#### MINUTES

# MONTANA SENATE 54th LEGISLATURE - REGULAR SESSION

#### COMMITTEE ON TAXATION

Call to Order: By CHAIRMAN GERRY DEVLIN, on February 28, 1995, at 8:00 a.m.

#### ROLL CALL

Members Present:

- Sen. Gerry Devlin, Chairman (R)
  Sen. Mike Foster, Vice Chairman (R)
  Sen. Mack Cole (R)
  Sen. Delwyn Gage (R)
  Sen. Lorents Grosfield (R)
  Sen. John G. Harp (R)
  Sen. Dorothy Eck (D)
  Sen. Barry "Spook" Stang (D)
  Sen. Fred R. Van Valkenburg (D)
- Members Excused: None
- Members Absent: None
- Staff Present: Jeff Martin, Legislative Council Renée Podell, Committee Secretary
- **Please Note:** These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary: Hearing: SB 325, SB 328 Executive Action: SB 213

## HEARING ON SB 325

#### Opening Statement by Sponsor:

SEN. DELWYN GAGE, SD 43, Cut Bank, presented SB 325 explaining in 1993 the Montana Capital Act was passed by the legislature as an attempt to entice companies through the use of tax credits to invest in capital companies in the State of Montana stimulating the economy in Montana. SEN. GAGE commented in some instances this funding was available to companies who weren't Montana companies. He stated as a result of the legislation capital companies sprang up around Montana. He said the assumption on the fiscal note is misleading, commenting that about 428,000 credits were used through 1993, effecting the revenue in the State of Montana. SEN. GAGE explained the bill simply says all of those investments made in a qualified month on or before April 23rd are legal transactions qualifying as legal investments.

#### Proponents' Testimony:

Jerome Anderson, Attorney representing Glacier Springs Capital Company, presented written testimony. EXHIBIT 1.

Pat Rice, Shareholder, Director, Officer, Glacier Springs Capital Company, explained Glacier Springs Company transactions and stated the company maintains they have complied with the Montana Capital Company Act.

Robert Sterup, Billings Attorney, Glacier Springs Capital Company, submitted written testimony. EXHIBIT 2.

#### Opponents' Testimony:

Andy Poole, Deputy Director, Department of Commerce, presented copies of Hearing Fact Assertions-Notice of Noncompliance. EXHIBIT 3.

Mick Robinson, Director, Department of Revenue, submitted Glacier Springs Capital Company flow charts and the associated time frame of transfers. **EXHIBIT 4**. He commented the question is whether or not an investment was made. **Mr. Robinson** stated the department isn't concerned with the technical aspects of the Montana Capital Company Act, but are indicating Glacier Springs Capital Company didn't make an investment at all.

#### Informational Testimony:

None

### Questions From Committee Members and Responses:

SEN. BARRY "SPOOK" STANG questioned Mr. Poole in regard to companies being investigated for not being in compliance with the Act. Mr. Poole acknowledged the Act was originally passed in 1983, and modified in 1995. He stated the intent of the Act was to create new jobs, but the Act had a number of loop holes in it allowing companies to do things that ordinary people would find troublesome.

SEN. MACK COLE asked Mr. Poole if the case has gone into court yet. Mr. Poole responded the Glacier Springs Capital Company was in District Court to decide the issue of whether or not the state had to share the information relative to other capital companies. He commented that the District Court ruled the state didn't have to share the information or present information on other capital companies in the hearing.

SEN. DOROTHY ECK asked SEN. GAGE why wasn't it a better solution to wait for an administrative ruling and questioned SEN. GAGE if this was the proper role of the legislature. SEN. GAGE commented when the legislature can do something to avoid a court action the legislature should do it.

SEN. ECK asked Mr. Poole if he agreed the administrative procedures process has broken down and not likely to come to a conclusion. Mr. Poole stated he doesn't agree the process has broken down because the hearing process has not been completed. He commented the administrative officer will rule on this particular proceeding shortly.

CHAIRMAN GERRY DEVLIN asked Mr. Anderson if the proceedings involving Glacier Springs Capital Company have or have not started. Mr. Anderson stated the proceedings are at midpoint. He explained this is not a technical violation of the statute, the company followed the statute, it is a subjective determination as to whether or not the company followed the purpose of the intent of the law.

SEN. STANG asked Mr. Anderson if the hearing officer will submit his findings in regard to the department being subjective or not. Mr. Anderson responded the hearing officer's job will be to determine whether or not the decision made by the Department of Commerce Director was correct.

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SEN. MIKE FOSTER questioned Pat Rice in regard to the flow chart submitted by Mr. Robinson. SEN. FOSTER commented he has reviewed the flow chart. He stated he understands the argument to be the state says money is moving but it is not doing what the law was intended for it to do. He stated the law intended the money to create jobs and economic development. SEN. FOSTER asked Mr. Rice to comment. Mr. Rice said he believes each step of a transaction is a legal, practical and economical change in circumstances for the entities involved. He explained the flow chart transactions.

#### {Tape: 1; Side: B; Comments: Tape Turned to Side B}

SEN. FRED VAN VALKENBURG asked Mr. Rice if the transactions on Page 4, of the flow chart (EXHIBIT 4) took place on April 1, 1991. Mr. Rice responded, "Yes". SEN. VAN VALKENBURG asked Mr. Rice who was the corporation relying on for tax advice with respect to state taxation on that date. Mr. Rice stated the corporation uses the law firm of Dorsey and Whitney. SEN. VAN VALKENBURG asked Mr. Rice if he was aware on April 1, 1991, that a bill was proceeding through the Montana Legislature which would change the manner in which capital companies operated. Mr. Rice acknowledged he was aware on that date there was a bill which would change operations. SEN. VAN VALKENBURG asked Mr. Rice if it would be fair to conclude the transaction of April 1, 1991, was completed on that date in order to avoid the consequences of the passage of the bill. Mr. Rice stated the corporation anticipated the change. He commented part of the legislation would have restricted the capital companies to invest only in investments pre-approved by the Department of Commerce. He said

in anticipation of the change, the corporation made their investments prior to the effective date of the passage of the bill.

