MINUTES

MONTANA SENATE
54th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **BRUCE D. CRIPPEN, CHAIRMAN**, on March 9, 1995, at 9:00 a.m.

ROLL CALL

Members Present:
Sen. Bruce D. Crippen, Chairman (R)
Sen. Al Bishop, Vice Chairman (R)
Sen. Larry L. Baer (R)
Sen. Sharon Estrada (R)
Sen. Lorents Grosfield (R)
Sen. Ric Holden (R)
Sen. Reiny Jabs (R)
Sen. Sue Bartlett (D)
Sen. Steve Doherty (D)
Sen. Mike Halligan (D)
Sen. Linda J. Nelson (D)

Members Excused: None.

Members Absent: Sen. Lorents Grosfield

Staff Present: Valencia Lane, Legislative Council
Judy Feland, Committee Secretary

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

Committee Business Summary:
Hearing: HB 311, HB 117, HB 501, HB 217
Executive Action: HB 217, HB 117

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HEARING ON HB 217

Opening Statement by Sponsor:

REPRESENTATIVE JOHN JOHNSON, House District 2, Glendive, sponsor of HB 217, asked that his bill be tabled by the committee. He stated that the bill had a purpose, but its purpose disappeared after it came out of the House and onto the floor. The purpose was to set into the school laws a statute dealing with assault on personnel. It no longer exists. Now the only thing the bill would do is ask the Office of Public Instruction to make mention of this particular statute in Chapter 45 in the codes of Montana.

This can be done in a letter, he said. He respectfully requested that the Judiciary Committee table the bill.

Proponents' Testimony:

None.

Opponents' Testimony:

None.

Questions From Committee Members and Responses:

None.

Closing by Sponsor:

REPRESENTATIVE JOHNSON closed on HB 217 without further comment.

EXECUTIVE ACTION ON HB 217

Motion/Vote: **SENATOR AL BISHOP MOVED THAT HB 217 BE TABLED.** The **MOTION CARRIED UNANIMOUSLY** on an oral vote.

HEARING ON HB 311

Opening Statement by Sponsor:

REPRESENTATIVE LARRY GRINDE, House District 94, Lewistown, sponsored HB 311. He said it was an important bill to the State of Montana and also the people of Montana. The 5th Amendment of the Constitution states that no person will be deprived of life, liberty or property without process of law, nor shall private property be taken for public use without just compensation. There are two kinds of private property bills coming out in the nation right now, which are "look before you leap," types of bills, and "takings," compensations bills where values are determined to be paid. This bill is a "look before you leap," bill. It means that if the State of Montana needs a piece of private property or something that affects private property, they should take a hard look, analyze, and see if a possible takings would occur. If so, they should find another alternative, or work with the people to find a solution to the problem. The statement of intent is the key to the bill, he said, which had been added with the help of the departments and agencies. It concluded that Attorney General Mazurek would compile a list shown in the statement of intent, which is the criteria to determine if there would be a possible takings occurring by state government. If they did not meet the criteria, a red flag comes up and government would have to take another look so that government would not be involved in a lawsuit down the road. He said there were precedents now on these lawsuits. It is costing

some states millions of dollars. In the future it will cost the federal government billions of dollars. It's a simple bill, he said. He called on **Hertha Lund,** who wrote an article **(EXHIBIT 1)** and a book about property rights legislation, now being used on a nationwide basis. He said she represented the **Farm Bureau.** She is also his counsel on this bill.

Proponents' Testimony:

