

MINUTES

**MONTANA HOUSE OF REPRESENTATIVES
53rd LEGISLATURE - REGULAR SESSION**

COMMITTEE ON NATURAL RESOURCES

Call to Order: By **CHAIRMAN DICK KNOX**, on March 5, 1993, at
3:00 p.m.

ROLL CALL

Members Present:

Rep. Dick Knox, Chairman (R)
Rep. Rolph Tunby, Vice Chairman (R)
Rep. Jody Bird (D)
Rep. Vivian Brooke (D)
Rep. Russ Fagg (R)
Rep. Gary Feland (R)
Rep. Mike Foster (R)
Rep. Bob Gilbert (R)
Rep. Hal Harper (D)
Rep. Scott Orr (R)
Rep. Bob Raney (D)
Rep. Dore Schwinden (D)
Rep. Jay Stovall (R)
Rep. Emily Swanson (D)
Rep. Howard Toole (D)
Rep. Doug Wagner (R)

Members Excused: None

Members Absent: None

Staff Present: Todd Everts, Environmental Quality Council
Michael Kakuk, Environmental Quality Council
Roberta Opel, Committee Secretary

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

Committee Business Summary:

Hearing: SB 225, SB 214, SB 275
Executive Action: None

HEARING ON SB 225

Opening Statement by Sponsor:

SEN. DAVID RYE, SD 47, Billings, said SB 225 sets up methodology
for future energy legislation. He also said the Senate Natural
Resources committee supported the bill with the new sections.

Proponents' Testimony:

Gerald Mueller, Missoula, on behalf of Deborah Schmidt, Executive Director, Environmental Quality Council (EQC), said an energy policy study was conducted in 1991 but funds became unavailable. He said two new sections have been incorporated into the bill: a goal statement and the estimated process time. Although there is a cost and benefit analysis included within the bill, there is no new general fund spending. The bill is a result of broad consensus for Montana energy cost.

Alan Davis, Chief, Planning and Analysis Bureau, Department of Natural Resources (DNRC), at the request of EQC, noted that the energy policy methodology was a result of an interim study which identified potential costs and benefits.

Gene Phillips, Pacific Power and Light, testified in support of the bill.

John Hines, Northwest Power Planning Council, appeared in support of SB 225.

Mike Pichette, Montana Power Company, stated the Company favored the bill.

Ted Lange, Northern Plains Resource Council (NPRC), said NPRC is encouraged by the bill's goal statement.

Bob Nelson, Montana Consumer Council, spoke in favor of the bill.

Bill Eagan, Montana Council Federation of Electrical Workers, rose in support of SB 225.

Jim Jensen, Montana Environmental Information Center (MEIC), said the bill is a result of a sound process.

Janet Ellis, Montana Audubon Legislative Fund, submitted written testimony supporting the bill. EXHIBIT 1

Opponents' Testimony: None

Questions From Committee Members and Responses:

REP. FOSTER asked Mr. Davis how many bills this session would qualify for similar extensive analysis. Mr. Davis replied approximately 10 bills.

REP. FOSTER asked how many man-hours were involved in these 10 bills? Mr. Davis said between two to three man hours were spent on SB 225. He added the department has been asked to use available resources.

REP. FOSTER asked if lines 22 and 45 apply to cost and supply. Mr. Davis answered yes.

REP. BROOKE asked if this working group would develop legislation to encourage policy goals? Paul Sihler, researcher, Environmental Quality Council (EQC), stated that the working group which created portions of SB 225 was created for an energy study.

REP. BROOKE stated there is need for an ethanol plant, for example, to be given additional monies and asked if there is criteria for which bills receive needed monies. Mr. Sihler stated there has been a 20 year battle in Montana regarding energy efficiency. He said priority is given to some topics.

REP. TOOLE asked Mr. Sihler to explain the working group definition. Mr. Sihler said that the broadest representation is referred to in the HJR 31 study. EXHIBIT 2 He said there was public input throughout the course of this study.

REP. TOOLE asked how it was possible to get legislation to go through the necessary process. Mr. Sihler replied that it would occur during the interim.

REP. RANEY said that the Gulf energy crisis brought about the interim study. He said the purpose of the study is to bring people together for deliberation before the bill is brought to the floor of the legislature.

REP. TOOLE said he could see problems with this process.

REP. RANEY noted DNRC would make the final analysis regarding the purpose of the bill.

REP. GILBERT said he could not understand the purpose of SB 225. Who is the agency working group, he asked. Gerald Mueller, a member of the HJR 31 Energy Policy Study Design Working Group and Least Cost Planning Group Coordinator, EXHIBIT 3, stated SB 225 establishes the process that the EQC will oversee and the DNRC will staff. A work-sheet noting a summary of the potential effects of proposed legislation was distributed to the committee. EXHIBIT 4

Mr. Sihler said the intent of the study is to model statutes after existing language, providing a baseline for future judgments. The fiscal note for the bill is modeled after this concept.

REP. RANEY said that the bill, developed through committee recommendations, has value. Mr. Phillips responded that SB 225 has already begun to benefit Pacific Power and Light.

Closing by Sponsor:

SEN. RYE said SB 225 starts the energy wheels moving.

HEARING ON SB 214

Opening Statement by Sponsor:

SEN. JEFF WELDON, SD 27, Arlee, presented SB 214, the Montana Cave Conservation Act. The bill would penalize vandalizing the surface and formation of caves and would protect cave life. A fine for violators would be levied. He said there are 350 known caves in Montana and the potential danger to these caves is grave. Twenty-three states currently have cave legislation.

Proponents' Testimony:

David Roemer, graduate student, University of Montana and member of the Lake Missoula Grotto of the National Speleological Society, said he supported SB 214 as it would protect an important part of Montana's heritage. EXHIBIT 5

Janet Ellis, Montana Audubon Legislative Fund, spoke in support of the bill which she said would protect the fragile and unique aspects of cave geography and creatures.