**SEN. JOHN HARP** acknowledged in regard to the Glacier Springs Capital Company's flow chart (EXHIBIT 4) there were 24 transactions between different entities on April 1, 1991.

CHAIRMAN DEVLIN asked Mr. Poole how many companies, how many instances, and what were the guidelines for determining qualifications or non-qualifications for this type of investing. Mr. Poole stated what constitutes a qualified investment is found in the Capital Company Act. He said there are no other capital companies who made investments like Glacier Springs Capital Company.

# <u>Closing by Sponsor</u>:

SEN. GAGE commented there are all sorts of ways to do business. He stated the legislature needs to address the problem and part of the hope for this bill is for Glacier Springs Capital Company and the DOR to settle.

## HEARING ON SB 328

## Opening Statement by Sponsor:

SEN. SUE BARTLETT, SD 27, Helena and Marysville, reported SB 328 is a tax applied to any class of personal property that is owned by a business. She said it is a business equipment tax, and the DOR should use the term "business equipment tax" on the forms they send out for reporting personal property owned by a business. SEN. BARTLETT commented the sole purpose of this bill is clarity and better communication with the public.

## Proponents' Testimony:

Riley Johnson, National Federation of Independent Business People, affirmed his support for SB 328 to clarify tax forms.

## Opponents' Testimony:

None

#### Informational Testimony:

None

## Questions From Committee Members and Responses:

CHAIRMAN DEVLIN asked SEN. BARTLETT where the bill originated from. SEN. BARTLETT reported it is her bill and she initiated the draft request. She explained it reflects conversations she has had over the last two or three years with the State Chamber

SENATE TAXATION COMMITTEE February 28, 1995 Page 5 of 6

of Commerce, local Chamber of Commerce, Mr. Johnson, and various other business people.

SEN. ECK asked Mr. Robinson how many categories of personal property there are. Mr. Robinson stated there are probably about 8 or 10 categories which include office and industrial equipment. He explained utilities, mines, railroads, and airlines are separate classes. He said anything that isn't real property falls into the personal property category.

SEN. LORENTS GROSFIELD asked SEN. BARTLETT why livestock was excluded. SEN. BARTLETT commented she personally believes livestock is a form of personal property. She affirmed Jeff Martin could explain this issue from a legal perspective in executive action.

#### <u>Closing by Sponsor:</u>

SEN. BARTLETT offered no further comments in closing.

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#### EXECUTIVE ACTION ON SB 328

Motion: SEN. HARP MOVED SB 328 DO PASS.

<u>Discussion</u>: SEN. GROSFIELD asked Mr. Martin to respond to the livestock issue. Mr. Martin commented the exclusion of livestock comes from discussions he had with attorneys at the DOR. He stated he reviewed the reporting form for business equipment and it is a separate form. He further stated the form used for livestock is a separate form.

Vote: DO PASS MOTION ON SB 328 CARRIED UNANIMOUSLY.

{Tape: 1; Side: B; Approx. Counter: 28.2.}

#### EXECUTIVE ACTION ON SB 213

<u>Discussion</u>: SEN. VAN VALKENBURG questioned Mr. Robinson in regard to the memo he presented. SEN. VAN VALKENBURG asked Mr. Robinson how he chose the average value of a home in Montana at \$52,000. Mr. Robinson responded it is the average value based on income level. He reported the value comes from census data.

Motion: SEN. HARP MOVED DO PASS ON SE 213.

<u>Discussion</u>: SEN. STANG stated some people may misuse this exemption because the definition of disabled should be well defined.

SEN. GROSFIELD commented the costs aren't well defined. SEN. VAN VALKENBURG explained the DOR affirms the current cost is at a maximum of \$466,000. He stated the DOR is not estimating what

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the increased cost will be as a result of raising the income levels.

CHAIRMAN DEVLIN asked what the raise figure will be. Mr. Robinson stated, "33%". SEN. GROSFIELD said there may be a large class of people in between \$15,000 and \$20,000. He said it could be 33% of the people who qualify or it could be less than that figure. SEN. VAN VALKENBURG commented Mr. Robinson said a lot of the people already qualify for the low income property tax credit regardless of what the veterans situation is. He said they are presently being exempted by virtue of the low income credit.

Vote: DO PASS MOTION FAILED 5 - 4 ON A ROLL CALL VOTE.

Motion: SEN. HARP MADE A SUBSTITUTE MOTION TO TABLE SB 213.

<u>Vote</u>: MOTION CARRIED 7 - 2 WITH SEN. HARP AND SEN. VAN VALKENBURG VOTING IN OPPOSITION.

#### ADJOURNMENT

Adjournment: 9:58 a.m.

GERRY ØEVLIN, Chairman

PODELL, Secretary

GD/rp

# MONTANA SENATE 1995 LEGISLATURE TAXATION COMMITTEE

ROLL CALL

DATE <u>February 28, 1995</u>

NAME	PRESENT	ABSENT	EXCUSED
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MACK COLE		•	<u> </u>
DELWYN GAGE			
LORENTS GROSFIELD			+
JOHN HARP			<u> </u>
DOROTHY ECK			
BARRY "SPOOK" STANG			
FRED VAN VALKENBURG			
MIKE FOSTER, VICE CHAIRMAN			
GERRY DEVLIN, CHAIRMAN			
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## SENATE STANDING COMMITTEE REPORT

Page 1 of 1 February 28, 1995

MR. PRESIDENT:

We, your committee on Taxation having had under consideration SB 328 (first reading copy -- white), respectfully report that SB 328 do pass.

