passed the in the U.S. Senate last year and may surface again this year.

*** Almost two-thirds of the states are working on similar legislation and three states -- Arizona, Delaware and Washington already have similar legislation.

EXPLANATION OF THE "MONTANA PRIVATE PROPERTY ASSESSMENT ACT"

Section 2. Policy -- Purpose: 1). This section defines the state's policy in reference to the Montana Constitution's section on private property. "Private property shall not be taken or damaged for public use without just compensation."

This section also state's the purpose of this Act, which is to protects private property owners, the interests of the general public, and the fiscal health of the state. The Act would protect private property owners because it would require government entities to assess their actions before implementation of those actions. This would result in a heightened awareness and respect for private property rights and would curb unplanned takings of private property, which would protect the state's fiscal health.

If South Carolina would have had an Act such as this one, it would not have had to pay almost $2 million for compensation to David Lucas. That case, Lucas v. South Carolina Coastal Commission, is the latest Supreme Court decision on takings.

2). This subsection defines the purpose of sections 1-5, which is to require government entities to assess their actions that affect the use and value of private property and any affect these actions have on constitutionally protected private property.

Section 3. Definitions.: This section defines key terms in the Act in a similar manner as the U.S. and Montana Supreme Courts have defined them in recent decisions.

A taking is defined as depriving a property owner by government action of either ownership or all economic value. Damaging is defined as depriving a property owner of a portion of ownership or of a portion of the economic value of the property.

Governmental action is defined as any statute, rule, regulation, or licensing or permitting requirements that may result in a taking or damaging of private property. The Act does not include eminent domain; the discontinuance of government programs other than law enforcement; the reduction of governmental interference with the use of private property; the seizure or forfeiture of private property for violation of criminal law; or any actions that abate a nuisance.

Real and personal property are included in the definition of private property. This means that the Act covers all property, not just land, water or timber interests.

The definition of government entity includes the legislature, county government, political subdivisions, or any officer or agency authorized to adopt rules. This means that all of these governmental bodies would be responsible to assess any action that could violate takings law and result in a taking of private property.

State agency is defined as an officer of agency of the executive branch of state government. This means any of the state departments would be responsible to assess any action that could result in a taking of private property.

Section 4. Assessment of Constitutional Impact on Private Property: 1). This subsection requires the government entity to prepare a written assessment that analyzes:

a). the description, purpose and plan for implementation of the government action, which includes any specific public health or safety risk the action is designed to prevent or mitigate;

b). the impact of the government actions on private property rights and whether the actions will result in a taking.

c). the identification of private property interests that could be potentially impacted by the governmental action.

d). any alternatives to the government action that may fulfill the legal duties of the government entity and reduce impact on private property owner, as well as reduce the risk of a taking.

e). the financial cost for compensation and the source of payment, if a taking would result.

f). an evaluation of the extent the proposed action would impose costs on property owners not borne by other citizens of the state or locality.

2). This subsection of section (4) would require the agency responsible for doing an analysis for a fiscal note for legislation to prepare the required assessment.

Section 5. Government Actions - State Agency Procedure: This section requires a state agency to adhere to more criteria in implementing governmental actions than a county government, the legislature or any other government entity.

1). The additional criteria for the state agency are:

a). if an agency requires a person to obtain a permit for a specific use of private property, the conditions imposed on issuing the permit must directly relate to the purpose for which the permit was issued;

b). any restriction imposed on the use of private property must be authorized by statute and must be proportionate to the extent the use of private property contributes to the overall problem that the restriction is designed to redress;

c). any conditions imposed by the state agency upon issuance of a permit shall substantially further the purposes the permitting or permission was designed to achieve;

d). state agency shall ensure that restrictions imposed on the use of private property shall be proportionate to the extent the use contributes to any harm the restriction is designed to prevent, mitigate, or remedy.

e). the state agency shall estimate the potential cost to the state if a court determines that the government action constitutes a constitutional taking.

2). This subsection allows the state agency to take action before the assessment in the case of an immediate threat to public health or safety requires immediate response by a state agency and to complete the assessment after the response is completed.

3). This subsection requires the state agency to ensure a diligent and speedy resolution of the process of seeking a permit or other authority to use private property.

4). This subsection requires the state agency to submit a copy of the assessment to governor, and the senate finance and claims committee and the house appropriations committee, if the legislature is in session. If the legislature is not in session, the state agency is required to submit a copy to the governor and the legislative finance committee.

Section 6. Cause of Action: 1). This section states that a property owner shall have a cause of action against a governmental entity that proceeds in violation of the Act. If the property owner proves that he has been damaged by the such violation, he shall be entitled to compensatory damages and other remedies or equitable relief against the governmental entity.

2). This subsection requires the governmental entity to have the burden of proof for any affirmative defense that may arise.

3). This subsection states the Act does not infringe or impair a property owner's right to proceed judicially under currently existing eminent domain or inverse condemnation law.

Section 7. Effective Date: This section states the Act shall be effective on July 1, 1993.

EXHIBIT #10
DATE 2-15-93
HB-570

(DRAFT PROPOSAL FOR BACKGROUNDER FOR THE MEDIA)

Background on the Private Property Assessment Act:
An Act to Protect the Fiscal Soundness of Government
while Protecting the Environment

Montana is one of approximately two-thirds of the states in America contemplating legislation to provide for a process to assess government regulations with regards to takings implications of private property. The Supreme Court in recent decisions, as well as the United States Claims Court have ruled that government regulation can go too far and take private property for which just compensation must be provided.

The Fifth Amendment of the United States Constitution provides that "No person shall ... be deprived of life, liberty or property, without due compensation." Under this clause, over reaching governmental regulation of land use can result in an unconstitutional "taking" of private property without "just compensation".

The taking clause applies to governmental regulation of land use. With the advent of more and more governmental regulations constructed to protect the environment, takings litigation has increased in the late 80's and early 90's. Last year, after the Supreme Court ruling in the Lucas case, the state of South Carolina awarded David Lucas close to $2 million for just compensation.

In that case, Lucas bought two ocean-front lots upon which he planned to build two homes, one to sell and one to live in. After he bought the lots South Carolina passed a state law which prevented building houses on the ocean-front lots. Lucas filed suit in state court. The trial court agreed with Lucas that the state regulation constituted a taking for which he was entitled to just compensation under the Fifth Amendment. On appeal, the South Carolina Supreme Court reversed this decision and declined the payment of compensation of $1.2 million awarded by the trial court. Lucas subsequently appealed the decision to the U.S. Supreme Court, where the court ruled in his favor.

This is just one of many cases of government regulation that has resulted in state or federal government paying just compensation to property owners whose rights have been violated by government actions. It is with this foresight that past Assistant Attorney General Roger J. Marzulla wrote the Executive Order on takings for President Reagan. Marzulla said in a 1988 article published in the Environmental Law Reporter, that at that time the Land and Natural Resources Division of the Judiciary Department had approximately $1 billion in takings claims pending.

The purpose of the Executive Order was to have government agencies analyze their plans to see of a taking might occur before initiating the action. In effect, the Executive Order provided a means to protect the fiscal health of government by minimizing government intrusion upon private property rights and, by instituting a budgetary process to pay just compensation when such intrusions were inevitable.

"Neither the Supreme Court's decisions, nor the Executive Order, nor the attorney general's guidance, will eliminate all uncertainty with respect to compensable regulatory takings protected by the Fifth Amendment. But protection of the nation's health and environment cannot await the arrival of absolute certainty. We lawyers have learned from the doctors and scientists that risk assessments can be made in the face of uncertainty, and that the `no action' operation is rarely the responsible one. The duty to advise government with respect to the takings implications of its regulatory programs is an ongoing process that thrives upon lusty debate. We can have a clean and healthful America, which, at the same time, respects traditional constitutional liberties. And that, in the end, is the true genius of our government system," Marzulla said.

The purpose of the legislation introduced by House Majority Leader Larry Grinde is to establish a process that mirrors other established reviews of government actions. "The process would help ensure that government would assess actions affecting private property. This in turn would help protect the few dollars we have in the state's coffers by safeguarding against an unplanned drain on the public treasury," Grinde said.

It is not the purpose of the legislation to strengthen existing takings law, Grinde said. "The legislation would simply provide a mechanism to protect taxpayers and property owners from unwarranted government regulations that may result in a compensable takings claim for which the state would be required to pay. I don't want Montana to get stuck for almost $2 million like South Carolina did."

Some environmental groups have argued against this type of legislation at the national level in other states looking at enacting similar legislation. The groups say that this type of action will result in environmental degradation because the state can't afford to pay for everything it regulates. Proponents of the bill do not agree and state that if the government wants to take property, it should pay for it as is provided for in the State and United States Constitutions.

Under the Constitution, when a public nuisance exists, the government can take property without compensation. However, proponents of the legislation, argue that often overzealous bureaucracies don't stop at the line mandated by legislation or the Constitution.

In one of the landmark U.S. Supreme Court decisions on takings law, First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, the Court said, "We realize that even our present holding will undoubtedly lessen to some extent the freedom and lessen to some extent the freedom and flexibility of land use planners and governing bodies .... But such consequences necessarily flow from any decision upholding a claim of a constitutional right; many provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities and the Just Compensation Clause of the Fifth Amendment is one of them."

Three states have enacted similar legislation. These states are Arizona, Delaware and Washington.

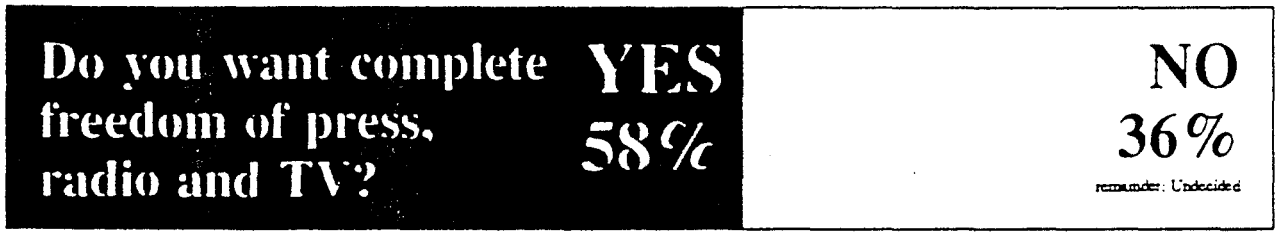
In one of the landmark U.S. Supreme Court decisions on takings law, First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, the Court said, "We realize that even our present holding will undoubtedly lessen to some extent the freedom and lessen to some extent the freedom and flexibility of land use planners and governing bodies .... But such consequences necessarily flow from any decision upholding a claim of a constitutional right; many provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities and the Just Compensation Clause of the Fifth Amendment is one of them."

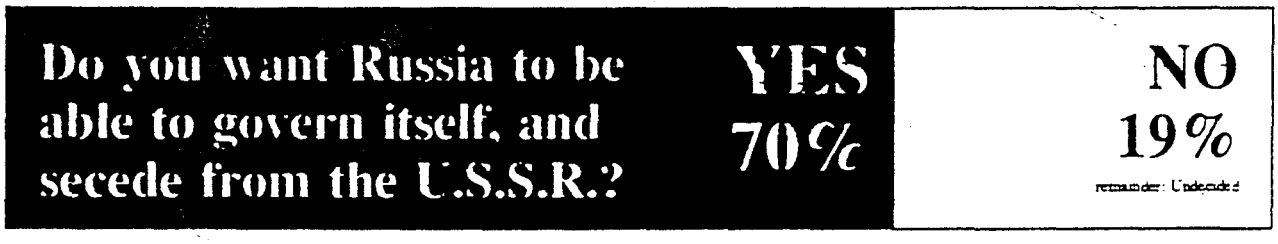
Three states have enacted similar legislation. These states are Arizona, Delaware and Washington.