Bruce Behmler, Lake Missoula Grotto, said cave formations have been disturbed by vandals and therefore supported SB 214.

Dick Boehmeler, Sierra Club, speaking in favor of SB 214 stated cave formations are extremely valuable.

J.V. Bennett, Montana Wildlife Federation, submitted testimony supporting the bill. EXHIBIT 6

Arnie Olsen, Montana Department of Fish, Wildlife and Parks, testified in support of SB 214. EXHIBIT 7

Kirsten Talmage, graduate student, University of Montana, stated caves are an important educational resource. EXHIBIT 8

Opponents' Testimony: None.

Questions From Committee Members and Responses:

REP. GILBERT stated the terms sinkhole and pit were synonymous with cave much as grotto and pit are slang terms for cave.

SEN. WELDON said the term sinkhole does not necessarily mean cave. He noted a definition of such terms could be included in the bill.

REP. WAGNER said the caving community would be the individuals policing the bill.

Mr. Roemer said that carbide lamps and a hand-held camera would be acceptable within the caves.

REP. GILBERT said that the bill does not differentiate between public and private caves nor does it discuss permission from cave owners. Mr. Roemer noted that the differentiation was omitted in order to balance cave protection and private landowner rights.

REP. GILBERT asked if there was a marked distinction within the bill regarding who owns cave property.

REP. WELDON replied that Sections 4 and 5 of the bill address property rights.

Closing by Sponsor:

SEN. WELDON said SB 225 has further educated him about cave resources. He said he is willing to work on amendments to the bill that would change the effective date.

HEARING ON 275

Opening Statement by Sponsor:

SEN. JEFF WELDON, SD 27, Arlee, said that SB 275 would provide civil or criminal penalty for unapproved stream-bed modification. He presented amendments to the committee. EXHIBIT 9

Proponents' Testimony:

Mike Volesky, Montana Association of Counties (MAC), presented a summary of proponent testimony EXHIBIT 10 from Martha E. McClain, Missoula County Deputy Attorney; Larry Nistler, Lake County Attorney, and George Corn, Ravalli County Attorney. EXHIBITS 11, 12 and 13, respectively.

Steve Schmitz, Bureau Chief, Conservation Districts Bureau, Department of Natural Resources and Conservation (DNRC), told the committee he was charged with administering the Streambed Protection Act, initiated in 1975. EXHIBIT 14

Jim Jensen, Montana Environmental Information Center (MEIC), on behalf of Lewis and Clark County, said conservation district supervisors are problem solvers. He stated SB 275 will give them an additional tool for solving problems.

Clay Landry, Trout Unlimited, said the bill would protect downstream water users as well as fish and habitat.

Opponents' Testimony: None

Questions From Committee Members and Responses:

REP. STOVALL asked if the conservation districts would offer technical assistance relating to streambed modification. Mr. Volesky replied that MAC would offer some assistance, EXHIBIT 15,

therefore, it is important to have funding addressed in the statutes of the bill. He indicated, by law, monies will be directed to the city general fund.

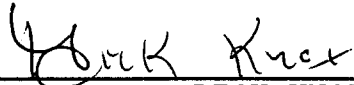
REP. FAGG asked Mr. Jensen if it was advisable to use both the words criminal and civil within the bill. Mr. Jensen said it is legal to assess criminal and civil penalties. He said once the modification permit is granted, it is impossible to force people into compliance.

Closing by Sponsor:

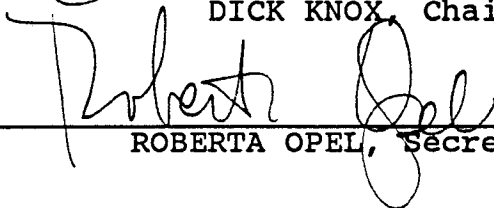
SEN. WELDON noted that the civil penalty is the main purpose of SB 275. He recommended the committee not adopt the amendment if it will jeopardize the bill.

ADJOURNMENT

Adjournment: 6:45 p.m.



DICK KNOX, Chairman



ROBERTA OPEL, Secretary

DK/ro

HOUSE OF REPRESENTATIVES

WITNESS STATEMENT

PLEASE PRINT

NAME Janet Ellis BILL NO. SB 225

ADDRESS _____ DATE March 5, 1993

WHOM DO YOU REPRESENT? MT Audubon Legislative Fund

SUPPORT OPPOSE _____ AMEND _____

COMMENTS: SB 225 sets up a systematic way to find solutions to identified energy policy problems. It coordinates the executive and legislative branches of Montana's government with the involvement of the Dept. of Natural Resources and Environmental Quality Council.

EXHIBIT 2

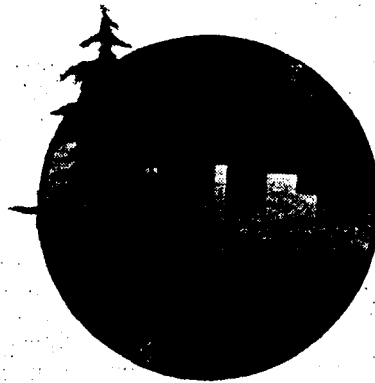
DATE 3-5-93

HB SB 225

HJR 31 ENERGY STUDY SUMMARY REPORT

This document is stored at the Historical Society at 225 North Roberts Street, Helena, MT 59620-1201. The phone number is 444-2694.