Signed Chair Gerry Devlin, Senator

Amd. Coord. SA Sec. of Senate

# MONTANA SENATE 1995 LEGISLATURE TAXATION COMMITTEE ROLL CALL VOTE

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DATE 2	28/95	BILL NO.	<u> 3B213</u>	NUMBER	
MOTION:	Do PAS	2.2			

NAME	AYE	NO
GERRY DEVLIN, CHAIRMAN		$\checkmark$
MACK COLE		$\boldsymbol{\mathcal{V}}$
DOROTHY ECK	L	
DELWYN GAGE	~	
LORENTS GROSFIELD		~
JOHN HARP		
BARRY "SPOOK" STANG		$\checkmark$
FRED VAN VALKENBURG		
MIKE FOSTER, VICE CHAIRMAN		$\boldsymbol{\mathcal{V}}$
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# THE GLACIER SPRINGS COMP

# SUMMARY OF BUSINESS GROWTH<sup>LL 10</sup> 38 325 FOR TRANSYSTEMS INC., TRANSPORT LEASING COMPANY AND TSI TRANSPORTATION INC. SINCE APRIL 1, 1991

SENATE TAXATION

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	1991	199 <b>2</b>	1993	1994
EMPLOYMENT				
as of 12/31	474	444	304	491

# LOCATIONS IN MONTANA

Great Falls	central office for operations in all states
Sidney	permanent base for Holly Sugar and MDU coal operations. Also serves as base for seasonal constructtion operations in eastern Montana.
Columbus	unit train loading facility for chrome concentrate. Base of operation

# CAPITAL EXPENDITURES AND COMMITMENTS

equipment manufactured at Billings	\$3,143,799
equipment sourced from Montana dealers	10,342,158
other equipment placed in service	3,782,188
Total	\$17,268,145
<b>REVENUE</b> earned and anticipated under contracts entered since investment by The Glacier Springs Company	\$94,113,200

for Syncoal delivery system.

# MEMORANDUM

# RE: The Glacier Springs Company

A review of the Department of Commerce files pertaining to Montana Capital Companies reveals that the Department's treatment of The Glacier Springs Company ("Glacier Springs" or "GSC") is remarkably different than the treatment it has afforded other Montana Capital Companies. Specifically, the Department has:

- Disapproved transactions engaged in by Glacier Springs while approving identical or substantially similar transactions engaged in by other capital companies;
- Determined that Glacier Springs investments did not generate sufficient economic activity while approving investments of other capital companies which generated no or virtually no new jobs or new economic activity;
- Applied to Glacier Springs interpretations of the Act which are directly at odds with the interpretations it has adopted in examinations of other capital companies;
- Selectively issued a Notice of Noncompliance to GSC while at the same time allowing another capital company it found to be in noncompliance an opportunity to remedy past noncompliance.

The foregoing is all the more remarkable when it is considered that the Department's deputy director admitted under oath that the Department has an obligation to treat all capital companies even-handedly. As Andy Poole testified at his deposition:

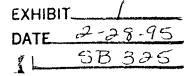
Q. Would you agree that the Department has an obligation to be uniform in its interpretation of the Act?

A. Yes, I would agree with that.

Q. Would you agree that the Department has an obligation to treat different capital companies consistently?

A. Yes.

A few examples of the disparate treatment referenced above are cited in this memorandum. This is not intended to be an exhaustive list but rather a selection of a few



illustrative examples. The identity of "other" capital companies referenced herein has been redacted in the interests of privacy.

# 1. Investment Companies In Which Capital Company Shareholders Have An Interest

GSC invested in certain companies in which the shareholders of GSC had an ownership interest. In its Notice of Noncompliance the Department found that such investments are impermissible. The Department determined that such investments create a "conflict of interest" and are not in keeping with the "spirit and purpose" of the Act. However, the Department has expressly authorized such investments in the past. As evidenced by a letter dated June 24, 1987 to Robert Pancich, then Administrator of the Montana Economic Development Board, the State at that time agreed that "neither the Montana Capital Company Act or the regulations promulgated under it suggest in any way that the term 'Qualified Investment' does not include an investment by a capital company in a business in which an owner or shareholder of the capital company has an interest. In 1991 the Department agreed that investments made by a Missoulabased capital company were permissible under the Act, notwithstanding that the investments were in businesses wholly owned by the sole owner of the capital company. And by letter dated July 13, 1987 the Department stated:

In our view, as long as there are proper disclosures a Montana Capital Company may make an investment in businesses in which owners of the capital company have an interest.

At no time did the Department issue any rulings, opinions, regulations, procedures, policies or handbooks notifying capital companies that its interpretation of the statute had changed. The Department has acknowledged that a 1991 amendment to the statute which addresses potential "conflicts of interest" does not apply to any of the transactions in which GSC engaged. Therefore, it is clear that the Department is applying to GSC a standard completely at odds with the position it has consistently taken in the past.

# 2. Investment Committee

In addition, the Department has claimed that GSC violated the Act because it did not have an "investment committee" comprised of independent individuals. However, the Department has consistently acknowledged that nothing in the Act required a capital company to even have an investment committee. In 1993, at the same time it was prosecuting GSC, the Department accepted the following position asserted by a Butte-based capital company:

You raised the issue of an apparent conflict of interest with this investment. When "capital company" made the investment, the Act did not prohibit a capital company from making an investment in a venture in which there may have been common ownership in the capital company and the entity seeking the loan. The conflict of

interest provisions of the Act prohibited members of the Board of Investments, the Commissioner of Financial Institutions and bank examiners from having a monetary interest in or be a borrower from any Montana capital company. The debt investment by (capital company) in the Hamilton Motel was approved by the Board of Directors. (Capital company) did not have an investment committee formed at that time. Again, the Act does not prohibit the Board of Directors from making the decision to make a qualified investment. Later, (capital company) formed an investment committee which was delegated the authority to make qualified investments. Therefore, I submit that the first investment made by (capital company) is a qualified investment which has already been approved by the Department of Commerce.

The department concurred with this explanation. However, when GSC took exactly the same position, the Department found GSC to be in noncompliance.