Hertha Lund, attorney, author, appeared to talk about the technical aspects of HB 311. She said it had been significantly amended since it appeared in the House. They added a statement of intent, she said, which sets up the current state of the law as far as a takings analysis. Some things were stricken and added, as a result of a meeting with state agency attorneys and the state Attorney General's office in trying to find some language everyone could live with as to implement the takings assessment. She said it was a bare bones bill now, that simply is meant to follow state and federal constitutional law. It has also been narrowed from all property to only real property including water rights. The first Section would give the Attorney General the authority to develop guidelines which they would hand out to the attorneys in the state agencies. That means the state would have only one takings assessment. There is no doubt that right now, they could write a whole law review about the status of the law on takings. There is enough settled for an assessment to be done. She handed out an overview of the takings law by Thomas Fenton Smith. **(EXHIBIT 2)** It was recently presented at a committee of the state bar, by Thomas Fenton Smith, an attorney from Colorado. Section 2 is the purpose of the bill. It sets out the meaning in accordance to the concepts of takings by the U.S. Supreme Court and the Montana Supreme Court. They would not extend the law beyond what is currently in law. This bill would not create a cause of action for a taking suit, it simply asks the agencies to apply a current takings law. The new Section, 3, is definitions. She said that the addition of, "or damaging," was simply to track the Montana Constitution. It is not in all takings bills because it is not in all state constitutions. They do not include eminent domain proceedings, seizure of property by law enforcement officials, forfeiture of property during or as a result of the criminal property proceedings, or a proposal to repeal a rule or discontinue a government program. These are not areas where it was thought government should have to do a takings assessment. The new Section 4, "Guidelines for Actions with Taking Implications", was amended. They started out asking each state agency to develop guidelines, but that section was amended and focused that function of the Attorney General's office. Idaho has done this, she said. It is working there as well as Utah. This bill would track the Idaho and Utah bills. Both of those states have incurred almost nil costs in implementing this type of bill. Section 5, the impact assessment, just asks the agencies to have a qualified person in the agency to implement or do the assessments. Any state agency with a taking or a damaging implication must submit it to that person for review, and if it

came up with the possibility of a takings, the agency would submit it to the Governor, or they would figure a way to go forward without that state agency action with the takings implication. If there is an emergency or something that is an immediate risk, an assessment can be done after a state agency action is taken. This is not a bill that puts a value on what a takings is, which recently passed Congress and they went down as far as 20 per cent of what a takings is. The bill is simply a "look before you leap" type of bill, she said. It is the simplest type of takings bill going on in the states. Fourteen states have passed takings legislation currently, including Arizona who passed the bill then took another look and repealed it. They are looking at it in the legislature again now, she said. There are currently over 23 states considering takings bills, plus the bills in Congress. She stated that there is a trend in the country to have government "look before you leap," so that state citizens will not have to pay money for takings. She spoke about the Lucas case in South Carolina where the state ended up paying $1.5 million. In another case in Wyoming, the federal government ended up paying over $120 million in a takings judgement.

Lorna Frank represented The Montana Farm Bureau Federation, the largest farm organization in the state with over 6,000 members. They strongly supported HB 311. She read from written testimony. **(EXHIBIT 3)**

Glen Marx, Policy Director on the Staff of Governor Racicot, spoke in favor of the amended version of HB 311. He read from written testimony. **(EXHIBIT 4)**

Pete McHugh, Lewis and Clark County Farm Bureau, supported the bill on behalf of his organization.

Eric Williams, Pegasus Gold, also for the Montana Mining Association, supported **REPRESENTATIVE GRINDE'S** bill.

Chris Racicot, representing the Montana Building Association, said their organization would like to go on record in support of HB 311.

John Bloomquist, Montana Stockgrowers Association, stated for all the aforementioned reasons, they support the bill.

Mike Murphy, representing the Montana Water Resources Association, stated that they also support HB 311. They felt the bill was appropriate for Montana.

Don Allen appeared on behalf of the Montana Wood Products Association in support of the bill.

Cliff Cox, rancher, Broadwater County and President of the Broadwater County Farm Bureau, rose in support of HB 311.

Jim Richard, Montana Wildlife Association, presented amendments that he stated were important to his organization's support. **(EXHIBIT 5).** On Page 2, Lines 4 and 5, they suggested that (6) be stricken. They felt that this line went beyond the clearly defined takings actions that have been defined, both in the U.S. and the Montana Constitutions. On Page 3, Lines 8 and 9, they wanted that particular Subsection stricken because it created an unbalance in the bill and some of the actions that would be excluded from the section may, in fact, create a takings or damaging situation. He stated that there are circumstances where the granting of a permit has a possibility of creating damage on other properties, i.e., downstream private property owners from a permitted mine. In trying to find language in making sure the assessment applies to those types of situations, he was unsuccessful in finding any that would not backfire. Perhaps in executive action, he suggested the committee could make a statement that the word, "damaging," would apply to those situations, or attempt the appropriate language. They supported the bill with the amendments because they felt the types of actions that state governments make will so rarely invoke a takings that this will not be onerous to state government. **CHAIRMAN BRUCE CRIPPEN** asked if they would support the bill without the proposed amendments. **Mr. Richard** said, "no".