Final Report to the 53rd Legislature of the State of Montana



December 1992

Prepared by the Montana Environmental Quality Council
and the
Montana Department of Natural Resources and Conservation

APPENDIX C

HJR 31
ENERGY POLICY STUDY DESIGN WORKING GROUP

Senator Steve Doherty, Working Group Chairman/Environmental Quality Council (EQC)

Senator David Rye, EQC

John Fitzpatrick, EQC

Art Wittich, Governor's Office/EQC

Van Jamison, Department of Natural Resources and Conservation

Rep. Joe Quilici (Bob Nelson), Legislative Consumer Committee

Bob Anderson (Dan Elliott), Public Service Commission

Shirley Ball, Ethanol/Agriculture

Jay Downen (Jim Eskridge), Rural Electric Cooperatives

Dave Houser, Electric/Natural Gas Utilities

Ben Havdahl, Montana Motor Carriers Association

John Hines, Northwest Power Planning Council

Tom Marvin, Montana Local Government Energy Office

Jim Morton, District XI Human Resource Council

Gerald Mueller, Regulation/Least Cost Planning Group Coordinator

Jim Nybo, Conservation/Environmental Organizations

Dennis Pierce (Bill Kelldorf), Shell Western Exploration and Production, Inc.

Dave Simpson (Darrel Myran), Westmoreland Resources

Sandy Straehl, Montana Department of Transportation

DIRECTIONS: Using the information in the Policy Evaluation Worksheet, summarize the potential effects of the proposed legislation as completely as possible in the space provided.

| COSTS AND BENEFITS | SUMMARY OF EFFECTS |
|--|--------------------|
| <p>DESCRIPTION OF THE PROPOSAL: Senate Bill No. 0225, "Energy Policy Development Process" The proposed legislation a) adopts a state energy policy goal statement; b) provides for an on-going state energy policy development process; c) provides for application of an energy policy analysis methodology for energy-related legislative proposals.</p> | |
| A. ENERGY EFFECTS | |
| 1. Potential Energy Production | Not applicable. |
| Potential Energy Savings | |
| 2. Time Period of Expected Production or Savings | Not applicable. |
| 3. Risks and Uncertainties | Not applicable. |
| 4. Impacts on Energy Reliability | Not applicable. |
| 5. Impacts on Energy Security | Not applicable. |
| 6. Energy Research and Development Benefits | Not applicable. |
| 7. Total Project Dollar Costs | Not applicable. |
| B. ENVIRONMENTAL EFFECTS | |
| 1. Effects on Air Quality | Not applicable. |
| 2. Effects on Water Quality | Not applicable. |
| Effects on Water Quantity | |

EFFECTS SUMMARY TABLE

| COSTS AND BENEFITS | SUMMARY OF EFFECTS |
|--|--------------------|
| B. ENVIRONMENTAL EFFECTS (Continued) | |
| 3. Effects on Existing Water Rights | Not applicable. |
| 4. Effects on Wildlife Populations and Habitats | Not applicable. |
| 5. Effects on Land Use | Not applicable. |
| 6. Other Environmental Effects (Specify): | Not applicable. |
| 7. Effects on Alternative Resource Uses | Not applicable. |
| C. ECONOMIC EFFECTS | |
| 1. Impacts on Local, State, and Regional Jobs Specific Sectors Affected | Not applicable. |
| 2. Effects on Local, State, and Regional Income Specific Income Groups Affected | Not applicable |
| 3. Impacts on Energy Prices | Not applicable. |
| 4. Impacts on Competitiveness of Energy Producers | Not applicable. |
| 5. Impacts on Competitiveness of Non-Residential Users Specific Users Affected | Not applicable. |
| 6. Effect on Affordability of Energy to Consumers | Not applicable. |

EFFECTS SUMMARY TABLE

| COSTS AND BENEFITS | SUMMARY OF EFFECTS |
|---|---|
| D. FISCAL EFFECTS | |
| 1. Change in Local and State Tax Revenue | No fiscal effect is expected as a result of this legislation. |
| Change in Local and State Expenditures | |
| 2. Impacts on Government Services | None expected. |
| Timing of Effects | |
| 3. Barriers to Implementation | Implementation requires legislative approval. |
| 4. Additional Federal, State, Local Tax Incentives/Subsidies Needed | None expected. |
| E. SOCIAL EFFECTS | |
| Effects on Population, Lifestyles and Cultures | Not applicable. |
| F. DISTRIBUTION OF EFFECTS | |
| Who Benefits (Specify): | Not applicable. |
| Who Pays (Specify): | Not applicable. |
| <p>ADDITIONAL NOTES OR COMMENTS: This bill will create an organized, collaborative energy policy development process. The use of the energy policy analysis methodology will assist in this process by providing information on total energy, environmental, economic, social, and fiscal costs and benefits of proposed energy-related legislation to decision-makers.</p> | |

EXHIBIT 4
 DATE 3-5-93
 SB 225

Statement of David Roemer before the House Natural Resources Committee,
March 5, 1993:

Mr. Chairman, members of the Committee; My name is David Roemer. I live in Missoula and attend graduate school at the University of Montana. I am a member of several cave-related organizations, including the Lake Missoula Grotto of the National Speleological Society, the American Cave Conservation Association, and Bat Conservation International, and I have devoted considerable time over the past four years towards understanding and interpreting an uncommon and oft-neglected resource - caves. I strongly support SB 214 because it will help to protect a little-known, yet important part of Montana's heritage.

The testimony you will hear this afternoon from Montana cavers and concerned citizens will reflect on the importance of caves, and the need for legislation to protect the caves of Montana.

Many people that I talk to are surprised when I tell them that there are at least 350 known caves in Montana and that there is a good potential for finding more. Caves are pretty far from the public eye and not many people realize that Montana has so many caves or that caves are sensitive environments. Caves are a rare and unique resource that is highly vulnerable to problems of pollution and vandalism. In the spring of 1990 there was a highly publicized incident of vandalism at Lewis and Clark Caverns State Park. Three people broke into the cave at night and then broke off some cave formations. Unfortunately, that kind of occurrence is common. When Argenta Cave near Dillon was visited last weekend by members of the grotto, they found the cave marred with graffiti, some with dates from 1987 and 1992. Vandalism and pollution are real threats to our fragile cave resource. A cave conservation act is a *timely* measure that is needed to highlight the importance of Montana's caves before more damage is done.