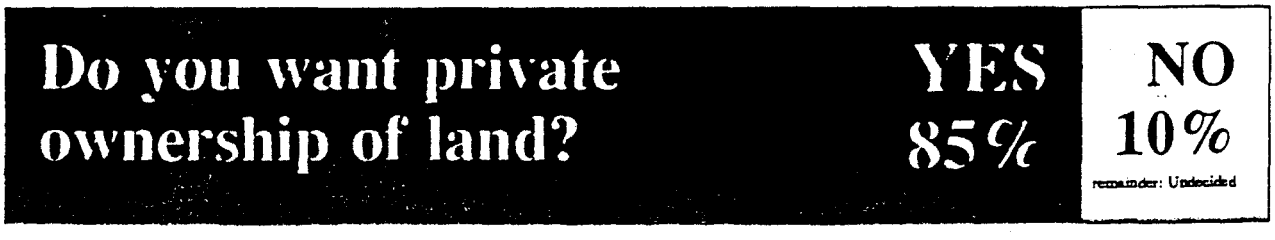
EXHIBIT #10
DATE 2-15-93
HB-570

What the New Generation of Russians *Really* Want

The Institute of Sociology at the Soviet Academy of Sciences recently conducted a poll of 1050 Russians between the ages of 18 and 25. The poll covered six regions of the Russian Republic, constituting a majority of the population and three-quarters of the territory. The respondents were selected from all basic social and professional categories. Here is what that survey revealed:







Taken from "What Young Russians Really Think", *Reader's Digest*, March 1991, pp. 49 - 52.

EXHIBIT 11
DATE 2-15-93
SB HB 570

H.B. 570 Amendments
Requested by Rep. Grinde
for the House Judiciary Committee

1. Page 4, Line 24
   Following: "taking"
   Insert: "or damaging"

2. Page 5, Line 7
   Following: "taking"
   Insert: "or damaging"

3. Page 5, Line 10
   Following: "taking"
   Insert: "or damaging"

4. Page 6, Line 11
   Following: "taking"
   Insert: "or damaging"

These amendments are requested to more fully parallel the language of the Montana Constitution in Article II, section 29 which requires that private property: "shall not be taken or damaged for public use without just compensation to the full extent of the loss."

EXHIBIT 12
DATE 2-15-93
SB HB 570

TESTIMONY ON HOUSE BILL 570
ACT REQUIRING AN ASSESSMENT OF GOVERNMENTAL
ACTIONS THAT AFFECT USE OF PRIVATE PROPERTY
HOUSE JUDICIARY COMMITTEE
FEBRUARY 15, 1993

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE, FOR THE RECORD MY NAME IS JOHN BLOOMQUIST, I AM THE ATTORNEY AND SPECIAL ASSISTANT FOR THE MONTANA STOCKGROWERS ASSOCIATION. THE MONTANA STOCKGROWERS ASSOCIATION IS AN ORGANIZATION OF OVER 3,500 RANCHERS AND PROPERTY OWNERS LOCATED THROUGHOUT MONTANA. I AM TESTIFYING BEFORE YOU TODAY IN SUPPORT OF H.B. 570.

THE STOCKGROWERS SUPPORT OF THIS LEGISLATION STEMS FROM THE PROCESS THAT IT CREATES. THIS BILL, IN PROVIDING AN ASSESSMENT BY GOVERNMENT ENTITIES WHEN THEY TAKE ACTION WHICH AFFECTS THE USE OR VALUE OF PRIVATE PROPERTY, CREATES AN IMPORTANT PROCESS NECESSARY IN GOOD GOVERNMENT PLANNING. IN OTHER AREAS, GOVERNMENT ACTIONS ARE ANALYZED AND PROCESSES EXIST FOR PLANNING THE IMPACTS OF THOSE ACTIONS ON CERTAIN AMENITIES. FOR EXAMPLE, WHEN GOVERNMENT TAKES AN ACTION WHICH AFFECTS THE QUALITY OF THE HUMAN ENVIRONMENT, AN ANALYSIS IS PREPARED FOR ANALYZING ENVIRONMENTAL IMPACTS. THIS PROCESS UNDER MEPA (MONTANA ENVIRONMENTAL POLICY ACT), AND OTHER PROCESSES AND ANALYSIS DONE BY GOVERNMENT ENTITIES ARE IMPORTANT IN PLANNING THE OVERALL RAMIFICATIONS OF GOVERNMENTAL ACTION. THIS BILL REPRESENTS THE PLANNING PROCESS WHEREBY GOVERNMENT ENTITIES ANALYZE THE AFFECTS OF THEIR ACTIONS ON PRIVATE PROPERTY INTERESTS. THE ANALYSIS PRESCRIBED IS NOT OVERLY BURDENSOME AND WILL BE BASED UPON TESTS DEFINED BY THE MONTANA AND U.S. SUPREME COURTS. SUCH A PROCESS DOES NOT PRESENTLY EXIST AND IS OFTEN OVERLOOKED BY GOVERNMENT ENTITIES WHEN ENACTING STATUTES, RULES, OR REGULATIONS.

THIS BILL REPRESENTS AN IMPORTANT AND NECESSARY PLANNING PROCESS FOR GOVERNMENT. BECAUSE PRIVATE PROPERTY INTERESTS ARE CONSTITUTIONALLY PROTECTED

UNDER BOTH UNITED STATES AND MONTANA CONSTITUTIONS, AND BECAUSE ACTIONS TAKEN BY GOVERNMENT WHICH TAKE OR DAMAGE PRIVATE PROPERTY MAY SUBJECT THE PUBLIC TREASURY TO LIABILITY FOR COMPENSATION TO THE PRIVATE PROPERTY OWNER, THIS BILL CREATES A TOOL FOR GOVERNMENT TO PLAN ITS ACTIONS. AS THE BODY OF REGULATORY TAKINGS LAW EXPANDS, AND AS PUBLIC FINANCES DWINDLE, NOW IS THE TIME FOR GOVERNMENT ENTITIES TO ANALYZE THE POTENTIAL FISCAL IMPACTS OF THEIR ACTIONS SHOULD PRIVATE PROPERTY INTERESTS BE IMPACTED.

VERY SIMPLY THAT IS WHAT THIS BILL IS. THE BILL IS A PLANNING PROCESS, A TOOL FOR ANALYSIS, AND CREATES A PROCESS SIMILAR TO OTHER GOVERNMENT ASSESSMENTS. THIS BILL DOES NOT EXPAND IN ANY MANNER LIABILITY TO GOVERNMENT. THIS BILL WILL NOT DEFINE WHEN COMPENSATION IS DUE, AS THAT IS A COURT'S DECISION AS SUCH A FINDING IS A CONSTITUTIONAL INTERPRETATION. THE BILL DOES NOT STRENGTHEN EXISTING TAKINGS LAW BUT SIMPLY PROTECTS GOVERNMENT AND INDIVIDUALS FROM UNPLANNED TAKINGS OF PRIVATE PROPERTY. THE BILL WILL NOT WEAKEN GOVERNMENT REGULATION IN ANY MANNER. IN FACT, REGULATION IMPOSED BY GOVERNMENT WHICH IMPACTS PRIVATE PROPERTY WILL BE MORE PLANNED AND CONSIDERED UNDER THIS BILL.

THE OPPONENTS OF THIS BILL MAY ALSO STATE THAT THIS PROCESS CREATES MORE "RED TAPE" AND IT WILL BE A TREMENDOUS EXPENSE TO GOVERNMENT. WHILE AN ANALYSIS IS REQUIRED, MOST GOVERNMENT ENTITIES HAVE ON HAND STAFF ATTORNEYS COMPETENT TO DO THE REQUIRED TAKINGS ANALYSIS AND IN FACT SUCH AN ANALYSIS SHOULD BE FISCALLY REQUIRED FOR ANY PROPER GOVERNMENT PLANNING. THE BILL IN FACT COULD SAVE GOVERNMENT ENTITIES MONEY RATHER THAN COSTING THEM DOLLARS. UNPLANNED TAKINGS, OR UNANALYZED GOVERNMENT ACTIONS WHICH RESULT IN TAKINGS, MAY BE DISCOVERED AND PREVENT LIABILITY TO THE PUBLIC. THE LEGISLATION WILL ALSO ALLOW GOVERNMENT TO CONSIDER ALTERNATIVES AND MAY IN FACT RESULT IN REDUCING POTENTIAL LIABILITY. FURTHERMORE, THE BILL WILL ALLOW FOR GOVERNMENT ACTIONS TO ACHIEVE THE DESIRED

EXHIBIT #12
DATE 2-15-93
HB-570

RESULTS IN THE LEAST INTRUSIVE MATTER TO PRIVATE PROPERTY INTERESTS AND THE CITIZENRY.

THIS BILL REPRESENTS A SOUND APPROACH TO PLANNING IN GOVERNMENT. LEGISLATION, RULES, OR REGULATIONS WHICH IMPACT PRIVATE PROPERTY RIGHTS SHOULD BE CAREFULLY CONSIDERED AND ANALYZED SO AS NOT TO SUBJECT DWINDLING PUBLIC FUNDS TO CONSTITUTIONALLY REQUIRED COMPENSATION AS A RESULT OF POORLY PLANNED GOVERNMENT ACTION. AS GOVERNMENT GROWS, AND AS REGULATION GROWS, THE BODY OF TAKINGS LAW AND THE DEGREE OF COMPENSATION OF GOVERNMENT ACTIONS TO PRIVATE PROPERTY OWNERS PROTECTED UNDER THE CONSTITUTION WILL SURELY GROW AS WELL. IT IS TIME FOR GOVERNMENT TO ANALYZE ITS ACTIONS ON PRIVATE PROPERTY INTERESTS AND FOLLOW A PROCESS SIMILAR TO OTHER GOVERNMENT PROCESSES AND ANALYZE THE IMPACT OF ITS POLICIES. NOW IS THE TIME.

WE STRONGLY URGE A VOTE OF DO PASS ON H.B. 570. THANK YOU FOR THE OPPORTUNITY TO TESTIFY.

EXHIBIT 13
DATE 2-15-93
SB HB 570

TESTIMONY ON H.B. 570

LEGAL HISTORY AND BACKGROUND

Hertha L. Lund

Hertha Lund
1031 E Broadway #206
Missoula, Mt 59802
721-6047

Chairman Fagg and members of the committee, my name is Hertha Lund. As a journalist working in D.C. for several years, I had the opportunity to attend two of the recent Supreme Court hearings on private property rights. Currently, I am attending the University of Montana School of Law. Drawing on my journalism experience and budding legal knowledge, I will briefly provide the legal background and need for H.B. 570.

One thing that I want to make clear at the onset is that this legislation will not extend current takings law. While working with other law school students, professors and lawyers to write this legislation, we simply took language from the United States and the Montana Constitutions and rules of law from recent U.S. and Montana Supreme Court decisions. Whether or not this legislation is passed, property owners have and still will have legal recourse against a government action which results in a takings of private property. The purpose of this legislation is to provide a mechanism whereby government entities have to assess their actions before taking private property.