# 3. <u>Alternative Sources of Financing</u>

The Department has claimed that GSC's investments in various businesses were not "qualified investments" because those businesses could have obtained financing from "conventional" sources. However, the Department has acknowledged that it has issued no policies, regulations, procedures or other materials which require proof that a capital company's investments do not displace conventional sources of financing. Furthermore, the Department has not required any other capital companies to prove that financing from "conventional" sources was not available for the businesses in which investments were made. A Butte-based capital company is owned by a family which operates a well-known chain of convenience stores with assets in the millions of dollars. The capital company renovated or built a number of hotels around the state. It is clear that the financing for these investments could have been obtained from conventional sources. These investments were approved by the Department.

In another case, a Montana capital company has a *written policy* of investing *only* in businesses which are creditworthy and have a proven track record. By definition, such businesses are capable of obtaining financing from conventional sources. Nonetheless, these investments have been approved by the Department.

Finally, a Billings-based capital company provided loans to livestock concerns which used the funds to buy cattle. Conventional financing for the livestock concern was available, as evidenced by the fact a bank took a first lien on the cattle. In essence, the capital company simply bought cattle which they fed through a going concern livestock operator. These investments were approved by the Department.

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# 4. <u>Economic Activity</u>

The Department has taken the position that the investments made by GSC did not stimulate economic activity in Montana or generate new jobs. However, the quarterly reports submitted by other capital companies reveal that the investments made by them created or sustained only a handful of jobs, or in some cases no jobs at all. The Department has approved these investments.

GSC invested funds in existing businesses. Other capital companies have done the same. A Butted-based capital company made investments for "capital improvements and additions to existing businesses." This capital company was given a clean bill of health.

Additionally, before issuing the notice of noncompliance the Department conducted no investigation of the investment made by GSC in ECM Limited Partnership. ECM is a start-up venture capital mining company which owns valuable mining claims in the state of Montana. Substantial exploration activity, and related economic stimulation within the state of Montana, has been conducted on those mining claims. A very real possibility exists that a gold mine will be developed in the state of Montana as a result of this investment, with a corresponding economic impact in Montana in the millions of dollars.

# 5. <u>Opportunity to Comply</u>

Immediately following its examination of GSC the Department issued a Notice of Noncompliance and announced that GSC would be subject to taxes and penalties of several hundred thousand dollars. GSC was given no warning and no opportunity to bring itself "into compliance" with the Act to the satisfaction of the Department. However, at the same time it was examining GSC the Department found that a Missoula-based capital company was out of compliance for various reasons. Rather than issue a notice of noncompliance and assess penalties, the Department gave that capital company an opportunity to remedy any past noncompliance. Specifically, the Department allowed the capital company to restructure its investments in various businesses and to form an independent investment committee. Upon the capital company's agreement to take these steps, the Department withdrew any claims of noncompliance.

In the case of another capital company, the Department granted an extension of time for the capital company to make qualified investments. The Act requires that a capital company invest at least 30% of its capital base in qualified investments within three years. The capital company, certified in 1988, failed to do so, and was given an extension of time through 1994 to meet the 30% threshold.

# SENATE TAXATION DATE <del>Jebruary 28, 1995</del> EXHIBIT NO. <u>3</u> BILL NO. <u>3</u><u>3</u>25

# MEMORANDUM

TO: Pat Rice

FROM: Robert Sterup

DATE: September 19, 1994/Updated January 11, 1995

RE: The Glacier Springs Company

# INTRODUCTION

In 1983 the Montana Legislature enacted the Montana Capital Company Act. The law allowes a fifty percent credit against Montana income for money invested in a qualified Montana Capital Company.

By 1990 approximately 20 Montana Capital Companies had been certified by the Board of Investments. Investments of \$12.33 million had been made in those various companies, and tax credits of \$5.85 million had been claimed. Among the companies was Glacier Springs Capital Company ("GSC"), certified in 1987.

In 1990 the Legislative Fiscal Analysis conducted a review of the Act and its administation by the Board of Investments ("BOI"). The report of investigation ("Cohea Report") dated August 1990 suggested significant modifications to the statute. The 1991 legislature enacted various substantive amendments to the Act, addressing the concerns expressed in the Cohea report. The amendments were made effective April 23, 1991.

GSC made various investments in Montana businesses on April 1, 1991. The investments totalled \$1.3 million dollars. GSC was aware of the pending amendments to the Act. GSC was also aware of investment practices of other Montana capital companies which had been approved by the BOI. GSC structured its investments to satisfy what it understood to be the criterion for qualified investments under the then-existing version of the Act. By making investments before the effective date of the amendments, GSC expected and understood that its investments would be subject to the pre-amended Act.

As a result of the Cohea report, oversight of the Act was transferred from the BOI to the Department of Commerce ("DOC") in May 1991. The DOC therafter undertook to examine the books and records of all Montana Capital Companies. DOC's examination of GSC commenced in February 1992. DOC ultimately issued a

report, dated November 30, 1992, notifying GSC its investments were not in compliance with the Act ("Notice of Noncompliance"). GSC subsequently availed itself of administrative review of the DOC's Notice of Noncompliance.

An evidentiary hearing was conducted before an administrative hearing officer the week of October 3, 1994. The parties have been granted leave to submit further evidentiary material to the tribunal. GSC is currently in the process of compiling and submitting such materials.

As has been conclusively established in administrative proceedings, no preamendment investments by Montana Capital Companies other than GSC ultimately have been disallowed by the DOC. To the contrary, all pre-amendment investments by all other Montana Capital Companies now have been formally approved by the DOC. Thus, no pre-April 23, 1991 investments by any Montana capital companies remain the subject of any dispute, save those of GSC. For that reason any issues resolved in the GSC administrative proceedings or in judicial review of those proceedings will not and cannot have any impact on any other capital companies. Continuing prosecution of GSC can have no precedential effect, since any rulings obtained by DOC will not have any effect on current or ongoing practices of Montana Capital Companies.