Caves are more than just holes in the ground. The photos that I'm passing around, besides showing damage to caves, show some of the wonder of our delicate cave resources. The minerals found in caves - stalactites and stalagmites are the most familiar - may be rare, and possess both aesthetic and scientific value. These formations fascinate visitors to caves such as Lewis and Clark Caverns not only for their beauty, but also because of the great length of time required for their formation. They may grow at rates as fast as a millimeter per year, if that much, and I have seen stalagmites estimated to be more than 800,000 years old. When they are broken off, they are essentially irreplaceable. The people who take them might put it in their fishtank, use it for a paperweight ... but it leaves a scar in the cave, that in a best-case scenario might be able to heal itself in a few thousand years, but probably never will.

Montana caves are important in many ways; for example, there is the **biological value** of caves. The entrances to caves have unique microclimates that give rise to locally rare plant communities. Cave ecosystems often contain small populations of uncommon or possibly threatened species. Cave-adapted species are unusual in form (e.g., blind cave crickets) and some are so rare as to be limited to only one cave. Some caves may contain invertebrates that are unstudied and undescribed. The Western Big-eared bat is a candidate for the endangered species list and is considered to be a sensitive species in Montana. Protecting cave habitat and cave life now would help to prevent cave species from becoming endangered in the future - or as the saying goes - "an ounce of prevention is worth a pound of cure."

The protection of **water quality** is another good reason why cave conservation makes sense. Many Montana caves serve as a natural conduit for surface water and groundwater. When a cave becomes polluted, the water that flows through that cave system - and out of that cave system - will become polluted as well. Pollution in caves will also upset the natural conditions that cave-adapted species require for survival. It is essential to keep caves free from pollution to protect cave habitat and water quality.

Montana caves have great **cultural and historic value**. Pictographs, stone tools, and burial sites have been discovered in caves in Montana. Many of these sites have been destroyed by vandalism, such as Inscription Cave near Billings and Point-of-Rocks Cave near Whitehall. The artifacts left in caves by Indians and early settlers deserve protection.

Montana caves have **geological value**. Caves may preserve features that we can use to interpret the geologic history of an area. The story of caves is mostly a story of geology, with a footnote on human use. The formations that we marvel at are a subject of inquiry for geologists and mineralogists.

Caves have **recreational and commercial value** as well. Organized caving is growing in the United States and in Montana. Many cavers are associated with national conservation groups, and use caves for recreation and research.

There are 23 other states with cave protection legislation. In states without effective cave protection laws, cave resources are being destroyed at what is sometimes an alarming rate (e.g., Bexar County, Texas). Land development pressure and the lack of liability protection have led to some caves being bulldozed shut. Rather than face the prospect of being sued over a potential cave-related injury, cave owners sometimes close their caves to cavers, or more seriously, bulldoze them closed entirely. Some eastern caves have been closed

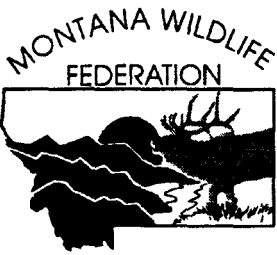
because untreated sewage flows through them. People often dump trash and dead livestock in cave entrances which destroys cave life. In Montana, vandalism has destroyed irreplaceable cultural artifacts and cave minerals.

SB 214 is a good idea. It was passed by the Senate last month by a 40 - 10 vote, largely on the simple merits of the bill. It balances cave conservation with private landowner's rights. Private landowners, and state and federal land managers, will be able to better protect their caves from vandals, under the provisions of SB 214. Importantly, this bill will help to increase public awareness of caves, and for the need to use them wisely, not destructively.

Only a strong cave conservation law will adequately protect Montana's great cave resources. I urge the Committee to support this bill with all of its provisions intact.

Thank you.

EXHIBIT 5
DATE 3-5-93
SB 225



MONTANA WILDLIFE FEDERATION

P.O. Box 1175, Helena, MT 59624 406-449-7604

1990 Outstanding State Affiliate of the National Wildlife Federation

EXHIBIT 6
DATE 3-5-93
HB SB 225

SB 214
March 5, 1993

Testimony presented by J.V. Bennett, representing the Montana Wildlife Federation before the House Natural Resources Committee

The Montana Wildlife Federation supports the Montana Cave Conservation Act, SB 214, for several reasons.

First of all, the protection of caves is a wildlife issue. Cave ecosystems frequently contain uncommon or threatened species such as Townsend's Big-eared bat. Also, since the flora within cave entrances is often strikingly different from the surrounding area and caves may contain unstudied species of invertebrates, intact cave ecosystems are of special interest to evolutionary biologists and ecologists. Moreover, bat species living in caves play a beneficial role in the surrounding environment by controlling insect populations through predation .

Another way caves benefit the surrounding area is many caves serve as a natural conduit for surface and ground water. Keeping caves free of pollution is essential for the health of humans and animal species, both wild and domestic.

Moreover, important archeological and paleontological sites have been found in Montana caves. In a cave on the Blacktail Ranch, North of Helena, several artifacts from early Native American peoples were discovered, as well as remains from animals now extinct in North America including camels, musk ox, and Kodak bears. These discoveries greatly enhance our understanding of Montana's natural history.

In addition, organized caving is a growing form of recreation in the United States and Montana.

All of these values are damaged when caves are vandalized or polluted. SB 214 provides legal protection for caves and recreational and historical values associated with them. Additionally, it protects the wildlife living in caves by providing penalties for disturbing cave life or restricting their movement.

It also serves the important function of providing liability protection for the owners of the private property on which many of these caves are located.

For these reasons the Montana Wildlife Federation believes passage of the Montana Cave Conservation Act is important. In states without effective cave protection laws, cave resources are being destroyed at an alarming rate. We urge the House Natural Resource Committee to give SB 214 a do pass recommendation.