Government can still clearly "go on" regulating private property without violating the constitution's prohibition against taking property without compensation, but government must act with greater care and sensitivity to the constitutionally guaranteed private property rights. I can tell you from hearing the oral arguments at the Supreme Court, the Justices indicated that they would not be lenient when government went too far in regulating and deprived a property owner of his or her rights.

EXHIBIT #13
DATE 2-15-93
HB-570

Some may ask why do we have to have this legislation now and why have we got by without it in the past? The answer is because we seem to have entered the era of government regulation and theses regulations are becoming increasingly far reaching into the private sector. The Montana and U.S. Constitutions have always protected private property rights and we are now approaching the nexus where government regulations are starting to cross over the threshold established by Supreme Court decisions of when government actions violate those constitutions.

At this time, I will include in my oral testimony a summary of legal analysis done by another law school student who could not be here to testify herself today. Page Carroccia is in the process of completing an extensive law review comment on private property rights according to the Montana Constitution and the recent Supreme Court decisions effect on Montana law.

As you can see this assessment process is not that complicated, unless one wants to make it so. This morning I prepared a brief example of the process a government entity and government agency would have to go through to comply with this legislation.

It is simply good government to assess the possible ramifications of possible governmental actions. As a student, I understand the importance of budgeting my money and planning on how I might spend. I don't think it is too much to require government to be responsible with taxpayer's money.

I and several other law school students, who could not make it today, strongly support this legislation and are available for any further research the committee might need.

EXAMPLE FORM FOR GOVERNMENT ASSESSMENT OF PRIVATE PROPERTY

1. Describe the the intended government action, it's purpose, including any specific health or safety risks the action is designed to protect. And describe how the purpose would be accomplished.

2. Evaluate the impact of the intended action on the use or value of private property interests. If the property owner is deprived of all economic value, the recent Supreme Court decision in LUCAS would apply. If not, the decision from PENN CENTRAL would apply.

LUCAS: If a government regulation prohibits all economic benefit or productive use of property, it will constitute a compensable taking unless the use would constitute a nuisance.

PENN CENTRAL: This is a multi-factor balancing test. 1) assess the economic impact of the regulation; 2) assess the character of the governmental action; 3) assess the investment backed expectations of the property owner and 4) assess offsetting reciprocal benefits. Prior to LUCAS, this was the principal test used by both the U.S. and Montana Supreme Courts.

3. Evaluate alternatives to the government action, such as incentives and other creative approaches to effect change without a government taking of property.

4. If it has been determined to possibly be a taking, estimate the financial cost of intended action. Use current fair market value and other methods to determine a reasonable range of possible government liability, as a result of the proposed action.

SECOND TIER FOR GOVERNMENT AGENCIES
In addition to 1-4 government agencies would have to:

5. Show that when government action requires a permit or other permission for a specific use of private property, the conditions imposed on the issuance of permit must substantially further the purpose that the permitting or permission process was designed to achieve.

6. Ensure that restrictions imposed on the use of private property are proportionate to the extent the use contributes to any harm the restriction is designed to prevent, mitigate, or remedy.

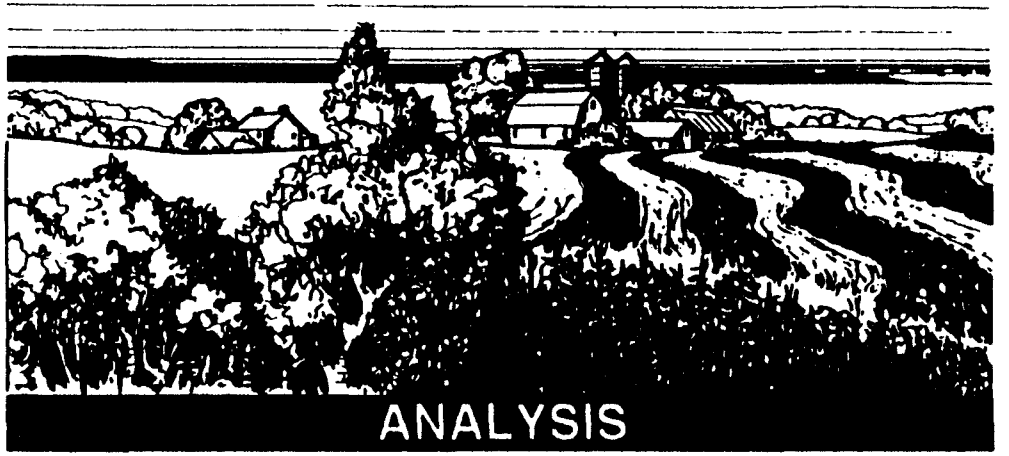
7. Ensure a diligent and speedy resolution of any procedures that are part of a process of seeking a permit or other permission to use private property.

8. Submit a copy of the assessment to the governor, the property owner, if identifiable and to the legislature.

EXHIBIT 11
DATE 2-15-93
HB-570

Private property rights hinge on Supreme Court

By Hertha Lund



The future of private property rights hangs in the balance as all three branches of government decide the preservation or demise of this cornerstone of a free society.

The basic philosophical questions of how best to govern society and who should pay for the cost of the collective good — individuals or society — is at the core of current debate in Congress, in cases before the Supreme Court and decisions to be made by the president.

At the forefront is the Fifth Amendment, which states "... no person shall be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation."

This sounds straightforward until it gets into legal interpretations. What is liberty, due process of law or just compensation? And when does a state's police power enable it to regulate property without compensation? On these questions lies the future of farmers' and ranchers' rights to their property unhindered by overzealous government regulators.

Environmental groups argue that the air and the water are not owned by anyone and in order to protect the environment, private landowners must bow to the public good and give up their property rights. Landowners argue that this is a violation of constitutional guarantees and that land is best cared for by individual owners, pointing to Eastern Europe's and Russia's environmental debacles as examples of central ownership's enhancement of the environment.

Private property rights scholar Richard Epstein, professor of law at the University of Chicago, says, "In effect, the position of environmentalists on this issue is that 'we'll allow you to keep the rind of the orange, just to make sure that we can suck out all of its juice and keep it for our own particular benefit.'"

Under wetlands, endangered species and other strangling regulations, the environmental groups and government bureaucracies want to be able to control the use of the land without compensating for it. However, the Supreme Court made it clear in a 1922 case, Pennsylvania Coal vs. Mahon: "If regulation goes too far, it will be considered a taking."

Since 1987, courts have begun to reaffirm that "regulatory takings" or "inverse condemnation" without the physical taking of the property are worthy of compensation when the government regulation destroys the owner's "economically viable use" of the land. It is this doctrine that most concerns environmental groups.

Many state and federal courts continue to decide property rights cases as though the constitutional landscape hadn't changed in the late 1980s. A trilogy of 1987 Supreme Court rulings with provocative language on private property rights — First English Evangelical Lutheran Church of Glendale vs. County of Los Angeles, Nollan vs. California Coastal Commission and Keystone Bituminous Coal Association vs. DeBenedictis — created a window of opportunity for private property owners and may have set the platform for a clarification by the Supreme Court on the relationship between private property rights and legitimate police action in government regulation.

What many landowners may not understand is that the government can take property for certain reasons. If there is a legitimate public purpose, the government may exercise its eminent domain powers and take private land with compensation. The question of what constitutes a taking for which the Fifth Amendment guarantees "just compensation" arises.

A common test for determining a regulatory taking by a government action is the Agins test, a two-pronged test developed by Supreme Court Justice Lewis Powell: "The application of a general zoning law to particular property effects is a taking if the ordinance does not substantially advance a legitimate state interest ... or denies an owner economically viable use of his land."

The "legitimate state interest" has been defined as an activity that fits within the realm of police power and protects or promotes public health, safety or welfare. Numerous cases have held that there is no formula to define the "economically viable use of property" prong of the Agins test and therefore it is open to new interpretation with each case.

Another way government agencies have gotten out of paying for land they have regulated is by relying on the "nuisance exception." This interpretation of the law has allowed regulators to disallow use of property if they could prove that a public nuisance resulted from the use of the land. This brings up the question of when a "legitimate nuisance" regulation turns into one that goes too far?

The various gray areas on takings law provide fertile ground for the Supreme Court to refine this area of law in three cases it is now considering — Yee vs. City of Escondido, PFZ Properties vs. Rodriguez (not a takings case, but a substantive due process case), which already have been heard, and Lucas vs. South Carolina Coastal Council, which is being heard this week.

Depending on how the Supreme Court rules on these cases, Congress will proceed accordingly with wetlands, endangered species and other environmental legislation. If the takings concept becomes more established in law, then members of Congress will be reluctant to pass expensive legislation. This means that whether or not Congress passes more regulatory laws or how it words these laws hangs in the balance of the Supreme Court's rulings.

If environmentalists, some members of Congress and bureaucracies can regulate without taking because of certain provisions in the law that ignore the Fifth Amendment, they will do so. On the other hand, if the Supreme Court comes out strongly in favor of private property rights, government agencies will back off from heavy-handed regulation because of the high cost of compensation for such activities.

EXHIBIT 17
DATE 2-15-93
~~SB~~ HB 570

MONTANA FARM BUREAU FEDERATION
502 South 19th • Bozeman, Montana 59715
Phone: (406) 587-3153

PRESIDENT DAVE McCLURE

TESTIMONY ON HB-570

MONTANA PRIVATE PROPERTY ASSESSMENT ACT

FEBRUARY 15, 1993

Chairman Rep. Fagg, members of the committee, I am Dave McClure, president of the Montana Farm Bureau Federation and a board member of the American Farm Bureau Federation. The American Farm Bureau Federation represents more than 4 million members from throughout America, in Montana we have more than 4,500 members.

My wife and I run a 2,000-acre diversified ranching operation 10 miles west of Lewistown. As the representative of Montana Farm Bureau members, a landowner and a taxpayer, I strongly support H.B. 570.

It is important to the economy in Montana that government entities be required to assess their actions before a taking of private property occurs. This legislation is a wise look ahead to stop unplanned, unwarranted government spending for unwise regulation of private property.

If South Carolina would have had such legislation in place, the state would not have been hit with an unbudgeted takings cost of almost $2 million. In that situation, a private landowner, David Lucas, planned to build two houses on two beach-front lots. In the meantime, the state government passed legislation that forbid building that close to the ocean, even though lots on either side of Lucas's lots had houses upon them. The Supreme Court ruled that the legislation resulted in a taking of private property and therefore the state of South Carolina had to compensate David Lucas.

Lucas is just one of many landowners, who will not stand for unwarranted,

uncompensated taking of private property. I and other landowners would go to court, if the government took our land without due compensation. This legislation would ward off future takings lawsuits. This would save the government and landowners the unneeded expense of litigation.

Some will most likely say that requiring the government to assess their actions will result in environmental degradation. That is simply ridiculous. H.B. 570 will not change current or future government regulation to protect the environment. It will simply require government agencies to assess their actions to keep them within the bounds of the Montana and United States Constitutions. Private property rights are protected by both documents and recent Supreme Court decisions indicate that the protection of private property will be upheld judicially. H.B. 570 will keep government from overstepping constitutional boundaries while upholding legislative intent.

This bill will not interfere with government action or regulation; however, we do want government to assess actions before causing landowners and the state to enter into lengthy, expensive court battles.