Opponents' Testimony:

Janet Ellis, representing the Montana Audubon Legislative Fund, opposed the bill for the following reasons: 1) What is the problem? She said if the Attorney General's Office were checked, they would find no takings by state government. Most of the cases in Montana were with local government. She asked why they would set up a bureaucratic process that would have a chilling effect on state agencies where there was no real visible issue. 2) Why is there no balance in the purpose statement and the statement of intent, between private property rights and public health, safety and welfare requirements? The bill would elevate private property rights above those items. In contrast, the Montana Environmental Policy Act does not elevate environmental concerns, seeking a balance of give and take. 3) HB 311 was anti-regulation legislation, she said. For example, if the legislature would pass a air quality law to protect public health, a takings assessment would be done on the polluter, but adjacent property owners would receive no consideration, as well as general health and safety.

Ted Lange, spoke on behalf of the Northern Plains Resource Council, saying that when they look at legislation, they look for balance, asking if the legislation is restricting one person's private property in order to protect the property of others. In this instance, their concerns dealt with the fiscal note and questions about the language. In Section 5, it listed three subjects on Page 4, Line 29 and 30 and Line 1-3 on Page 5 that need to be considered in a takings assessment. In the statement of intent, however, he said there were six things that

need to be considered. On Page 2, Line 4, it appeared to them to go significantly beyond "look before you leap." They questioned the balance. On Page 1, Lines 27 and 28, he stated that the language there might achieve the balance they were looking for, but they weren't sure. He was interested to hear how Idaho and Utah had no costs in implementing a similar bill. Depending on the department, he felt the assessments could be extremely expensive.

Deborah Smith, attorney, Helena, represented the Sierra Club, opposed the bill for several reasons. They were not opposed to private property protection, but did not believe that's what this bill was about. HB 311 is based on the notion that all regulatory actions are bad somehow. Regulation should be examined because it impedes people's freedom from using their property the way they want. She said they were a society that is organized by communities and that structure places obligations on property owners, both in restricting the ways they can use their property and calling for them to forego all economically viable use of their property as long as the government pays full compensation. She maintained that regulation is O.K., while HB 311 says it is not O.K. She said it was a fundamental change in the way that the law has looked at the role of government law, regulation, and the use of private property. The Sierra Club holds that the property rights of most Americans are not at all threatened by regulation. They are protected by regulation, in areas such as zoning, air quality and water quality permits. She did not believe that the complicated issue of takings could be solved by a checklist procedure. She stated actions that are going to be subject to agency review raise no serious constitutional concerns. In Lucas, the landowner was deprived of all economically viable use of the property. That is exactly what the 5th Amendment, and Article 2, Section 29 of the Montana Constitution are supposed to prohibit. On the other side are a myriad a cases. In 1985, U.S. vs. Riverside Bayview Homes, developers challenged the 404 permit (the wetlands dredge and fill, under the Clean Water Act), saying they could not regulate it because it was a takings. The Supreme Court held that they could regulate. If the people thought their land was taken, they could go to claims court and the government would pay for it. That case reaffirmed the bundle-of-rights notion, a serious concern to many Montanans. If they own a lot of land and a portion of the land is taken in its entirety, as recently as 1993, a unanimous U.S. Supreme Court rejected the theory that just because you deprive someone of all the use of a portion of their land, does not mean that they have been deprived of all economically available use of ALL of their land. That is the test, she said. Even under Lucas, there is only one footnote to suggest that perhaps one of the justices may be willing to re-examine this bundle-of-rights notion. Some things are not takings, she said. A suit alleging that a bear was killing a rancher's cattle was rejected. A claim of elk and antelope foraging grazing allotments was rejected. A rancher alleged that the Forest Service had taken his property by reducing the number

of cows allowed to graze public land, and this also, was rejected. If they want to re-define what a taking is, they should be looking at a Constitutional Convention, she said. This bill would add unnecessary layers of an administrative process to review things that are not takings, stifling agency actions from issuing permits at all.