# SUMMARY OF GLACIER SPRINGS MATTER

Glacier Springs Capital ("GSC") Company is a certified Montana Capital Company under the Montana Capital Company Act, MCA § 90-8-101 et seq. During the period 1988 through April 1, 1991 GSC made various investments in Montana businesses, primarily in the mining and transportation industries, in the aggregate amount of over one million dollars. GSC filed quarterly reports with the Department of Commerce ("DOC") as required by statute. The DOC noted no exceptions to the investments. A summary of the transactions is attached.

In 1992 the DOC initiated a review of the GSC investments, and subsequently issued a Notice of Noncompliance, alleging GSC's investments, though "technically" complying, did not meet the "spirit" and "purpose" of the Act.

DOC appears to claim GSC's investments in Montana businesses were "sham" transactions. However, the evidence establishes that the investments generated substantial economic activity and employment in the State of Montana. One of the transportation companies in which investment was made recorded a profit of \$318,957 through the end of 1992, the year after the investment was made.

EXHIBIT\_\_\_ DATE 2-28-95 1L 5B 325

The transportation company's new financial commitments since the investments were made in April 1991 exceed \$16 million dollars, including the purchase of equipment manufactured in Montana at a cost in excess of \$3 million dollars, while \$10 million dollars worth of equipment was ordered through Montana dealers. Thus value was realized both by the entities in which investments were made and by the Montana businesses with which those entities have done business. The Billings-based mining company in which GSC invested has also generated substantial revenue and employment in Montana, including possible development of a gold mine in southwestern Montana.

Discovery has revealed that the practices of GSC which the DOC now claims were noncomplying had previously been approved by the DOC when engaged in by other capital companies. Specifically, the DOC has:

- Disapproved transactions engaged in by Glacier Springs while approving identical or substantially similar transactions engaged in by other capital companies;
- Determined that Glacier Springs investments did not generate sufficient economic activity while approving investments of other
   capital companies which generated no or virtually no new jobs or new economic activity;
- Applied to Glacier Springs interpretations of the Act which are directly at odds with the interpretations it has adopted in examinations of other capital companies;
- Selectively issued a Notice of Noncompliance to GSC while at the same time allowing another capital company it found to be in noncompliance an opportunity to remedy past noncompliance.

The foregoing is all the more remarkable when it is considered that the Department's deputy director admitted under oath that the Department has an obligation to treat all capital companies even-handedly. As Andy Poole testified at his deposition:

Q. Would you agree that the Department has an obligation to be uniform in its interpretation of the Act?

A. Yes, I would agree with that.

Q. Would you agree that the Department has an obligation to treat different capital companies consistently?

A. Yes.

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By way of further example, GSC invested in certain companies in which the shareholders of GSC had an ownership interest. In its Notice of Noncompliance the Department found that such investments are impermissible. However, the Department has expressly authorized such investments in the past. As evidenced by a letter dated June 24, 1987 to Robert Pancich, then Administrator of the Montana Economic Development Board, the State at that time agreed that "neither the Montana Capital Company Act nor the regulations promulgated under it suggest in any way that the term 'Qualified Investment' does not include an investment by a capital company in a business in which an owner or shareholder of the capital company has an interest." Relatedly, the Department has claimed that GSC violated the Act because it allegedly did not have an "investment committee" comprised of "independent" advisors. However, in 1993, at the same time it was prosecuting GSC, the Department took *exactly the opposite position*, with respect to a Butte-based capital company.

The DOC has claimed that GSC's investments in various businesses were not "qualified investments" because those businesses could have obtained financing from "conventional" sources. However, the DOC has not required any other capital companies to prove that financing from "conventional" sources was not available for the businesses in which investments were made. A Butte-based capital company is owned by a family which operates a well-known chain of convenience stores with assets in the millions of dollars. The capital company renovated or built a number of hotels around the state. These investments were approved by the DOC. It is clear beyond peradventure that the financing for these investments could have been obtained from conventional sources. In another case, a Montana capital company has a *written policy* of investing *only* in businesses are capable of obtaining financing from conventional sources. Nonetheless, these investments have been approved by the DOC.

GSC invested funds in existing businesses. Other capital companies have done the same. A Butte-Based capital company made investments for "capital improvements and additions to existing businesses." This capital company was given a clean bill of health.

In administrative proceedings the DOC was successful in obtaining an order from the hearing officer excluding this highly probative evidence. Thus, GSC has been denied any opportunity to prove that the DOC is not affording it even-handed treatment, as Director Poole admitted the DOC is obligated to do.

By virtue of the DOC's conduct GSC has been forced to engage in administrative proceedings which are premature at best. Immediately following its

EXHIBIT\_2 DATE 2-28-95 11 5B 325

examination of GSC the Department issued a Notice of Noncompliance and announced that GSC would be subject to taxes and penalties. GSC was given no warning, and no opportunity to bring itself "into compliance" to the satisfaction of the Department. The Act specifically requires that before DOC can seek decertification and penalties, it must grant the capital company opportunity to bring itself into compliance within a "specified time period." MCA § 90-8-321(2). The DOC has <u>admitted</u> it afforded GSC no opportunity to do so. When GSC requested dismissal, stay or bifurcation of the administrative proceedings until such time as it had been granted a reasonably cure opportunity, the DOC responded by stating that whether it affords capital companies this procedural right is entirely "discretionary" with the DOC. In effect, the DOC's interpretation grants it carte blanche to pick and choose the procedural protections it will afford, on a case by case basis, at its sole and unfettered discretion, in accordance with its arbitrary and subjective judgments. The DOC's interpretation of the Act is unconstitutional on its face. See City of <u>Choteau v. Joslyn, 678 P.2d 665 (1984); Zander v. District Court</u>, 180 Mont. 548, 591 P.2d 656 (1979)(statute unconstitutional when based on arbitrary presumption). A statute which discriminates in favor of some capital companies and against others is unconstitutional. See e.g. Land Title Association v. First American Title & Escrow of Billings, 167 Mont. 471, 539 P.2d 711 (1975). It also seems clear the notice and cure procedural right is all that may save the Act from unconstitutional vagueness. See Montana Auto. Association v. Greelv, 193 Mont. 378, 632 P.2d 300 (1981)(statute void for vagueness). By the State's adherence to that requirement is a capital company given "fair notice" what "conduct is forbidden" as constitutionally required. <u>Cf. In</u> re the Petition of M.C., 211 Mont. 105, 683 P.2d 956 (1984)(statute constitutional only so long as procedural safeguards mandated by the act are followed). GSC has been denied that procedural protection.