On a side note, as a landowner I would submit that private ownership is still the best way to protect private property. I am a environmentalist and I am concerned about the condition of my land. I have not seen where government regulation has resulted in great environmental

benefits. However, I have seen my land and my neighbors land improve throughout the years as we labor to pass on, to our children, land in better condition than we inherited. It is important to most landowners to pass on cherished land in improved condition to our children.

On the contrary, in countries where the government did not guarantee private property rights the land diminished in environmental value. Just look at the Soviet Union and Eastern Europe to see government regulation and control gone amuck. History has proven that private ownership is the best way to protect the environment.

As the English author, Arthur Young, once said, "Give a man the secure possession of bleak rock, and he will turn it into a garden; give him a nine years lease of a garden, and he will turn it into a desert." The magic of property ownership turns sand into gold.

The private property assessment act is needed to help curb government over-regulation of private property. The legislature should affirm that private property rights are protected so that property owners will continue to improve, conserve, and invest in their property interests.

All across America, 30 states are or have considered similar legislation. Arizona and Delaware passed legislation last year while the state of Washington already had similar legislation on the books. It is a natural, common sense approach to provide a balance between government regulations and constitutionally protected property rights. I predict that in years to come, those states that thought ahead to require such assessments are going to reap fiscal benefits for their wisdom.

EXHIBIT #14
DATE 2-15-93
HB-570

To quote from the U.S. Executive Order, "Responsible fiscal management and fundamental principles of good government, require that government decision-makers evaluate carefully the effect of their administrative, regulatory, and legislative actions on constitutionally protected property rights. Executive departments and agencies should review their actions carefully to prevent unnecessary takings and should account in decision-making for those takings that are necessitated by statutory mandate."

It has been said that the right to own and control property is the foundation of all other individual liberties. The Supreme Court has said, "Property does not have rights. People have rights. The right to enjoy property without unlawful destruction, no less than the right to speak or the right to travel, is in a truth a personal right ... In fact, a fundamental interdependence exists between the personal right to liberty and personal right to property."

Even though this legislation will not strengthen or extend existing takings law, it will help all property owners and all citizens of Montana because it will require the government to know the results of government actions before saddling the state with a huge compensation bill.

We in Farm Bureau strongly support H.B. 570, as a result of its potential to ward off expensive litigation and its potential to protect against an unplanned, unwarranted drain on the public treasury.

Sincerely,

David McClure, President Montana Farm Bureau Federation

MONTANANS FOR MULTIPLE USE

P.O. BOX 190068, HUNGRY HORSE, MT 59919 ** 387-5535

February 15, 1993

EXHIBIT 15
DATE 2-15-93
~~X~~ HB 570

Representative Russell Fagg, Chairman
Judiciary Committee
Capitol Station
Helena, MT 59624

Dear Representative Fagg,

Montanans For Multiple Use is a nonprofit organization who represents over 1500 multiple users. Please enter the following comments as testimony at the hearing in the House Judiciary Committee, Monday February 15, 1993 at 10:30 a.m.

Montanans For Multiple would like to have it go on record as proponents to House Bill (HB) 570, The Private Property Assessment Act, introduced by Representative Larry Grinde, House Majority Leader.

Many members of Montanans For Multiple Use (MFMU) are families who own private property here in the State of Montana. We cannot stress to you enough the significance of this legislation. As Montanans we must maintain our constitutional rights as private property owners. It is vital to private property owners of Montana that HB 570 succeeds so that government regulations will not restrict our right to utilize our own property in a sensible manner.

MFMU strongly regards that the takings aspect of private property should be measured before any regulation or government action takes place. HB 570 would compel government agencies to assess whether or not their actions or regulations would cause a taking. This would safeguard the state from any unplanned acquisitions of property and would furnish a full-scale analysis of alternatives, if a taking might result from a governmental action. This bill would discourage more insidious erosion of private property rights and would help restrict government abuse of power. If HB 570 fails private property owners will not be paid for their loss in value they may encounter by land use restrictions.

The Fifth Amendment of the Constitution and Article II, section 29 of the Montana Constitution provides for just compensation, if a taking occurs of private property by government actions or regulations. HB 570 would require government entities to assess their actions before a taking could result. Arizona and Delaware passed legislation similar to this last year and many other states have similar bills this year. MFMU believes it is a sound economic policy to assess effects before a taking occurs.

All private property owners and all taxpayers in Montana would benefit if HB 570 succeeds. If a government entity inadvertently takes private property, the state or local government is compelled to provide just compensation. We don't want the State of Montana inadvertently spending our tax dollars. That is why it is better to demand that government assess actions before its hands are in the taxpayers pocketbooks.

HB 570 is a responsible approach to ward off impending lawsuits and unwanted, unplanned exhaustion of government finances. This legislation would require an assessment by government entities previous to any action that may result in a compensable taking of private property. HB 570 will not strengthen existing takings law but will instead shield governments and individuals from the unplanned takings of private property. "Takings" will still be defined in both the U.S. and Montana Constitution. Governmental regulations will not be weakened by this bill but would simply require an assessment of potential impacts of government regulations on private property.

As we all know, Montana has a huge deficit and HB 570 would help reduce unwarranted, unplanned strains on the state's already "in the red" bank account. Montana families do not want to have to sue the government or spend time and money in court. This bill would empower the government to look ahead and avoid the burden and compensation of a court trial. As Montana landowners we are concerned about our state's debt, and we strongly support HB 570 the Montana Private Property Assessment Act.

As private property owners we are concerned with self-righteous groups using regulations and law to impersonate their social agenda. For instance if a private property owner was to have an Environmental Impact Statement (EIS) done to permit some type of development on their land and in doing so met every regulation of this EIS after the study was completed. Even if their developments were not deemed to harm the environment this EIS procedure could continue to proceed for numerous years because of some self-righteous group who has threatened to sue the state for not completely researching one of the vague areas in the EIS. The State of Montana could be required to continue spending taxpayer's money on this long-drawn out EIS because of this action.

EXHIBIT #15
DATE 2-15-93
HB-570

To enact The Private Property Assessment Act could counteract this from happening. HB 570 would grant the state with the need to assess their actions for takings ramifications. It would provide a balancing factor for the vocal minority who belong to radical groups that use laws as a means of enacting their ideas on the majority. In the long run this bill would help ward off government spending while protecting private citizens.

HB 570 would not stop environmental regulations, even if it were assessed to be a taking. This legislation would merely require the government to know the results of its actions before it takes those actions and provide possible alternatives to avoid takings implications.

MFMU strongly supports HB 570 because we are landowners who pay taxes and firmly believe that private ownership is the sensible way to protect the environment. If you were to compare the land in Montana to what it was like in the homestead days, you would perceive a great improvement. We must remember a sound government is a government that rules less.

If Americans continue to allow government to take their private property, it will erode the very foundation on which this Nation, its integrity, independence and its economy are based. Common sense tells us that if government regulation was a good direction to take, the Eastern European countries and the Soviet Union would have good environmental records. As you know the opposite has happened, in these countries their environment is in much worse condition with central command then we have in America.

HB 570 would be better for private property owners and Montana taxpayers. Montana families are the most important resource this state possesses. We must make sure that this resource is protected to the fullest extent possible.

Sincerely,

Peggy A. Wagner

Peggy A. Wagner, Director

cc: Governor Marc Racicot
Representative Larry Grinde, House Majority Leader
Judiciary Committee Members

EXHIBIT 16
DATE 2-15-93
SB HB570

TESTIMONY ON HOUSE BILL 570
AN ACT REQUIRING AN ASSESSMENT OF GOVERNMENTAL ACTIONS
THAT AFFECT THE USE OF PRIVATE PROPERTY
HOUSE JUDICIARY COMMITTEE
FEBRUARY 15, 1993

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE, MY NAME IS Jim Peterson AND I AM TESTIFYING BEFORE YOU TODAY IN SUPPORT OF H.B. 570. THIS BILL REPRESENTS AN EFFORT TO PROVIDE BALANCE IN GOVERNMENT DECISIONS WHICH AFFECT THE USE OF PRIVATE PROPERTY. PRIVATE PROPERTY INTERESTS ARE CONSTITUTIONALLY PROTECTED UNDER THE UNITED STATES AND MONTANA CONSTITUTIONS AND THIS ACT WILL ALLOW FOR GOVERNMENT TO PLAN ITS ACTIONS WHICH IMPACT THE USE OF PRIVATE PROPERTY AND THE VALUE OF PRIVATE PROPERTY.

THIS PLANNING PROCESS IS NECESSARY BECAUSE NOT ONLY ARE PRIVATE PROPERTY INTERESTS CONSTITUTIONALLY PROTECTED, BUT THE TAKING OR DAMAGING OF PRIVATE PROPERTY BY GOVERNMENTAL ACTION MAY SUBJECT THE STATE AND GOVERNMENT TO POTENTIAL LIABILITY.

OBVIOUSLY THIS IS A TIME WHEN GOVERNMENT SHOULD BE REQUIRED TO DO ALL THE FINANCIAL PLANNING IT IS CAPABLE OF. THE PROCESS THIS BILL CREATES WOULD ALLOW GOVERNMENT TO LOOK AT ITS ACTIONS AND PLAN FOR ANY LIABILITY WHICH MAY BE APPARENT BY ACTIONS WHICH AFFECT THE USE OR VALUE OF CONSTITUTIONALLY PROTECTED INTEREST. OTHER STATES ARE ACTIVELY PURSUING AND SUPPORTING THIS TYPE OF LEGISLATION. AS GOVERNMENT GROWS AND AS REGULATION GROWS, PRIVATE PROPERTY INTERESTS ARE BEING MORE AFFECTED THAN EVER BEFORE AND TAKINGS LITIGATION AND COMPENSATION IS AN EVER GROWING ISSUE. STATES LIKE WASHINGTON, DELAWARE, ARIZONA, AND COLORADO HAVE ENACTED "SIMILAR" LEGISLATION AND REQUIRE GOVERNMENT TO PLAN FOR THE RAMIFICATIONS OF ITS ACTIONS.

I HAVE WITH ME TODAY A LETTER FROM THE GOVERNOR OF ARIZONA, TO THE PRESIDENT OF THE ARIZONA SENATE. THE LETTER WAS SENT AFTER THE SIGNING OF ARIZONA'S PRIVATE PROPERTY RIGHTS PROTECTION BILL INTO LAW. I WILL DISTRIBUTE

IT TO YOU WITH MY WRITTEN TESTIMONY. I WOULD LIKE TO QUOTE ONE PORTION OF THAT LETTER TO YOU. IN DISCUSSING THE REASONING FOR SIGNING THE LEGISLATION, THE GOVERNOR OF THE STATE OF ARIZONA STATED, AND I QUOTE FROM THE BOTTOM OF PAGE 2 OF THE LETTER, "IT REQUIRES NO PARTICULAR GENIUS OR PROPHECY AT THIS POINT TO SEE THAT THROUGHOUT THE REMAINDER OF THIS DECADE, FIFTH AMENDMENT TAKINGS LITIGATION AND THE DIFFICULT QUESTIONS IT RAISES MAY BE THE PREDOMINANT SUBJECT OF FEDERAL AND PERHAPS STATE CONSTITUTIONAL LAW. IN LIGHT OF THAT FACT A SORT OF REVIEW PROCESS THIS LAW ENTAILS MAY BE CONSIDERED A WISE AND PRESCIENT TACTIC FOR LIABILITY AVOIDANCE, MUCH LIKE MANY OTHER STATE GOVERNMENTS ARE FORCED TO UNDERGO IN OUR LITIGIOUS AGE. AT THE END OF THE DAY IT MAY WELL TURN OUT THAT THE ARIZONA LEGISLATURE WAS OUT IN FRONT OF THE DEVELOPING PROBLEM WHICH OTHER STATE GOVERNMENTS FAILED TO NOTICE BEFORE IT WAS TOO LATE."