EXHIBIT 7
DATE 3-5-93
HB SB 214

SB 214
March 5, 1993

Testimony presented by Arnold Olsen, Dept. of Fish, Wildlife &
Parks before the House Natural Resources Committee

SB 214, the Montana Cave Conservation Act, calls for protection of the state's caverns. Some of the protection written into the bill already exists under separate state and federal legislation. However, SB 214 gives stature to and profiles the important cave resources in our state.

We supported amendments added in the Senate to remove our designation as the management agency. We do not have the staff and resources.

We support the preservation and protection concepts embodied in SB 214, and believe this legislation is an appropriate first step to help protect Montana's caves.

Mr. Chairman and the Committee,

For the record, I am Kirsten Talmage, a graduate student in environmental education in Missoula. I am an occasional caver, and I have worked in Carlsbad Caverns National Park, and other locations with caves. I teach children outdoors. I am here to support the Montana Cave Conservation Act, SB 214.

In addition to the reasons given by David Roemer, Senator Jeff Weldon, and others, caves should be protected as an educational resource. Most educational theory says that a child learns best when he or she is doing, and that showing is more effective than simply telling. Caves therefore provide excellent sites for teaching the following concepts:

- 1) ongoing geological processes, especially chemical weathering and deposition;
- 2) the fragility, diversity, and uniqueness of ecosystems;
- 3) hydrology, because caves are natural piping and often filtering systems for water;
- 4) local history, both before and after white settlement;
- 5) appreciation for "natural art";
- 6) self-esteem, through carefully-led safe risk-taking (i.e. a situation which is actually safe, yet challenges a student to go beyond his/her fears); and
- 7) empathy for others who are afraid, e.g. their friends or characters in books such as Tom Sawyer.

These things can best be taught through field trips, but that requires known and safe caves, caves with easy access. Without protection, these are precisely the sort of caves that are most vulnerable to vandalism and graffiti. Naturally, undamaged caves would be better than broken ones for teaching.

In order to provide for continued educational opportunities, I urge you to protect Montana's caves by passing Senate Bill 214.

Thank you.

Kirsten Talmage
1610 Arthur Ave.
Missoula, MT 59801
5 March 1993

EXHIBIT 9
DATE 3-5-93
HB SB 275

Amendments to Senate Bill No. 275
Blue Reading Copy

Requested by Senator Weldon
For the Committee on Natural Resources

Prepared by Doug Sternberg, Council Staff
March 4, 1993

1. Title, line 9.

Following: "PENALTY;"

Insert: "PROVIDING FOR DISPOSITION OF PENALTY PROCEEDS;"

2. Page 1, line 17.

Following: "restoration"

Insert: "-- disposition of penalty proceeds"

3. Page 2, line 8.

Following: "~~district.~~"

Insert: "(2) Civil penalties collected under subsection (1) must be deposited in the same manner as county tax funds under 76-15-523. A district in which a violation occurs must upon demand receive all or a portion of the money deposited under this subsection and shall deposit the money in a bank or financial institution for use by the district in defraying the costs of administering the provisions of this part or costs of providing public information and education regarding streambed protection."

Renumber: subsequent subsection

EXHIBIT 10
DATE 3-5-93
HE SB 275

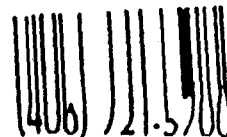
SUMMARY OF DOCUMENTATION OF THE PROBLEM

FIRST DOCUMENT IS A JANUARY 15, 1993 LETTER TO SENATOR JEFF WELDON FROM MISSOULA DEPUTY COUNTY ATTORNEY MARNIE MCCLAIN. MS. MCCLAIN ADDRESSES THE BROAD MANNER IN WHICH THE EXISTING LAW IS WRITTEN AND THE ADVANTAGES OF A CIVIL PENALTY.

SECOND DOCUMENT IS AN AUGUST 6, 1992 LETTER TO LAKE COUNTY CONSERVATION DISTRICT SUPERVISOR DENNIS DEVRIES FROM LAKE COUNTY ATTORNEY LARRY NISTLER. IN IT MR. NISTLER ADDRESSES BURDEN OF PROOF AND CIVIL PENALTIES ALLOWED UNDER OTHER STREAM PERMITTING LAWS. HE AS WELL RECOMMENDS AMENDING CURRENT LAW TO INCLUDE CIVIL PENALTIES.

THIRD DOCUMENT IS A MAY 12, 1992 LETTER TO DON MACINTYRE, CHIEF LEGAL COUNSEL AT DNRC. IT IS FROM RAVALLI COUNTY ATTORNEY GEORGE CORN, WHO SPEAKS TO THE VAGUENESS OF THE EXISTING LAW, THE REQUIRED BURDEN OF PROOF, AND THE EASE WITH WHICH ACTION MIGHT BE TAKEN IF THERE WERE A CIVIL OPTION.

EXHIBIT 11
DATE 3-5-93
SB 275



FAX # (406) 523-4803

Senator Jeff Weldon
Helena, MT

January 15, 1993

Re: The Natural Streambed and Land Preservation Act

Dear Senator Weldon:

I am writing at the request of the Missoula County Conservation District with some proposed changes for The Natural Streambed and Land Preservation Act. The proposed changes are intended only to clarify prohibited conduct and not to expand the scope of the Act.

One of the problems with the Act is found with the definition of "project" at Section 75-7-103(5). The definition reads as follows: "Project means a physical alteration or modification of a stream in the state of Montana which results in a change in the state of the stream in contravention of Section 75-7-102." Section 75-7-102 is the policy statement for the Act and reads as follows: "It is the policy of the state of Montana that its natural rivers and streams and the lands and property immediately adjacent to them within the state are to be protected and preserved to be available in their natural or existing state and to prohibit unauthorized projects and in so doing to keep soil erosion and sedimentation to a minimum except as may be necessary, and appropriate after due consideration of all factors involved. Further, it is the policy of this state to recognize the needs of irrigation and agricultural use of the rivers and streams of the state of Montana and to protect the use of water for any useful or beneficial purpose as guaranteed by the Constitution of the State of Montana." As you can see, the policy statement is quite broad. Its multiple parts confound efforts to state precisely the definition of project. The following definition of project is proposed: "Project means a physical alteration or modification of a stream in the state of Montana which results in a change in the natural or existing state of the stream."