Don Judge, Executive Director, Montana State AFL-CIO, opposed the bill. At the national level, he said that the AFL-CIO, along with a number of international unions, is involved in coalitions' efforts with more than 200 other organizations including representatives of church groups, environmentalists, consumers and others to deal with takings issues across the country. They were concerned as a labor organization that the original legislation would have jeopardized the health and safety of the workers in the workplace. They were also consumers of air, water and of the amenities of life that include hunting and fishing on the lands they live in. The sponsor had excluded personal property from this bill, which helped tremendously with their concerns. But he still felt it would hamstring government. An assessment cannot be done to require the potential impact on one or more citizens of a proposed agency or rule simply by going through a checklist. He used as an example the Ripartarian Streambed Law, which requires a tree of a certain diameter be left along the stream. He also expressed concern that the bill would provide the framework to allow for amendments for personal property as well as real property. He also worried about lawsuits by creating another branch of government and allowing agency people to implement the rules. He said there was a caveat for health and safety problems. He said pesticides would be an example, where the prohibition of certain chemicals might diminish the profit of a person's land, perhaps the agency would be sued. He said it was no secret that this legislation had been spearheaded by the American Farm Bureau Federation and the National Realtors who want to address the repeal of the Executive Branch Order of **President Ronald Reagan** to implement takings legislation. It was brought forth to deal with the wetlands issue, but has consequences that reach much beyond. He said his organization thinks they are consequences that affect the public negatively, dampers the government's enthusiasm for purpose and responsibility to protect the safety and health of the people of Montana.

Ann Hedges, Montana Environmental Information Center, opposed HB 311. She asked why the state should spend $26,000 on something that was not a problem. There was no problem in this state, she said. The Montana Supreme Court has only addressed this issue three times. On one occasion, it found a taking had occurred. She said environmental assessments under the Montana Environmental Policy Act (MEPA) started out as a checklist. Now, they are detailed analysis of environmental impacts. She was concerned that a checklist would develop into a larger document.

Wade Sikorski, rancher, Fallon County, said that he had quite a bit of experience in agriculture. His family had not experienced the government running amuck and taking their property or burdening them with irresponsible regulations. They felt they had benefitted from government regulation. On the other hand, he had seen corporations taking other people's property or affecting their property values adversely. In his community Ross Electric is trying to set up a PCB transformer incineration facility which would affect a small safflower plant a couple hundred yards down the hill from that plant. He has been told by some of his customers that if Ross Electric starts operating, they will not buy his safflower product any more. He said corporate takings like this would not be addressed in the bill. He was concerned that the bill would shift the balance to large property owners who would be able to take advantage of it, and undermine the rights of small property owners like farmers and ranchers.

Questions From Committee Members and Responses:

SENATOR BISHOP asked **REPRESENTATIVE GRINDE** about the impact statements being made available to the Governor. **REPRESENTATIVE GRINDE** said it was correct. **SENATOR BISHOP** asked if they would be made available to the public at the same time. **REPRESENTATIVE GRINDE** replied that he would think so. It would be public information. **SENATOR BISHOP** said he agreed with one of the proponents in that the legislature would not be able to see these guidelines. They would be put into effect and they would have no opportunity to assess them in advance. **REPRESENTATIVE GRINDE** said it would be set up like every other rule or regulation that they do. It would be scrutinized in a public process. **SENATOR BISHOP** said they would not see the guidelines before they are put into place and acted upon. **REPRESENTATIVE GRINDE** said if they attended the hearings on public policy, yes. **SENATOR BISHOP** said there would be a time lapse and they would not have a chance to do anything. **REPRESENTATIVE GRINDE** said the same would be true of all the rules and regulations they pass out of the legislature that go for public scrutiny under public policy. They do not have a chance to look at them. He said if he would like to look at them, they should change the laws and the way it's done. **SENATOR STEVE DOHERTY** said the fellow from Fallon County talked about what would happen if the state would grant a permit to Ross Electric. that there may be an effect on that state action on another property owner. If a permit was granted at Colstrip 3 and 4, they would get a transmission line all the way across the state. He asked if the sponsor would consider the land lost by farmers to the line to be a potential takings? **REPRESENTATIVE GRINDE** said the bill would not address that hypothetical problem. He said they were not re-defining what's already in the Constitution. All he was asking the state is to look at these things before they do them. He said they already had police state actions and nuisance laws that would take into consideration the things he was speaking about. This does not affect the public good, he said. **SENATOR DOHERTY** referred to the question of public documents by **SENATOR BISHOP.**