I URGE YOU TO ENACT THIS LEGISLATION FOR MONTANA GOVERNMENT TO PLAN ITS ACTIONS BEFORE IT IS TOO LATE FOR THIS STATE, AND GOVERNMENT EXPOSES ITSELF TO UNNECESSARY LIABILITY FOR TAKINGS CLAIMS BECAUSE OF UNPLANNED LEGISLATION OR REGULATION.

THANK YOU FOR THIS OPPORTUNITY TO TESTIFY.

EXHIBIT 1
DATE 2-15-93
SB HB 570

Written Testimony For H.B. 570

by

Robert G. Natelson
Professor of Law
University of Montana

I.
INTRODUCTION

This is written testimony in favor of H.B. 570, the "Private Property Assessment Act." This bill would create a review procedure by which decision making by Montana governmental entities would include consideration of potential liability for "takings" and "damage" under Article II, Section 29 of the Montana Constitution.

I am Professor of Law, University of Montana School of Law. I am the principal scholar at the Law School in the law of property and one of two scholars working in the field of constitutional law and constitutional history.

II.
RECOMMENDED WORDING CHANGES

In order to better effectuate the bill's purpose, I recommend that the phrase "or damaging" be inserted after the word "taking" in Sections 4(b), 4(d)(iii), 4(e), and 5(c).

III.
REASONS FOR H.B. 570

There are two fundamental reasons for enacting H.B. 570:

(A) It is just;

(B) It is prudent.

A. *H.B. 570 is just.*

The ideal behind the "takings" clauses of the U.S. and Montana Constitutions is that a few people ought not be singled out to bear a disproportionate part of the cost of a measure that benefits society as a whole. This ideal is central to the legitimacy of American Government. A brief discussion of the topic appears in the appended article, which appeared in the Newsletter Timberlines last year. (See Attachment "A".)

As the article indicates, the Takings Clause of the U.S. Constitution helps to effectuate this ideal. As noted below, Article II, Section 29 of the Montana Constitution goes even farther.

Another reason H.B. 570 would be a step toward justice is that it would discourage governmental entities from thoughtlessly and needlessly inflicting damage on innocent property owners. A government subject to H.B. 570 would be a fairer, more decent, and less arrogant government.

B. *H.B. 570 is prudent.*

1. *Prudence in general.* Justice Brennan of the U.S. Supreme Court once observed that when advocates of a policy are unwilling to provide for compensation of those hurt by the policy, you have a strong indication that the policy is socially harmful. This is because (1) truly beneficial measures create enough "social good" to enable society to compensate the losers and (2) when a measure is not valuable enough allow compensation, this means the measure causes more harm than good. Justice Brennan's point is that respect for the principle behind the Takings Clause helps to ensure that governmental actions really are socially wise, rather than merely devices by which powerful interest groups plunder less powerful ones.[1]

Thus, by helping to ensure that government respects the U.S. and Montana Takings Clauses, H.B. 570 will increase the likelihood that government decisions serve the public welfare.

B. *Prudence for the state treasury.* From a fiscal viewpoint also, H.B. 570 is a prudent measure. Montana state and local government is more exposed to "takings" liability than in the past, partly because of the broader scope of governmental regulation, partly because of wording of Article II, Section 29 of the Montana Constitution, and partly because of recent decisions from the U.S. Supreme Court -- especially Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886 (1992).

The interaction of Lucas with Article II, Section 29 is particularly important. Unlike the federal government, which is liable only for physical invasions of property and for regulatory restrictions that eliminate *all* economic value to the owner, Montana governmental

[1] Justice Brennan's comment probably came from writings by Frank Michelman, Professor of Law at Harvard University and the nation's leading expert in Takings jurisprudence.

EXHIBIT #17
DATE 2-15-93
HB-570

entities are liable for partial takings (called "damaging" in H.B. 570).[2] See, e.g., Knight v. City of Billings, 197 Mont. 165, 642 P.2d 141 (1982). Prior to 1992, Montana government's principal defense against liability for partial takings was the doctrine reflected in another Montana Supreme Court case, McElwain v. County of Flathead, 248 Mont. 231, 811 P.2d 1267 (1991). But McElwain is no longer tenable, given the U.S. Supreme Court's repudiation of it in Lucas.

In sum: "Takings" law is in flux, and the direction of the flux is toward more litigation and more governmental liability. By ensuring that governmental entities assess the constitutional implications of their decisions, H.B. 570 would help protect Montana taxpayers from litigation and from adverse damage awards.

Respectfully submitted,

ROBERT G. NATELSON

[2] Art. II, §29 states that "[p]rivate property shall not be taken *or damaged* for public use without just compensation to the full extent of the loss having been first made to or paid into court for the owner." (emphasis added).

Law of the Land:

Property Rights and the American Ideal

by Rob Natelson

Property rights are essential to the theory on which American government is founded. Politicians have been able to abuse property rights in recent years because many Americans do not understand this central truth.

The political ideal underpinning American government is very different from the theories prevailing in ancient times. In ancient societies, the general view was that all power belonged rightfully to the state. It made no difference whether the state was a monarchy (as in Babylonia), a democracy (as in Athens), or a constitutional republic (as in early Rome). No individual had any rights against the state. Property interests were merely marks of official favor -- bestowed, revoked, or limited at the sovereign's pleasure.

In its ultimate extension, this theory gave the state the power of human sacrifice. Even when the government did not literally hurl unfortunates to the flames, it often exercised the power figuratively: by depriving innocents of their lives, liberties, or belongings in the name of the common good.

In the years after Magna Carta (1215), English political theorists developed a different theory of government. They argued that individuals held rights that could be exercised against the state itself. Eventually, writers such as John Locke began to liken civil society to a contract -- a "social

compact" -- in which neither sovereign nor individuals could unilaterally alter the rights of others.

With some refinements, this is the theory on which American government was founded. Its most eloquent expression appears in the Declaration of Independence:

> *We hold these truths to be self evident: That all men are created equal. That they are endowed by their Creator with certain unalienable rights; that among these are life, liberty and the pursuit of happiness: That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it....*

Consider some of this statement's principal points:

* Rights come from the Creator, not from the state. Rights exist before and above the state.
* The state is established, and may be altered, only by the consent of the people.
* The only reason the state exists is to protect rights. Therefore even the people have no "just power" to abridge the rights of individuals.

Although the drafters of the U.S. Constitution (including the Bill of Rights) often were impeded by the demands of practical politics, in general the Constitution reflects the ideals set forth in the Declaration of Independence. The rights

EXHIBIT #17
DATE 2-15-93
HB-570

enumerated in the Constitution were designed primarily to minimize the number of instances in which the federal government could engage, literally or figuratively, in "human sacrifice."

Among the rights recognized in the Constitution were some that promoted easy access to the political process (assembly, petition for redress, and local control through federalism), some ensuring fair procedures (e.g., trial by jury, no unreasonable searches), and some protecting individual expression. Included in the last group were freedom of speech, ownership of firearms, freedom of religion, preservation of contracts, and the right to obtain and keep property.

Too many policymakers and pressure groups are ignorant of the legitimating theory of American government. Too many harbor the notion that government can trample property rights (or other rights) in pursuit of the "general good." But a government that imposes disproportionate losses on some for the supposed benefit of all undermines its very reason for existence. It pursues a path followed by ancient societies but fundamentally hostile to the American ideal.

-30-

EXHIBIT 6
DATE 2-15-93
SB HB 570

Testimony prepared for presentation to the House Judiciary Committee.

Subj: House Bill 570
Date: February 15, 1993.
By: Bob Barry
For: Montana Alliance for Progressive Policy

Mr. Chairman, members of the committee, my name is Bob Barry. I'm speaking today on behalf of the Montana Alliance for Progressive Policy.

House Bill 570 radically redefines what constitutes a public "taking" of private property and sets up new bureaucratic hoops for state and local government to jump through. Its net effect would be to paralyze state and local government efforts protecting public health, welfare, and safety—and to make many public actions more expensive than they are now.

The Alliance believes it's a bad idea.

Private property rights don't exist in a vacuum; they must be balanced against other rights, and one person's property rights must be balanced against another's. That is exactly what has happened in 200 years of legislation and case law.

This balancing process continues. In the recent Lucas case, the Federal Supreme Court made a small adjustment in takings law favoring property rights, and numerous takings cases are working their way through the federal court system. This legislature also has many bills before it which establish or adjust the existing balance between competing rights and interests affected by specific state and local government policies.

By explicitly making partial loss of value a basis for takings compensation, House Bill 570 embraces a concept that the Supreme Court declined to adopt in the Lucas case. It also changes the assumptions on which virtually all state and local regulatory and permitting functions are based. Its enactment would send this legislature and local governments "back to the drawing board" on issues where all parties involved accept the existing resolution.

The Alliance is concerned about the red tape this bill would impose.

State agencies would probably be the least affected by the requirement for written assessments; they have people on their staff who routinely do this sort of thing. But what about the small town or weed control district; do they have the expertise needed to determine if a takings would occur and to estimate its costs?

Costs are another major concern! As we all know, red tape is a very expensive commodity. Federal funding of many state programs could be lost if state and local entities were no longer able to comply with federal requirements.

Compensation and litigation costs would be staggering! All regulations are not going to be eliminated; some are necessary to allow communities of people with different, sometimes conflicting interests to live together. Even those regulations that virtually no one would challenge in concept, will result in compensation claims under the generous provisions of this bill.

Worse yet, while some attorneys believe that this bill applies only to permitting and regulating actions, others are certain the courts would interpret it as applying to other functions, such as public facility sighting. If so, anyone whose property value is affected by the siting of a highway, a landfill, or a sewage plant could file for takings compensation. In analyzing the Arizona takings law, the Arizona Director of Transportation indicated that if this broader interpretation prevailed, the cost to the highway department would "approach total direct right-of-way costs (hundreds of millions of dollars)."

Finally, the Alliance sees this legislation as being a lot like rabbit hunting with a howitzer. You have a good chance of killing some rabbits, but you're also very likely to do a lot of unnecessary damage.

Does Montana really want to cripple vital state and local government functions in order to affect a shift in the balance of property rights versus other equally valid rights and public concerns?

Do we want to face claims when the fire marshal limits occupancy of a club or theater, because it lacks adequate fire exits; or when the health department shuts down a restaurant operating an unsanitary kitchen?

Do we want the federal government to take back the funding and authority to administer programs which are granted to the state contingent upon our regulations meeting federal guidelines?

There are those in our society who refuse to take the rights of their neighbors into consideration. That's why we have regulations.

The Alliance urges you to reject the indiscriminate, shot gun, approach to property rights protection embodied in House Bill 570. The balance between public and private interests that best fits specific issues and situations is being addressed in this legislature and in the courts. Our state doesn't need an expensive, quick fix that could well create problems far worse than it solves.

Thank you.