The DOC by its conduct has admitted the validity of GSC's right to a cure opportunity. At the same time it was examining GSC the Department found that a Missoula-based capital company was out of compliance for various reasons. Rather than issue a notice of noncompliance and assess penalties, the Department gave that capital company an opportunity to remedy any past noncompliance. Specifically, the Department allowed the capital company to restructure its investments in various businesses and to form an independent investment committee. Upon the capital company's agreement to take these steps, the Department withdrew any claims of noncompliance. In the case of another capital company, the Department granted an extension of time for the capital company to make qualified investments. The Act requires that a capital company invest at least 30% of its capital base in qualified investments within three years. The capital company, certified in 1988, failed to do so, and was given an extension of time through 1994 to meet the 30% threshold.

Although we do not believe that GSC has been out of compliance with the Act in any respect, it is striking to observe that GSC has never been given any

opportunity to remedy any alleged noncompliance. As a matter of law, the Department has an obligation to afford GSC even-handed treatment. Administrative agencies must execute the law committed to them fairly and honestly and treat everyone alike according to the standards and rules of action prescribed. 2 Am. Jur. 2d <u>Administrative Law § 193</u>. Moreover, the Department's decision to decertify GSC is quasi-judicial in character. "Quasi-judicial' functions are those which lie midway between the judicial and ministerial ones, and when the law in words or by implication commit to any officer the duty of looking into the facts and acting upon them not in a way which it specifically directs but after a discretion in its nature judicial, the function is quasi-judicial." State ex rel Lee v. Montana Livestock Sanitary Board, 135 Mont. 202, 339 P.2d 487 (1959). In its examination of GSC the Department was obligated to adhere to its own norms, prior rulings and precedents. See Secretary of Agriculture v. United States, 347 U.S. 645 (1954) (agency action invalid when it failed to adequately explain its "departure from prior norms"). As stated by Justice Marshall in Atchison, Topeka & Santa Fe Railway Co. v. Wichita Board of Trade, 412 U.S. 800 (1973):

A settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to. From this presumption flows the agency's duty to explain its departure from prior norms....

While GSC maintains the investments were complying, it has at various times sought to effect some reasonable resolution of the matter. The DOC made a settlement proposal, offering to accept half the claimed tax credits if GSC would reinvest certain moneys. GSC countered with a proposal which included a reduction in credits claimed but no or limited reinvestment. In response the State made a proposal much more onerous than its initial offer. Later the DOC agreed to engage in additional settlement discussions. GSC proposed that DOC accept certain of the investments, grant credits accordingly, and GSC would withdraw its claims as to other investments, leaving open the possibility of reinvestment as necessary. DOC failed to accept this offer or even make a counterproposal. Rather than resolve the matter the DOC seems intent on insisting that substantial time and money be expended by both sides in litigation. The DOC's conduct has made resolution of the controversy virtually impossible.

# SUMMARY OF TRANSACTIONS

EXHIBIT\_\_\_\_\_ DATE\_\_\_\_\_\_8-95 11 5B320

On or about May 5, 1988 GSC applied to the Department of Commerce seeking certification of the Company as a Montana Capital Company. Department of Commerce certified GSC as a Montana Capital Company and authorized \$650,000 as tax credits available. On or about December 28, 1988, GSC applied to the Department of Commerce seeking to increase the authorized tax credits from \$650,000 to \$1,300,000. During 1988, GSC acquired an interest in the capital and profits of ECM Limited Partnership, a limited partnership formed under the laws of the State of Montana (the "Partnership"). The Partnership was organized for the purpose of prospecting for, developing and mining gold and other valuable minerals. The Company paid a total of \$450,000 cash for its interest in the Partnership.

• On June 30, 1988, GSC borrowed \$150,000 from Transport Leasing Company ("TLC"), a general partnership formed under the laws of the State of Montana; on September 29, 1988 GSC borrowed an additional \$100,000 from TLC. During the calendar year 1988, TLC expended the sum of \$130,754.30, all of which was for the benefit of the Company. As of December 26, 1988, GSC was indebted to TLC in the total amount of \$380,754.30. (\$250,000 represented by promissory notes and \$130,754.30 for expenses advanced by TLC on behalf of the Company.) On or about February 9, 1988, GSC borrowed \$150,000 from Transystems, Inc., a Montana corporation ("TSI") which was evidenced by a promissory note. Various individuals made withdrawals of capital from TLC as reductions of the partners' capital accounts. On December 27, 1988, each of the partners of TLC who withdrew funds from TLC purchased one share of stock in GSC for the purchase price of \$1.00 and contributed additional paid in capital in the amount of \$83,024.90. On December 27, 1988, GSC issued a check to TSI in the amount of \$100,430, thereby reducing GSC's indebtedness to TSI to \$50,000. On December 27, 1988, GSC issued a check to TLC in the amount of \$480,754.30, thereby repaying in full the GSC's obligation to TLC in the amount of \$380,754.30. The remaining \$100,000 was properly treated on their respective accounting and financial books and records by GSC and TLC as an advance from GSC to TLC.

On November 30, 1989, C&A Service Corporation, a Montana corporation ("C&A"), issued checks to the various individuals in the total amount \$718,815. Those persons then issued checks to GSC. GSC treated \$1.00 from each investor as being received for the issuance of 1 share of common stock having a par value of \$1.00 and the balance as paid in capital. On November 30, GSC issued a check to C&A in the amount of \$718,850; GSC and C&A properly reported the \$718,850 payment from GSC to C&A on their respective accounting and financial records as a loan from GSC to C&A.