As public documents, they would be discoverable in any lawsuit. **Hertha Lund** said they needed to clarify that in the last section. Actions with takings implications are what get passed on. A state agency would reassess their action. They could achieve the same purpose without a takings. There may be a few actions that have takings implications in the public domain. It really allows the agency to be ahead of time. Just because the documents are available does not mean that an individual property owner would not have a cause of action anyway, she said. **SENATOR DOHERTY** said, given that, they would be usable and discoverable by a landowner or an aggrieved party in any subsequent action, and with the knowledge that the administrative law tenet that the courts give deference to the findings of an administrative agency, in a subsequent decision, wouldn't that document, prepared by a department, say that there are potential takings implications? Wouldn't that tilt the balance of the court to a finding of a takings where previously the court would not do that? **Hertha Lund** stated that state agencies would achieve their purposes with different means. A takings action would be brought separately from the assessment. It would not be right for the government to take property just because certain citizens did not know they were taking it. She said they were asking the state government to follow the Constitutional Law. She referred to fears about pesticides, workers safety and regulation in other testimony, but the bill would not extend current takings law beyond what it is. **SENATOR DOHERTY** asked **Mr. Robinson, Director, Health and Environmental Sciences,** about the testimony that there would be no cost to implement the bill other than the Attorney General's initial guidelines figures, which would be $26,000. Also, he spoke about issuing a water quality permit, which might affect a lot of people downstream. He asked about implementing the bill as a simple checklist. Did he think people would go out for every water quality permit and make an analysis of how the action would affect private property rights. **Mr. Robinson** said he was correct in assuming it would affect downstream or downwind folks. The first statutory guidance says that any permit that is issued cannot damage beneficial uses downstream. This bill would make them do a little more analysis as they issue the permits and hopefully it would not create a huge burden. If they saw something down the road that is an unintended result, the Governor's office would come in with amendments.
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SENATOR RIC HOLDEN asked **REPRESENATIVE GRINDE** what a "takings" is? The sponsor said it was an encroachment by government that goes beyond the Constitution. **SENATOR HOLDEN** asked what that would mean to someone who did not understand the Constitution. **REPRESENTATIVE GRINDE** said that the 5th Amendment read that the government shall not take private property without just compensation. Our forefathers wrote the Constitution to protect one of the most valuable rights that is given to us: the right to own property. The government should not have the right to take that property away from you, at least without just compensation or for the good of the whole, or for health and environment. **SENATOR HOLDEN** asked **Don Judge** about his testimony. He expressed