Protect Your Rights!
Oppose Takings Legislation (House Bill 570)

A bill just introduced in the Montana State Legislature would, if enacted, paralyze state efforts to protect consumers, public health and safety, civil rights, and the environment. **House Bill 570, entitled "An act requiring an assessment of governmental actions that affect the use of private property"** is modeled on "private property protection" or "takings" legislation that was introduced last year in 27 state legislatures but which passed in only three.

"Takings" or "Private Property Protection" legislation is an item high on the agenda of the mining, timber, real estate, pesticide, and agribusiness industries. It gets its name from the constitutional requirement to compensate property owners when government actions take their property or destroy its value.

Promoted as needed to protect small property owners from excessive government regulation, takings laws would, in reality, prevent state government from protecting the public from unscrupulous business practices and irresponsible industry actions. Citizen groups fighting these proposals call them "Polluters' Protection Acts".

There is considerable uncertainty about just exactly what House Bill 570 would do to existing state law. One of the few points that attorneys reviewing this bill agree on is, "It's a lawyers' field day as to what it means." However, there is consensus on several points:

• **It attempts to expand the definition of what constitutes a compensatable taking of private property rights.** The current legal definition represents a balance between the need to protect the rights of property owners and the need to protect community interests. This balance has been achieved through 200 years of court cases dealing with property rights and public health and safety. House Bill 570 destroys this historic balance by specifying its own standards. It says that a taking would occur if only a portion of the economic value of a property is lost. Thus, if the most profitable use of a movie theater located across the street from a school was to show "adult" films, the owner could claim compensation if city regulations prohibited him from showing such films.

Equally pernicious are provisions allowing for takings claims based on delays in government decisions. This would allow a property owner seeking a permit for a landfill to claim compensation for any delays in processing the permit regardless of whether the permit was granted or denied.

• **It greatly increases the bureaucratic red tape involved in any action that might involve a taking.** State and local government entities would be required to prepare a written takings assessment of each proposed action, including an estimate of the cost to the public if a taking occurs. This new layer of red tape would clearly increase the cost to the taxpayer and the time required for government actions. Small government entities, such as weed control districts or small towns, would be hardest hit because they lack the staff to do this extra paperwork or the expertise to estimate takings costs.

• It may drastically restrict the conditions under which the government entities can act and the methods they can employ. Attorneys disagree sharply on the extent to which House Bill 570 would restrict when and how government could act to protect public health and safety. Few will venture a guess as to how the courts would interpret a provision requiring that state agencies "ensure that restrictions imposed on the use of private property are proportionate to the extent the use contributes to any harm the restriction is designed to prevent, mitigate, or remedy." Some think that this provision taken together with other bill language may virtually eliminate the ability of agencies to use general rules or guidelines. For example, instead of utilizing a statute prohibiting sewage lagoons from being located within 500 feet of a water well, the state might have to perform a rigorous case by case analysis to determine how close a particular sewage lagoon could be located to existing wells.

• The costs of compensation could be staggering! Changing the established definition of compensatable taking would result in an avalanche of court cases to interpret the new definition. Expanding the definition virtually invites property owners to propose uses of their land that would conflict with public health and safety. Section 6 of the bill encourages such behavior by shifting the burden of proof in compensation cases almost entirely onto the government.

Does Montana need a law like this one to protect private property rights?

Virtually all of the issues raised by proponents of takings legislation are federal issues involving 404 permits, riparian areas, the federal endangered species act, and other federal regulations. House Bill 570 is not going to change these federal rules—other than to cause the federal government to take back enforcement authority (and funding) that has been delegated to the state.

Supporters of takings legislation often present carefully selected horror stories to back their allegations that takings is a serious problem. Typically, these stories won't stand up to close scrutiny. Most often they relate to federal regulations, to incorrect application of existing law, or to situations where a valid public interest was being protected.

The obvious beneficiaries of this bill would be those who want to dump dangerous wastes in Montana waters, air, or landfills; those who want to use pesticides and other chemical products with no consideration for the impacts on their neighbors; those who want to subdivide and develop land without rules to protect the buyers or the community, those who want to squeeze the last dime of profit out of their employees without regard for employee health and safety; those who don't want to provide fire exits or handicapped access in their buildings—the list could go on and on, but the only property owners to be found on it are those who are out to profit by using their property in ways that are a threat to their neighbors, customers, employees–to all Montanans.

For more information contact: Montana Alliance for Progressive Policy, P O Box 961, Helena, MT 59624, phone (406) 443-7283.

Northern Plains Resource Council

NPRC POSITION ON "TAKINGS" DECEMBER 1982

EXHIBIT #18
DATE 2-15-93
HB-570

NPRC expects the introduction of "takings" legislation in the 1993 Legislature, similar to the "Private Property Protection Act" passed last year in the Arizona Legislature. The Arizona law requires the government to compensate property owners for any loss of property value due to government actions, including:

- any government action where the state cannot prove a "real and substantial" threat to public health and safety, (currently the state can act on "potential" threats); or,

- "undue delays" in decision making.

The Arizona law also creates layers of new bureaucracy and paper work by requiring state agencies to prepare takings assessments of all proposed actions. An additional layer of review is required for actions to protect public health and safety.

Opponents of the Arizona law have collected enough signatures to mandate a statewide referendum. The law will not go into effect unless the referdum passes.

NPRC is concerned that enactment of such a law in Montana could severely impair the state's ability to act in the public interest. NPRC will strongly oppose any takings legislation that would:

- jeopardize millions of dollars of federal matching funds for Montana by gutting state regulatory programs to the point where such programs no longer meet minimum federal standards;

- increase the financial burden on state agencies and Montana taxpayers;

- create an adversarial relationship between property owners and the state;

104 N. Broadway, Suite 419 Billings, MT 59101-2092 (406)248-1154

- restrict public participation in any regulatory process;

- exempts companies or individuals from responsibility for damage to others' property or infringement of others' rights;

- require the state to affirmatively prove a "real and substantial" threat to public health and safety before taking any action, thereby barring the state from acting to prevent potential health threats, environmental hazards, unsafe practices, neglect of children and senior citizens, and abuse of civil rights.

NPRC believes that cooperative efforts between property owners and government - such as long range local and regional planning - represent more equitable and constructive methods for finding solutions to the problem of government takings.

EXHIBIT 17
DATE 2-15-93
~~SB~~ HB 570

February 15, 1993

Chairman Russell Fagg
House Judiciary Committee
Capitol Station
Helena, Montana 59620

Dear Chairman Fagg and Judiciary Committee Members:

I own property and work in Gallatin County. I submit this testimony on HB 570, the proposed "Montana Private Property Assessment Act".

Although this "takings" bill states that it is intended to "protect private property owners, the interests of the general public, and the fiscal health of the state, ... and to avoid any unnecessary burdens on the public treasury," I believe it would do just the opposite. It will do more to paralyze state efforts to protect consumers, public health and safety, civil rights, and the environment than it will do to protect property rights.

Implementation of this act will require a staggering amount of red tape, costing Montana's citizens millions of additional dollars in taxes. It will require several new layers of bureaucratic review. First, the Attorney General has to develop "takings" guidelines that must be followed by all state agencies. Every proposed governmental action will need review to determine if it has "takings implications," which must include an estimate of the cost to the state if a taking is found. An additional layer of review is required for actions proposed to protect public health and safety.

Whenever the state proposes to regulate on a matter relating to public health or the environment, such as toxic waste dumping, food handling, highway safety, or day care centers, the regulators would have to document whether the new regulation would affect the value or use of property, or the operating costs or profits of a business. If so, regulators would have to determine if that would constitute a "taking," which should be paid for by the state. Such a bill could end up forcing us, the taxpayers, to pay businesses not to endanger the public and to pay polluters not to pollute. Even worse, under this bill, public officials would have to prove that a business' action would pose a real and substantial threat to human health, a radical departure from the current standards that protect against potential and probable threats.

This bill would substantially decrease the ability of our local governments to plan. Over the past few years, I have become more concerned about the ability of our local governments to plan for growth so that the costs of unplanned developments are not

allowed to overburden us taxpayers. Planning for growth and development results in many benefits for communities, including fiscal savings as well as retention of community character, creation of new amenities, preservation of invaluable natural resources, and a healthy environment, all of which have economic implications. Land use planning can prevent or reduce the costs of property damage and loss of life from natural hazards such as flooding, by not permitting certain types of development in hazard-prone areas. Without planning, new developments increase infrastructure and fiscal costs, change community character and decrease quality of life and the environment with traffic congestion, noise, crime, and pollution, and decrease the viability of traditional occupations such as farming and ranching.

This bill masquerades as an "anti-government regulation" bill, when in fact it creates more rules and regulations and agency bureaucracy to address something that isn't even a problem at the state level. Montana's state government has hardly run amok in imposing regulatory burdens on private property owners. To the extent that there are legitimate concerns about potential abuses by state agencies, the legislature has ample authority to address the problem in the statutes specific to each agency. The broadside approach in this bill is an invitation to disaster.

Takings issues should be dealt with by the courts. If a property owner thinks a regulation goes too far, he or she is free to seek relief from the courts. Each case of takings must be looked at individually, with an eye for the specific details. Legislating a takings policy fails to do this; whereas the courts are best suited to look at the specifics.

Please, let's not take such a giant step backwards! This bill is totally unnecessary!

Sincerely,

Valorie Drake

Valorie Drake
1477 Hamilton Road
Belgrade, MT 59714
388-1888

EXHIBIT 20
DATE 2-15-93
HB 570

Montana State AFL-CIO

Donald R. Judge
Executive Secretary

110 West 13th Street, P.O. Box 1176, Helena, Montana 59624 406-442-1708

TESTIMONY OF DON JUDGE ON HOUSE BILL 570,
HEARINGS OF THE HOUSE JUDICIARY COMMITTEE, MONDAY, FEBRUARY 15, 1993

Mr. Chairman, members of the committee, for the record, my name is Don Judge and I'm here representing the Montana State AFL-CIO.

Trade unionists in Montana and across the country oppose these so-called "takings" bills in their many forms because they do just what the name implies: they "take."

These bills are not designed to protect private property owners from having things taken from them -- the U.S. and Montana Constitutions already do that.

These bills, which have been tried in nearly 30 states and have failed in most, are designed to make it easier for unscrupulous property owners to take things from you and me. Mostly, they're designed to prohibit any new rules to protect public health and safety and to pick our pockets if we dare write any such rules.

Let me provide a little background.

The prime motivation of those groups and organizations -- primarily members of the Moonie-funded "Wise Use Movement -- who advocate this kind of legislation is to block the implementation of regulatory programs that they oppose, and which they don't have the political power to block in any other way.

The seed for all of these bills -- HB 570 and many other bills in state legislatures across the West -- is Executive Order 12630, signed by President Reagan in 1988. That order requires federal agencies to examine the extent to which proposed regulatory actions might interfere with private property rights. The historical record clearly shows that members of the Reagan Administration developed the "takings" scheme not out of concern for individual rights, but rather as a pretext for blocking regulatory objectives with which they disagreed on policy grounds.

Former U.S. Solicitor General Charles Fried wrote in his book about serving in the Reagan White House that former Attorney General Meese created the whole "takings" issue as a way to put what he called "a severe brake upon federal and state regulation of business and property."

By the way, I want to interject here that the Executive Order that started all this foolishness is likely to be repealed by President Clinton in the next few weeks.

Now, we don't oppose the idea of cutting down the number of rules and regulations floating around state government. The fewer the better, quite frankly, as long as the ones we have do the job of protecting the public health, welfare and safety, an obligation you members of the Legislature are constitutional sworn to uphold.