Section 75-7-123 is the penalty section of the Act. Although it is fairly clear, the proposed amendments would make violation of the Act an absolute liability offense and provide for a civil penalty in addition to the criminal penalty. In a absolute liability offense, a person may be guilty of an offense as to each element thereof, without having acted purposely, knowingly or negligently. The proposed amendments for Section 75-7-123 are as follows:

(1) A person is guilty of an offense under this section if he: (a) initiates a project without written consent of the supervisors or

contrary to a material permit condition; (b) omits material information or makes any false statement or representation in a permit application or during an on-site inspection.

(2) Any person in violation of this section is absolutely liable as provided in Section 45-2-104 MCA.

Lastly, I have proposed adding a civil penalty, which would allow for a larger fine than is allowed under a misdemeanor conviction. This section would address repeat violators and wealthy violators who may not experience a \$500.00 fine as a significant deterrent.

Criminal Penalty Section.

(1) A person who violates Section 75-7-123 (1) MCA shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than \$25 or more than \$500 for each day that person continues to physically alter or modify the stream. In addition, that person shall restore, at the discretion of the court, the damaged stream, as recommended by the team and approved by the supervisors, to as near to its prior condition as possible.

Civil Penalty

(1) Any person who violates Section 75-7-123 is subject to a civil penalty not to exceed \$10,000 per violation. Each day of violation constitutes a separate violation.

(2) Action under this section does not bar action under Section 75-10-418.

Thank you for your interest and any assistance you can give.

Sincerely,


Martha E. McClain
Deputy County Attorney

LAKE COUNTY ATTORNEY'S OFFICE

LAKE COUNTY COURTHOUSE
106 FOURTH AVENUE EAST
POLSON, MONTANA 59860-2183
(406) 883-6211

Larry J. Nietfer, County Attorney
Mitchell A. Young, Deputy
Kathleen O'Rourke-Mullins, Deputy

Administrative Assistants
Susan Hill
Marty Corse

August 6, 1992

EXHIBIT 12
DATE 3-5-93
SB 275

Dennis Devries
Lake County Board of Conservation District
P.O. Box 766
Polson, Montana 59860

Dear Dennis:

Pursuant to the request of the County Supervisors and your letter of June 25, 1992, I have again reviewed the Jim Creek and Piper Creek project activities by Plum Creek for possible criminal prosecution. In doing so, I reviewed the permit, the modified permit, the numerous items of correspondence and reports, photos from Scott Rumsey and the applicable Montana law. I also reviewed this matter with Don McIntyre, legal counsel for the State Department of Natural Resources.

As I previously advised you, I am confident that the Streamside Management Act (SMA) and the Streambed and Land Preservation Act (SLPA) can and do overlap in providing jurisdiction to your conservation district in this case. Violations of either of these acts may also constitute a violation of the Montana Water Quality Act. (MWQA)

As you know, conservation districts supervise enforcement of the SLPA, the Department of State Lands supervises enforcement of the SMA, and the Department of Health and Environmental Sciences supervises enforcement of violations of the MWQA. However, violations of SMA or MWQA are civil violations with civil penalties. Complaints only need be proven by a preponderance of the evidence. Violations of SLPA are criminal and result in criminal penalties. These complaints must be proven "beyond a reasonable doubt", placing a much higher burden of proof on the conservation district in pursuing its complaint.

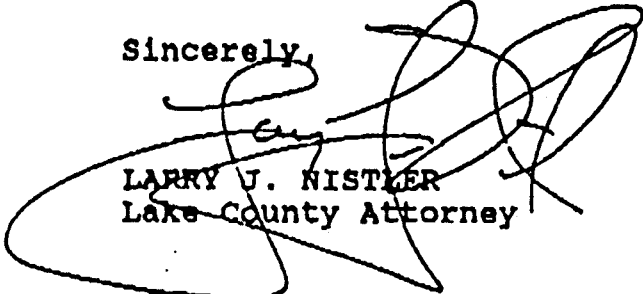
In assessing this case for criminal prosecution, it appears that this would be something of a "test" case as there is little or no precedent. In speaking with Mr. McIntyre, he noted that Ravalli County has attempted criminal prosecutions of this kind without success. The facts of the case are muddled by the modification of the original permit on February 4, 1992, the conflicting reports from Steve Tralles of the Department of Health and Environmental Sciences, and the conflicting reports of Bill Fischer of the Department of State Lands.

Dennis Devries
August 6, 1992
Page Two

As Mr. Fischer found a civil violation of SMA, he could have sought a civil penalty, but did not. Mr. Tralles' latest report, dated July 1, 1992 states that he now finds a civil violation of MWQA, but does not indicate whether he will seek a civil penalty.

It is my opinion that a criminal charge in this case would not be successful and that the facts of this case do not make it a good "test case" to establish a precedent. Therefore, I am declining to file a criminal complaint and am recommending that your board seek a legislative amendment to MCA 75-7-123. Specifically, those portions of the penalty section which refer to the violations as being criminal should be amended to make them civil. This would greatly enhance your ability to pursue penalties for violations of your permit process.