On April 1, 1991 Patrick W. Rice purchased from Glacier Springs an \$80,000.00 note executed by ECM Ltd. Partnership. Patrick W. Rice issued a check in the amount of \$112,000.00 to Glacier Springs as a loan to Glacier Springs. C&A issued a check to GSC in the amount of \$718,815.60 as a payment in full satisfaction of a loan previously made to C&A by GSC. GSC issued a check to TSI in the amount of \$325,000.00 as an equity investment by GSC in TSI, purchasing 20,211 shares of common stock in TSI. GSC issued a check to TLC in the amount of \$325,000.00 and TLC in First Amendment to Restatement of Partnership Agreement of TLC admitted GSC as a Class C partner having 116.6 units representing an 11.66% interest in the capital and profits of TLC. GSC issued a check to TSIT in the amount of \$260,000.00 as an equity investment by GSC in TSIT, purchasing 50 shares of common stock of TSIT for \$260,000.00.

As a result of the April 1, 1991 transactions GSC ceased to be a creditor of either C&A or ECM Ltd. Partnership. As a result of the April 1, 1991 transactions GSC became a shareholder in both TSIT and TSI and became a partner of TLC. As a result of the April 1, 1991 transactions GSC exchanged the position of being a creditor of C&A and ECM Ltd. Partnership for an equity or risk capital position in TSIT, TSI and TLC.

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BEFORE THE DEPARTMENT OF COMMERCE STATE OF MONTANA

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IN THE MATTER OF THE FINDING OF GLACIER SPRINGS CAPITAL COMPANY IN NONCOMPLIANCE WITH THE MONTANA CAPITAL COMPANY ACT.

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NOTICE OF NONCOMPLIANCE AND NOTIFICATION TO THE DEPARTMENT OF REVENUE AND OPPORTUNITY FOR HEARING

TO: Thomas F. Topel, Legal Counsel Daniel Rice, President Patrick W. Rice, Secretary Glacier Springs Capital Company

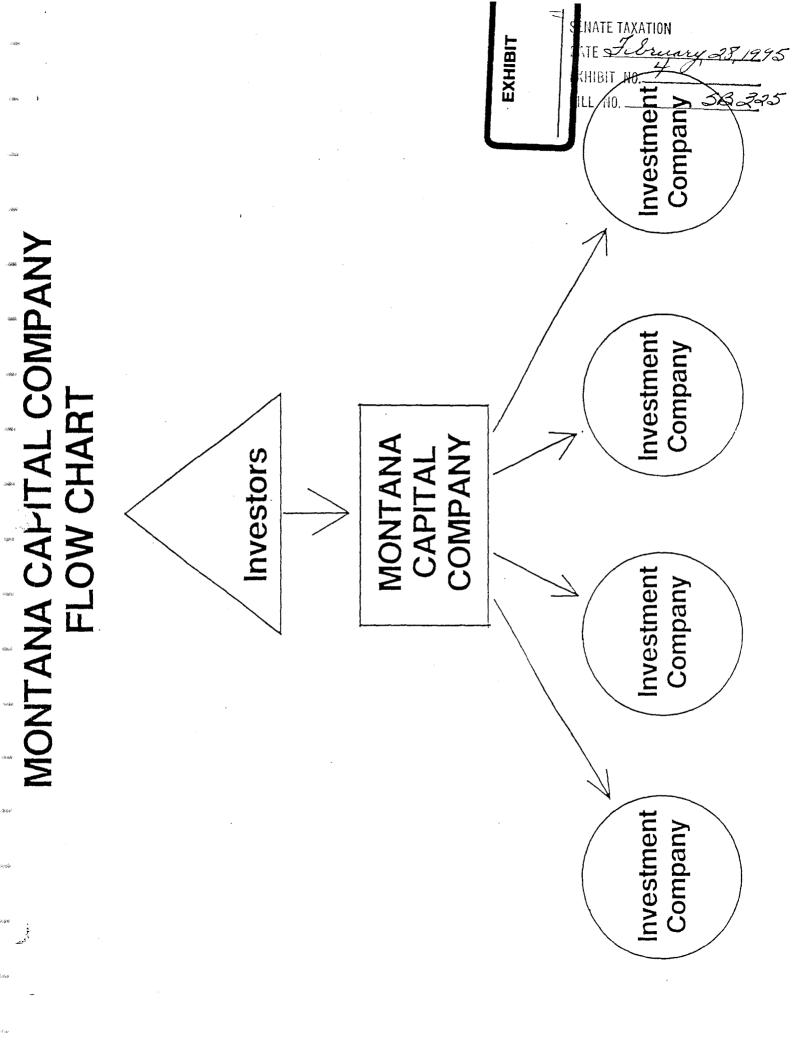
PLEASE TAKE NOTICE that the Department of Commerce of the State of Montana finds that the Glacier Springs Capital Company is in noncompliance with the provisions of the Montana Capital Company Act and Section 90-8-101, et.seq., Montana Code Annotated ("MCA"). The Department's authority is set forth under Section 90-8-101, MCA, et.seq. including but not limited to Section 90-8-313, MCA. The Department will refer its find of noncompliance to the Department of Revenue of the State of Montana.