In Wyoming, their Legislature faced a similar bill about two weeks ago, and they defeated it rather handily. They weren't convinced that there were any significant takings occurring under current Wyoming law, and they were horrified at the financial and regulatory burden this kind of legislation would create.

In Colorado, they're considering a similar bill, but they're finding the fiscal notes a little hard to swallow -- the agency-by-agency fiscal notes say that it will cost literally millions of dollars of state funds and thousands of hours of staff time to go back and review every state law and regulation to see if it might possibly maybe someday cause a taking.

I know that a fiscal note has been requested on HB 570. I would encourage the sponsor and supporters of this bill to get in touch with the drafters of our fiscal notes and make sure the bill's potential implications are clearly understood, so that a complete and responsible fiscal assessment of HB 570 is prepared. We understand that some state agencies are of the opinion that takings legislation like this wouldn't have any effect on them. Let me assure you that our analysis, buoyed by attorneys who have been involved in U.S. Supreme Court cases on takings, says quite the contrary.

Some of the examples of takings that could occur under this bill are outrageous.

What if a movie theater decided it was in its best interest to show an X-rated film, but local ordinances prohibited it? The theater owner could then say that constitutes a compensable taking under this proposal.

What if a factory wanted to dump it's trash into the Clark Fork River, but local and state laws said that couldn't be done? The company could then argue, under HB 570, that such regulations constitute a compensable taking of the company's ability to conduct its business affairs.

What if workers, by rule, regulation or law, were guaranteed asbestos-protective clothing and breathing apparatus when they're demolishing old asbestos-filled buildings, and the company said "no?" The workers could argue that the company's refusal was a compensable taking of the workers' right to conduct their work in a manner they see fit. The company could argue that the state should be responsible for buying the clothing, and that the state's passage of the regulation was a compensable taking of the company's private right to conduct its business as it sees fit.

The examples can go on and on. The whole point of this bill is the word "compensable."

Private property owners -- a small group of them in this case -- want to be compensated for every possible government regulation or even non-regulation that might impact them. Never mind the necessary balance between protecting private property and public health and welfare; never mind this country's 200-year history of balancing private needs against the public good. Never mind all of that -- just throw it out and make everything a compensable taking.

Mr. Chairman, members of the committee, you have heard for years about gridlock in the Legislature, gridlock in the debate over our natural resources, gridlock in Washington, D.C., and so forth. I suggest to you that this bill represents a new kind of gridlock -- one called "greed-lock."

Mr. Chairman, I challenge the sponsors and supporters of this bill to present any concrete examples of takings that have occurred without just compensation and due process of law under the Fifth Amendment of the U.S. Constitution and Article II, Section 29 of the Montana Constitution.

If they can -- and in other states they have not been able to make such examples -- then I'd say it would indicate we have been poor watchdogs of our constitution. Given the integrity, experience and expertise of the people who have run Montana's government and judiciary over the last 100 years, I doubt very much that would be true.

Mr. Chairman, members of the committee, I urge you to kill this bill and get on with more pressing business at hand in this Legislature.

Thank you.

EXHIBIT 21
DATE 2-15-93
HB 570

Common Cause montana
P.O. Box 623
Helena, MT
59624
406/442-9251

COMMON CAUSE TESTIMONY
IN OPPOSITION TO HB 570
FEBRUARY 15, 1993

Mister Chairman, members of the House Judiciary Committee, for the record my name is Amy Kelley, Executive Director of Common Cause/Montana.

I speak today in strong opposition to HB 570.

Common Cause does not take a position on how big the government should be. Rather, we advocate ways to make our government process work better, to make it more open and accessible to citizens, and to improve the government's ability to protect the public interest.

On its surface, this bill appears to jump on the bandwagon of "getting government off our backs" and to protect the rights of small property owners. However, we feel the true consequence of such legislation would be to weaken the ability of our government -- both state and local -- from initiating measures to protect public health, safety, and the environment.

This bill would put an enormous and costly burden on state and local government to prove that the need for such regulations outweigh <u>any level</u> of economic loss to a private interest, and to prove that the government has the money to compensate the property owner for any such loss before taking any action. As a result, any proposed regulatory legislation would undoubtedly have a huge fiscal note which, as we are all too aware, spells death to a proposal regardless of merit.

In the past year, legislation similar to HB 570 has been introduced in 27 state legislatures. Only three of these states passed such laws, and in at least one -- Arizona -- a broad coalition of groups is working hard to repeal the law through the ballot.

Our government should not be restricted to making decisions based on economic impact alone. When dealing with public health and safety, the public interest is paramount. Individuals are already constitutionally protected against uncompensated takings of private property. This bill takes the definition of a "taking" too far.

The only bandwagon the Montana legislature should jump on is that taken by 24 other states in killing similar legislation. We urge a "DO NOT PASS" on HB 570.

EXHIBIT 20
DATE 2-15-93
SB HB 570

Page Carroccia
535 Myrtle
Missoula, MT.
542-1241

February 15, 1993

The Honorable Russell Fagg
and Members of the House Judiciary Committee

Dear Committee Members:

I had hoped to testify in person before this committee because I feel so strongly about proposed House Bill 570 sponsored by Mr. Larry Grinde. Unfortunately, the day of the hearing conflicted with a prior obligation, and I am submitting written comments in lieu of oral testimony.

I grew up on a ranch in south central Montana and worked for a development company in California for a number of years before entering Law School at the University of Montana. My background in agriculture as well as my work experience in California contributed to the sincere interest I have in ensuring that Montana recognize the rights of property owners as well as attempt to reform the gradual undermining of those rights. Along with some of my law school classmates and professors, I have attempted to provide Montana Stockgrowers with comments to assist in the formation of this bill.

Rather than simply making comments and suggestion based on my personal opinion of how the rights of property owners ought to be protected, I have done substantial research on the subject for a Law Review Comment which will be published this coming summer. That article 1) looks at the controversy surrounding the Framers' intent and interpretation of Constitutional rights to be afforded property owners; 2) gives an overview of Federal "regulatory" takings law; 3) reviews the Montana Constitution and how Article II, Section 29 has been interpreted in Montana case law, and 4) discusses the way in which legislative action can reaffirm the fundamental rights of property owners by assessing governmental actions that impact those rights. This article is now in draft format and I thought about submitting it, but decided a 50 page Law Review article might be more irritating than helpful.

Before I discuss the proposed bill in detail, let me state explicitly that I am not disputing the validity of some governmental police powers, nor am I opposed to environmental and land use concerns. However, let me also stress that a property right is an individual right guaranteed by the U.S. and Montana Constitutions. Too often, people forget that property rights are human rights and are vital to our concepts of personal liberty and

economic security.

House Bill 570 proposes that governmental entities ought to assess the impact of proposed actions (defined as rules, statutes, regulations, licensing or permit requirements that may result in a taking or damaging of private property) prior to the implementation of such actions. The bill proposes a slightly more rigorous review standard for state agencies.

This is not a particularly onerous requirement and any administrative burdens caused by the assessment should be outweighed by the public's expectations that government carefully consider the need for, and ramifications of, regulatory actions. Sound principles of responsible government mandate that government entities be able to justify their actions.

The assessment required of governmental entities is straightforward: a) a description of the action, its purpose and how that purpose will be accomplished; b) the impact of the action on the use or value of private property; c) an identification of the property owners' impacted rights; d) alternatives to the government action; e) an estimate of financial cost and the source of payment if a court of law were to find a taking; and f) whether the action imposes a disproportionate burden on the property owner.

This assessment was not pulled out of thin air, but is well grounded in case law as well as executive action. The assessment is modeled after Executive Order 12630, signed by President Reagan on March 15, 1988, requiring a similar assessment by federal agencies. The tests used by the U.S. Supreme Court to determine the standard of review to be applied to regulatory actions have become increasingly rigorous in recent years. The principal test used from the turn of the century (with the notable exception of Pennsylvania Coal v. Mahon) until the early 70's was a "rational basis" test. The courts simply asked if the regulation was rationally related to a legitimate state interest. All governmental enactments or regulations were given a presumption of validity and the burden was on the property owner to prove that the regulation was invalid.

In 1978, the Court set out a multi-factor balancing test in Penn Central Transportation Co. v. New York. These factors considered 1) the economic impact of the regulation; 2) the character of the governmental action; 3) the investment backed expectations of the property owner and 4) offsetting reciprocal benefits. This test, with a few variations on the factors, is the principle test currently used by both the U.S. and Montana Supreme courts.

In 1987, the U.S. Supreme Court decided 3 cases important for certain aspects of the Court's analysis. In Nollan v. California Coastal Commission, Justice Scalia, in writing for the majority, said: "We view the Fifth Amendment's property clause to be more

than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination." In Keystone Bituminous Coal Assoc. v. DeBenedictis, the Court again looks to a balancing test in reaching its decision: a) the character of the government action; b) whether the action makes it impossible for petitioners to profitable engage in their business and c) whether the action unduly interferes with investment backed expectations. First English Evangelical Lutheran Church v. Los Angeles made it clear that a valid police power action could still be a taking requiring compensation, even if the taking was only temporary in nature.

One of the most recent regulatory takings cases, Lucas v. South Carolina Coastal Commission (1992), does not take issue with the validity of the act in question but states that the governmental entity, the South Carolina Coastal Commission, offers no proof of the way in which the petitioner's use of his property interferes with the purpose of the governmental action. The Court also discusses the nexus between the regulatory action and the prohibited/regulated use as well as the proportionality of distribution of the burden between landowner and public. The Court advocates a shifting of the burden of proof to the governmental entity when the majority asserts that "the State must do more that proffer legislative judgments to avoid invalidating the law."

Finally, Lucas seems to recognize the role states will play in the determination of takings cases and the question of compensation. "The answer to this difficult question may lie in how the owner's reasonable expectations have ben shaped by the State's law of property--i.e., whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in property with respect to which the claimant alleges a diminution in (or elimination of) value."

While Montana takings law follows federal takings law in most case analysis, Montana does recognize a slightly higher standard of protection for property owners. This standard is set forth in Article II, Section 29 of the Montana Constitution: Private property shall not be taken **or damaged** for public use without just compensation. The Montana Supreme Court has specifically recognized the "or damaging" clause. See, e.g. Less v. City of Butte and Knight v. City of Billings.

Briefly, let me sum up my reasons for supporting this bill:

1. As I have attempted to demonstrate, the proposed bill does not exceed constitutional authority for the protection of the rights of property owners, nor is it apposite to federal or state takings law. In fact, the language is simply a clarification of Supreme Court decisions and is very similar to an already existing Executive Order.

2. Some of the cases discussed above (and a multitude of cases not

EXHIBIT #22
DATE 2-15-93
HB-570

discussed) might never have been litigated if assessments and reviews were required prior to the implementation of governmental regulations.

3. Neither the State of Montana nor the Federal Government is in great fiscal health. We cannot afford to engage in needless litigation or overlook the expenses of paying compensation when a taking is found. Review standards may eliminate some of those costs.

4. The rights of property owners ought to be of concern to everyone in this state. I have heard the criticism that this bill is only for the benefit of the agriculture sector in Montana. Actually, takings actions more often impact individuals located within or immediately outside city boundaries. Takings actions also arise in the development of land, whether it is the big developer or the individual building a retirement home. Furthermore, takings can occur in the personal property arena, too. Takings law is by no means exclusive to agriculture or even the real property owner.