Sincerely,



LARRY J. NISTLER
Lake County Attorney

LJN:mc

RAVALLI COUNTY ATTORNEY
 COURTHOUSE BOX 5008, HAMILTON, MT 59840
 (406) 363-4440

George H. Corn
 County Attorney

Gerald D. Williams
 Deputy Attorney

May 12, 1992

EXHIBIT 13
 DATE 3-5-93
 BY SB 275

Donald MacIntyre, Chief Legal Counsel
 Department of Natural Resources
 1520 East Sixth Avenue
 Helena, MT 59620-2301

Re: State v. Varner

Dear Don:

As you know, this case was brought pursuant to Section 75-7-123, M.C.A. The case was resolved before the jury was picked, by the Defendant's agreement to pay \$1,500, in return for which I dismissed the charges against him. I believe this was the best resolution of the matter that could be achieved. Don Peters of the Missoula Office of Fish, Wildlife & Parks, who is advising the Conservation District on the stream rehabilitation, felt that it was a good resolution.

I have some real concerns with using this law for criminal prosecutions in the future, however, particularly in a situation like this, where the defendant applied for a permit but then exceeded its scope.

My concern is with the vagueness of the law when used as the basis for a criminal prosecution. In support of that, I have included several jury instructions that I drafted, there being no approved or model instructions or, indeed, any cases on the same. As you can see, the jury instructions are quite vague. This would leave it open for the defense attorney to argue that the law does not put one on notice of what conduct is prohibited and, hence, the void-for-vagueness argument applies.

Further, as I feel the instructions must be drafted, the jury is required to apply the "policy" of the State of Montana to the defendant's actions. The jury is further required to determine whether or not the project "significantly altered or modified a stream." Furthermore, although I termed this last phase an affirmative defense, there is no case that says that would be required of the defendant. What's a judge to do in such a situation.

Donald MacIntyre
May 12, 1992
Page 2.

In sum, I was quite afraid, after drafting instructions, that the judge might toss the whole thing out as too vague to support a criminal prosecution. However, that could be because I don't have a deft hand at drafting instructions. Accordingly, please feel free to criticize and comment on these instructions, and please don't hesitate to tell me that I am mistaken.

One solution, which we have previously discussed, would be to include a civil penalty in the law. This would give a county attorney the option of going civil or criminal, depending on the person's actions. A civil suit also has the advantage of the State having to prove its case only by a preponderance of the evidence, as opposed to beyond a reasonable doubt in a criminal case. It is my feeling that since the person accused of committing this "crime" is not the "average" misdemeanor, jurors are usually going to be sympathetic to the person. Having a civil option removes the burden of having to prove that a well-meaning but uninformed person committed a criminal act. This is easier on jurors and prosecutors. The criminal penalty would still exist for egregious actions, so you still might want to consider clarifying language.

In closing, let me thank you for your brief. As you know, I was not able to add it on appeal because the judge ruled that the Department was not a party. Fortunately, we were able to convince the judge not to dismiss the case anyway. However, legislation could and should be drafted that would allow the Department to become a party. I believe this would be quite easy if the civil option were available.

I have taken the liberty of sending a copy of it to Stan Bradshaw, since he has expressed an interest in this matter, as well. I am also sending a copy to the Bitterroot Conservation District.

Thank you again for your help in this. Please don't hesitate to call if you have any questions.

Sincerely,

George H. Corn
Ravalli County Attorney

GHC:se

cc: Stan Bradshaw, 824 9th Avenue, Helena, MT 59601
Bitterroot Conservation District

DATE 3-5-93
SB275

A LOOK AT PERMIT #'s OF FIVE CONSERVATION DISTRICTS

| CONSERVATION DISTRICT | NO. OF PERMITS ISSUED IN 1992 | VIOLATIONS IN 1992* |
|--------------------------------|-------------------------------|----------------------|
| MISSOULA CO. CD | 77 | 2 |
| CARBON CO. CD | 48 | 10 (In last 5 years) |
| BITTERROOT CD (Ravalli Co.) | 64 | 8 |
| LAKE CO. CD | Approx. 25-30 | 4 |
| FLATHEAD CO. CD | Approx. 200 | Approx. 20-30 |

*IT IS IMPORTANT TO NOTE THAT NOT ALL VIOLATIONS MAKE IT TO COURT.

EXHIBIT 12
3-5-93
SB 225

NATURAL STREAMBED AND LAND PRESERVATION ACT (310 LAW)

A. BACKGROUND

MONTANA CONSERVATION DISTRICTS ADMINISTER THE NATURAL STREAMBED AND LAND PRESERVATION ACT FOR THE PURPOSE OF PROTECTING THE BED AND BANKS OF PERENNIAL-FLOWING STREAMS. THE ACT IS INTENDED TO MAINTAIN THE NATURAL STATE OF RIVERS AND STREAMS BY MINIMIZING EROSION AND SEDIMENTATION, WHILE RECOGNIZING THE NEEDS OF AGRICULTURE, RECREATION, AND OTHER WATER USES.

ANY PERSON CONTEMPLATING AN ACTION WHICH IMPACTS THE BED OR BANKS ADJACENT TO A STREAM MUST OBTAIN A PERMIT FROM THE LOCAL CONSERVATION DISTRICT. PROPOSED PROJECTS ARE INSPECTED BY A TEAM COMPOSED OF A DISTRICT SUPERVISOR; A DEPARTMENT OF FISH, WILDLIFE, AND PARKS REPRESENTATIVE; AND THE LANDOWNER. THE DISTRICT BOARD OF SUPERVISORS MAKES THE FINAL PERMITTING DECISION, WHICH IS SUBJECT TO ARBITRATION IF REQUESTED BY ANY MEMBER OF THE REVIEW TEAM. VIOLATORS OF THE ACT ARE SUBJECT TO A MISDEMEANOR FINE OF NOT LESS THAN \$25 OR MORE THAN \$500 PER DAY, IF CONVICTED. IN MOST CASES, HOWEVER, VIOLATORS REMEDY THE SITUATION BEFORE FINES BECOME NECESSARY.