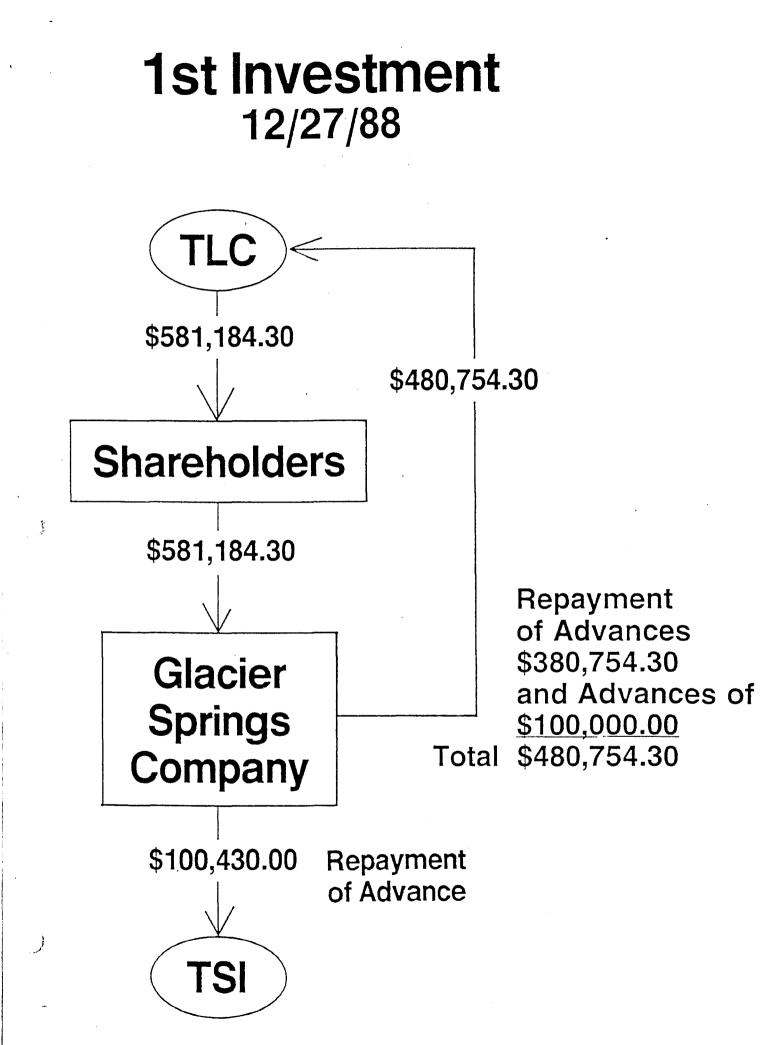
## REASONS FOR ACTION

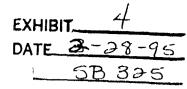
The Department has conducted an investigation to determine the validity of the tax credit received by Glacier Springs Capital Company, and has reasonable and probable cause to believe that the following facts justify and support such a finding that GSC is in noncompliance with the Montana Capital Company Act, Section 90-8-101, MCA, et. seq.

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

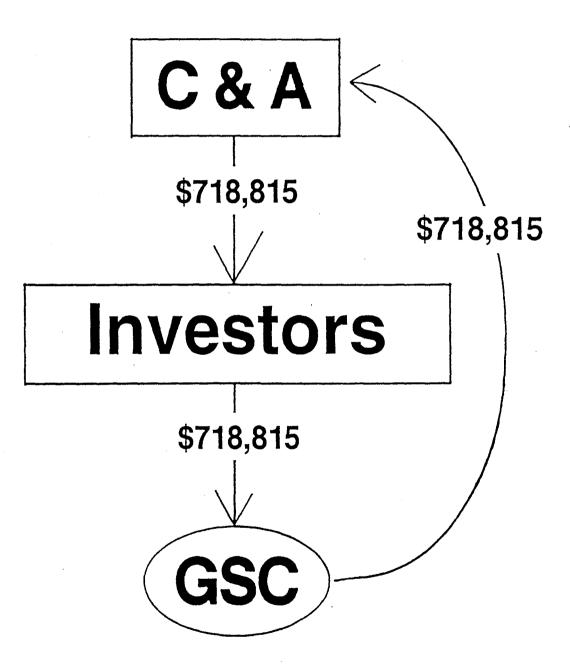
**EXHIBIT** 49

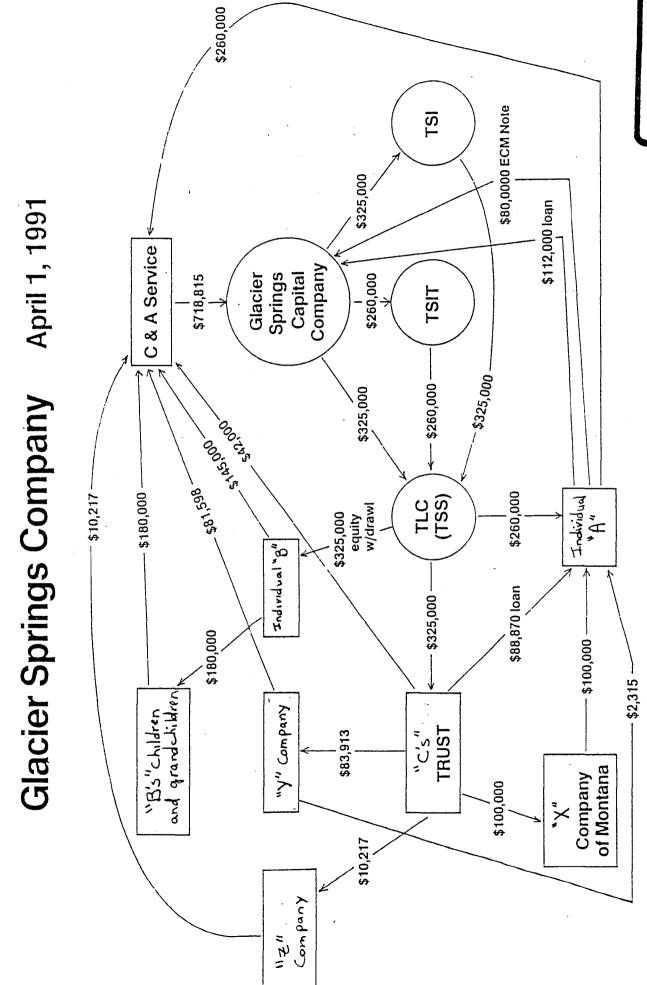






# Nov. 30, 1989 2nd Investment





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DATE Frebruary 28, 199. SENATE COMMITTEE ON an enstor Lage BILLS BEING HEARD TODAY: 16 32

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Name	Representing	Bill No.	Support	Oppose
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ANDY POOLE	DEPT OF COMMERCE	325		X
Micis REBINICON	DEPT. OF REVENAE	325		X
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# VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY

REGISTER.F10