5. Montana has a rich history of recognizing the rights of property owners.

6. The citizens of this state are not asking too much in expecting responsibility and accountability from their government.

I strongly urge this committee to adopt this bill, and would be happy to provide further comments if I could be of any assistance or provide further factual support for the bill.

Sincerely,

Page Carroccia

Page Carroccia

HOUSE OF REPRESENTATIVES
VISITOR REGISTER

Judiciary COMMITTEE BILL NO. HB 562

DATE Feb. 15, 1993 SPONSOR(S) J. Rice

PLEASE PRINT PLEASE PRINT PLEASE PRINT

NAME AND ADDRESS	REPRESENTING	SUPPORT	OPPOSE
John Connor	MT County Attys Assn	X	
Laura Kobzik	Christian Coalition	X	
Sharon Doty	Mont Catholic Conf.	X	
Ann Gilkey	DFS		
Dallas D Erickson	Montana Citizens for Decency	X	
Jenny Erickson	Myself & 9 Children	X	
Kathleen J Holmer	Boy Scouts of America & Myself	X	
Randy Vaught	SELF	X	

PLEASE LEAVE PREPARED TESTIMONY WITH SECRETARY. WITNESS STATEMENT FORMS ARE AVAILABLE IF YOU CARE TO SUBMIT WRITTEN TESTIMONY.

HOUSE OF REPRESENTATIVES
VISITOR REGISTER

Judiciary COMMITTEE BILL NO. HB 597

DATE Feb. 15, 1993 SPONSOR(S) Whalen

PLEASE PRINT **PLEASE PRINT** **PLEASE PRINT**

NAME AND ADDRESS	REPRESENTING	SUPPORT	OPPOSE
BOB WOOD	CITY OF HELENA		✓

PLEASE LEAVE PREPARED TESTIMONY WITH SECRETARY. WITNESS STATEMENT FORMS ARE AVAILABLE IF YOU CARE TO SUBMIT WRITTEN TESTIMONY.

HOUSE OF REPRESENTATIVES
VISITOR REGISTER

Judiciary COMMITTEE BILL NO. HB 559

DATE Feb. 15, 1993 SPONSOR(S) Anderson

PLEASE PRINT PLEASE PRINT PLEASE PRINT

NAME AND ADDRESS	REPRESENTING	SUPPORT	OPPOSE
Patrick Chenovick	Supreme Court Admin.	✓	

PLEASE LEAVE PREPARED TESTIMONY WITH SECRETARY. WITNESS STATEMENT FORMS ARE AVAILABLE IF YOU CARE TO SUBMIT WRITTEN TESTIMONY.

HOUSE OF REPRESENTATIVES
VISITOR REGISTER

Judiciary COMMITTEE BILL NO. HB555

DATE Feb. 15, 1993 SPONSOR(S) B. Pavlovich

PLEASE PRINT PLEASE PRINT PLEASE PRINT

NAME AND ADDRESS	REPRESENTING	SUPPORT	OPPOSE
Jerry R. Wing	Clerk of Courts	X	
Lori Maloney	Clerks of Court	X	
Clara Gilreath	Clerks of Court	X	
Ann Gilley	DFS		

PLEASE LEAVE PREPARED TESTIMONY WITH SECRETARY. WITNESS STATEMENT FORMS ARE AVAILABLE IF YOU CARE TO SUBMIT WRITTEN TESTIMONY.

HOUSE OF REPRESENTATIVES
VISITOR REGISTER

Judiciary COMMITTEE BILL NO. HB 554

DATE Feb. 15, 1993 SPONSOR(S) B. Clark

PLEASE PRINT PLEASE PRINT PLEASE PRINT

NAME AND ADDRESS	REPRESENTING	SUPPORT	OPPOSE
Bob Campbell	ACLU of Montana		X

PLEASE LEAVE PREPARED TESTIMONY WITH SECRETARY. WITNESS STATEMENT FORMS ARE AVAILABLE IF YOU CARE TO SUBMIT WRITTEN TESTIMONY.

HOUSE OF REPRESENTATIVES
VISITOR REGISTER

Judiciary COMMITTEE BILL NO. HB 561

DATE Feb. 15, 1993 SPONSOR(S) D. Brown

PLEASE PRINT PLEASE PRINT PLEASE PRINT

NAME AND ADDRESS	REPRESENTING	SUPPORT	OPPOSE
David Owen	MT Chamber of Commerce	✓	
Anne MacDuffie	Human Rights Commission	✓	

PLEASE LEAVE PREPARED TESTIMONY WITH SECRETARY. WITNESS STATEMENT FORMS ARE AVAILABLE IF YOU CARE TO SUBMIT WRITTEN TESTIMONY.

HOUSE OF REPRESENTATIVES
VISITOR REGISTER

Judiciary COMMITTEE BILL NO. HB 570

DATE Feb. 15, 1993 SPONSOR(S) L. Grinde

PLEASE PRINT **PLEASE PRINT** **PLEASE PRINT**

NAME AND ADDRESS	REPRESENTING	SUPPORT	OPPOSE
Valorie Drake 1477 Hamilton Rd Belgrade, MT 59714	self		X
Joe Steinbeisser Jr.	self	X	
Janet Ellis	MT Audubon Leg Fund		X
Mary Maddox	M.W.R.A. & self	X	
Rosemary Koch	Central MT WIFE	X	
Ken Hoovestol	MT. Snowmobile Assn.	X	
Peggy A. Wagner	Montanans For Multiple Use	X	
Molly Deschoemaker	MT. Women Sustainable Farm Economies	X	
David Owen	MT Chamba [illegible]	✓	
Jim Petersen	Montana Stockgrowers	✓	
Don Judge	MT STATE AFL-CIO		X
Dave McClure	Mont Farm Bureau	✓	
Gordon Morris	MACo		X
Blake Wordal	Lewis & Clark County		X

PLEASE LEAVE PREPARED TESTIMONY WITH SECRETARY. WITNESS STATEMENT FORMS ARE AVAILABLE IF YOU CARE TO SUBMIT WRITTEN TESTIMONY.

HOUSE OF REPRESENTATIVES
VISITOR REGISTER

Judiciary COMMITTEE BILL NO HB 570

DATE Feb. 15, 1993 SPONSOR(S) J. Grinde

PLEASE PRINT PLEASE PRINT PLEASE PRINT

NAME AND ADDRESS	REPRESENTING	SUPPORT	OPPOSE
Ally Kelley	Common Cause		X
Richard Parks	MPRC		X
Russell B Hill	MTA		X
Stan Bradshaw	MT. Trout Unlimited		✓
Bob Barry	MAPP		✓
Cary Hegreberg	MT Wood Products	✓	
Peggy Trenk	LWETA	✓	
Bob Ekey	Greater Yellowstone Coal		X
Brian McNitt	MEIC		X
Bill Berberet	F.B.	✓	~~X~~
Grace Berberet	Farm Bureau	✓	~~X~~
John Hossack	Forest Consultant	X	
Katherine Orr	DHES		X
Lorna Frank	Mt. Farm Bureau	X	

PLEASE LEAVE PREPARED TESTIMONY WITH SECRETARY. WITNESS STATEMENT FORMS ARE AVAILABLE IF YOU CARE TO SUBMIT WRITTEN TESTIMONY.

HOUSE OF REPRESENTATIVES
VISITOR REGISTER

Judiciary COMMITTEE BILL NO. HB 570

DATE Feb. 15, 1993 SPONSOR(S) L. Grinde

PLEASE PRINT **PLEASE PRINT** **PLEASE PRINT**

NAME AND ADDRESS	REPRESENTING	SUPPORT	OPPOSE
Jake Cummins 502 S. 19th Bozeman MT 59715	MT FARM BUREAU	✓	
Laurie Ott 2433 N. Montana	KTVH — Channel 12		
Don Allen	MT Wood Products Assn.	HB 570 ✓	
John Fitzpatrick	Pegasus Gold	570 ✓	
WARD JACKSON	SW MT STOCKMENS ASSOC. HARRISON MT	✓	
E E Mortensen	Helena	✓	
STAN KALECZYC	MT MUNICIPAL INSURANCE AUTHORITY / LEAGUE OF CITIES		HB 570 ✓
Jim Richard	MWF HB570		✓
Mike Micone	MMA	HB570	
Ted J. Doney	ASARCO; Mt. Dairymen's Assn.	570	
John Bloomquist	Mt. Stockgrowers Assoc.	570	
JAMIE Doggett	MT Cattlewomen	570	
Tom Hopgood	Mt. Assoc. Realtors	570	
Bob Stephens	MT Grain Growers Assn	✓	

PLEASE LEAVE PREPARED TESTIMONY WITH SECRETARY. WITNESS STATEMENT FORMS ARE AVAILABLE IF YOU CARE TO SUBMIT WRITTEN TESTIMONY.

HOUSE OF REPRESENTATIVES
VISITOR REGISTER

Judiciary COMMITTEE BILL NO. HB570

DATE Feb. 15, 1993 SPONSOR(S) L. Grinde

PLEASE PRINT **PLEASE PRINT** **PLEASE PRINT**

NAME AND ADDRESS	REPRESENTING	SUPPORT	OPPOSE
HARLEY WARNER	ASSOC. OF CHURCHES		X
BETH BAKER	DEPT OF JUSTICE		HB 570
CHRISTINE MANGIANTINI	League of Wm Voters		HB 570 X
Clay Landry	Montana ~~Environmental~~ Info Center		HB570 X
Cliff Cox	rancher	X	
Henry Droge	Farm B.		
Don T. Davis	S+C Farm Bureau	X	
Bill Johnson	" " "	X	
Fred Fuller-Belgrade	Gal. Co. Farm Bur.	X	
Edith J. Wright 2433 Springhill Com Rd Belgrade	Gal-Co. Farm Bureau	X	
Bill Wright	MT Farm Bureau	X	
Missy Cox	MT. Cattle Women	X	
[illegible]	MWA	X	
Bill Verwolf	self CM Helena		X

PLEASE LEAVE PREPARED TESTIMONY WITH SECRETARY. WITNESS STATEMENT FORMS ARE AVAILABLE IF YOU CARE TO SUBMIT WRITTEN TESTIMONY.

HOUSE OF REPRESENTATIVES
VISITOR REGISTER

Judiciary COMMITTEE BILL NO. HB570

DATE Feb. 15, 1993 SPONSOR(S) L. Grinde

PLEASE PRINT PLEASE PRINT PLEASE PRINT

NAME AND ADDRESS	REPRESENTING	SUPPORT	OPPOSE
Hertha Lund 1031 E. Broadway #206 Missoula, MT 59802		✓	

PLEASE LEAVE PREPARED TESTIMONY WITH SECRETARY. WITNESS STATEMENT FORMS ARE AVAILABLE IF YOU CARE TO SUBMIT WRITTEN TESTIMONY.

HOUSE OF REPRESENTATIVES
VISITOR REGISTER

Judiciary COMMITTEE BILL NO. HB 551

DATE Feb. 15, 1993 SPONSOR(S) Cobb

PLEASE PRINT PLEASE PRINT PLEASE PRINT

NAME AND ADDRESS	REPRESENTING	SUPPORT	OPPOSE

PLEASE LEAVE PREPARED TESTIMONY WITH SECRETARY. WITNESS STATEMENT FORMS ARE AVAILABLE IF YOU CARE TO SUBMIT WRITTEN TESTIMONY.