B. LOCAL ADMINISTRATION

ADMINISTRATION OF THE 310 PERMIT PROGRAM HAS BEEN QUITE SUCCESSFUL BECAUSE THE EFFORT IS CONDUCTED LOCALLY BY PEOPLE WITH DIRECT KNOWLEDGE OF CONDITIONS IN THE PROJECT AREA. THE DISTRICTS ASSOCIATION WITH THE LOCAL TECHNICAL STAFF OF THE USDA SOIL CONSERVATION SERVICE; THE DEPARTMENT OF FISH, WILDLIFE, AND PARKS; AND LOCAL LANDOWNERS HAS PROVEN EFFECTIVE IN MEETING THE INTENT OF THE LAW. DISTRICTS FEEL THAT COOPERATION, EDUCATION, AND LOCAL INPUT ARE MORE EFFECTIVE AND EFFICIENT THAN REGULATION AND CONFRONTATION.

C. THE CURRENT SITUATION

CONSERVATION DISTRICTS HAVE TAKEN A SERIOUS APPROACH TO THEIR 310 RESPONSIBILITIES. AS A RESULT, MUCH TIME, EFFORT, AND RESOURCES HAVE BEEN DIRECTED TOWARD THIS GROWING EFFORT.

SINCE ITS INCEPTION IN 1975, THE NUMBER OF PERMIT APPLICATIONS HAVE INCREASED SUBSTANTIALLY DUE TO PUBLIC AWARENESS. MANY DISTRICTS HAVE BEEN FORCED TO CURTAIL OTHER ACTIVITIES TO EFFECTIVELY ADMINISTER THE STAGGERING FLOW OF APPLICATIONS. IN MANY CASES, SPECIAL DISTRICT MEETINGS ARE REQUIRED TO HANDLE 310 APPLICATIONS, AND MEETINGS OFTEN LAST SIX HOURS OR MORE (OFTEN UNTIL 2:00 A.M.) BECAUSE OF PERMIT VOLUME.

TO ENCOURAGE VOLUNTARY PARTICIPATION IN THE 310 PROGRAM, DISTRICTS DO NOT LEVY A PERMIT FEE, AND NO EXTERNAL FUNDING IS AVAILABLE TO THE DISTRICTS FOR 310 ADMINISTRATION. ALTHOUGH SUPERVISORS VOLUNTEER THEIR TIME AT MEETINGS, 310 ADMINISTRATION HAS PUT SEVERE PRESSURE ON ALREADY LIMITED DISTRICT BUDGETS.

IN ADDITION TO PROCESSING 310 APPLICATIONS, SUPERVISORS OFTEN SPEND CONSIDERABLE TIME AND EFFORT ON ARBITRATION OF DECISIONS AND ENFORCEMENT OF 310 VIOLATIONS. NEEDED LEGAL SUPPORT IS USUALLY VERY DIFFICULT TO OBTAIN FROM COUNTY ATTORNEYS BECAUSE OF LOCAL PRIORITIES AND TIME REQUIREMENTS ASSOCIATED WITH ENFORCEMENT. THOSE COUNTY ATTORNEYS WHO ARE WILLING TO OVERLOOK THESE PRIORITIES AND TIME REQUIREMENTS HAVE HAD A DIFFICULT TIME PROSECUTING 310 VIOLATIONS FOR THREE REASONS:

- 1) IN A CRIMINAL PROSECUTION, THE STATE HAS TO PROVE ITS CASE BEYOND A REASONABLE DOUBT. IN A CIVIL CASE, ALL THAT IS NEEDED IS PROOF THROUGH A PREPONDERANCE OF EVIDENCE.
- 2) A JURY IS OFTEN HESITANT IN SUCH A CASE TO CALL SUCH A VIOLATION A CRIMINAL ACT.
- 3) THE MANNER IN WHICH JURY INSTRUCTIONS MUST BE DRAFTED REQUIRES THAT THE JURY APPLIES THE POLICY OF THE STATE OF MONTANA WITH LITTLE OR NO FIRST-HAND KNOWLEDGE OF THE SUBJECT. IN ADDITION, IT REQUIRES THE JURY TO DETERMINE WHETHER OR NOT A VIOLATOR ACTUALLY "SIGNIFICANTLY ALTERED OR MODIFIED A STREAM."

HOUSE OF REPRESENTATIVES
VISITOR REGISTER

Natural Resources

COMMITTEE

BILL NO. SB225

DATE 3/1/93 SPONSOR(S) SEN. RYAN

PLEASE PRINT

PLEASE PRINT

PLEASE PRINT

| NAME AND ADDRESS | REPRESENTING | SUPPORT | OPPOSE |
|------------------|---------------------------|---------|--------|
| Alan Davis | DARC | ✓ | |
| Bob Nelson | Consumer Council | ✓ | |
| Jerry Anderson | Shell Western Exp. Inc. | ✓ | |
| GENE PHILLIPS | PACIFIC POWER & LIGHT | X | |
| Jim Jansen | MEIC | X | |
| John Hines | NUPPC | ✓ | |
| Janet Ellis | MT Audubon | ✓ | |
| Mike Pichette | MT Power Co | ✓ | |
| DOUG ABELSON | NORTHERN, MONT. OIL & GAS | ✓ | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |

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

HOUSE OF REPRESENTATIVES
VISITOR'S REGISTER

Natural Resources

COMMITTEE

BILL NO.

SB

214

DATE 3/5/93

SPONSOR(S) SEN WELDON

PLEASE PRINT

PLEASE PRINT

PLEASE PRINT

| NAME AND ADDRESS | REPRESENTING | SUPPORT | OPPOSE |
|--|-----------------------------|---------|--------|
| David Roemer 1610 Hartman MS 124 MT | Lake Missoula Gratto | ✓ | |
| Arnie Olson | MDFWP | ✓ | |
| Dick Beckwith | Sierra Club | ✓ | |
| Bruce Beckwith | Lake Missoula Gratto | — | |
| Bob Barry | Myself | ✓ | |
| J.V. Bennett | Montana Wildlife Federation | ✓ | |
| Janet Ellis | MT Audubon | ✓ | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |

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