surprise that a union would address this bill. **Mr. Judge** said that the **AFL-CIO** is very concerned about takings legislation for a number of reasons. One is the hamstringing of government's ability to regulate the public health and safety. Another is because of the potential cost. As consumers of water and air and the life they enjoy, they saw a risk being set up by the legislation. **SENATOR MIKE HALLIGAN** asked **Ms. Lund** about the differences between the three criteria in Section 5 and the six separate criteria in the statement of intent. **Ms. Lund** stated that the first six were directly out of the Penn Central case and the five criteria are different. The first part sets up a takings analysis or kind of a flow chart. Section 5 asks them to take into consideration this top layer, such as (a), the likelihood that a state or federal court would hold that the action is a taking or damaging. Then, they would implement the five steps from the intent section. They do not go to the same purpose. **SENATOR HALLIGAN** said there was some confusion about the intent of the six as opposed to what is required under the guidelines in Subsection 3. He asked another question about the inclusion on Page 2, Line 29, "or permit condition or denial," this would seem to be a project specific or an entity specific event. He said in speaking about a mine and the tailings pile would have to be 20 miles away, would it be considered a taking? Would the state have to pay $400-500 million? **Ms. Lund** said that the pit condition or denial tracks Constitutional Law and most of it is based on Supreme Court Law congruent with Montana Law on takings. She said again that the bill would not extend current Montana law. There had been cases, such as the Nolan case out of South Carolina which was a permitting case, and the Dolan case, the latest case the Supreme Court heard in the last term, which was another permit condition or denial. The Supreme Court has said that it would be necessary to have several things if it would be able to deny a permit or put a condition on it. They would have to meet the takings analysis plus they would have to develop some prongs that apply specifically to permits, such as it must substantively advance government purpose and must be a nexus and have other qualifications on that type of action. Therefore, this type of bill tracks current law and does not extend beyond what the Constitution already applies as protection. If it was not in the bill, she said, and the state agency would not do an analysis on state actions held to be takings, they are not going to questioning things they should be question to see if they are open to a takings suit. In response to the examples, she said the only place the court has found a takings is when it's between the government and the person who is getting a permit, or who the action affects. It has not been extended to neighbors at this point. That is a nuisance action. They would have a cause of action regardless of if this bill passes or not. **SENATOR HALLIGAN** asked **Katherine Orr, chief counsel for the Department of Health,** about an example of permitting a mine and the only way to grant it was to move the tailings somewhere else, would it be a takings? Would the Department have to grant the permit then, to avoid a takings situation? **Ms. Orr** said the elements that are listed in the

statement of intent are elements that have been delineated in federal and state precedent in interpreting takings language. Element # 3 on the bottom of Page 1 is an approximation in her view of what the courts have delineated by way of a standard. Under the Lucas case, she said, and also as articulated by the Dolan vs. City of Tigard case, the standard is not deprivation of economically viable use or resulting in a temporary or permanent physical invasion of the property. Both the cases talk about a total deprivation. They would have to look at those things in issuing a permit in determining if they would have to pay compensation to the mine. They would also look at whether or not a substantial state interest were advanced and whether it would be on behalf of the general public good. She said it would be an issue of first impression and they would go through the elements. **SENATOR SUE BARTLETT** asked the sponsor if the recommended amendments by the Montana Wildlife Federation met with his approval? **REPRESENTATIVE GRINDE** said he had not had a chance to analyze them. The bill was already scrutinized by agencies and the Attorney General. They tried to be amenable to everyone and write the cleanest bill they could. He would like to see the bill as it stands. **SENATOR BARTLETT** stated that it would seem logical that state agencies do not operate in isolation from the Constitution, the statutes or court decisions relating to the takings of private property. In all likelihood they may already do much of what is suggested in the bill in terms of automatically giving consideration to whether or not there may be a taking of another violation. Did he feel state agencies do not do that now? **REPRESENTATIVE GRINDE** said he would never insinuate that the state agencies are not doing their jobs. He was trying to have them take a further look at any actions on their proceedings to protect the state from litigation and to protect the private property owner. **SENATOR BARTLETT** asked **Beth Baker, Department of Justice,** if she had reviewed the cases that had to do with takings cases and if so, how many of those involved decisions made by a state agency as opposed to some other level of government. **Ms. Baker** said she had when the bill came before the legislature two years before. They had anticipated that questions would come up about takings law in Montana. She presented a summary **(EXHIBIT 6)** of regulatory takings law in Montana. It cited cases heard by the Supreme Court since the 1972 Constitution was adopted having to do with regulatory takings as opposed to traditional takings cases which are physical invasions cases or an actual appropriation of property. On the last page, in short summary of the cases decided, she said most have been challenges to either state statutes enacted by the legislature or actions taken by local governments. Of the cases she reviewed, there was only one in which a state agency was the defendant, which was cited on Page 5, Adams vs. The Montana Department of Highways. In that case the Highway Department was building a bridge on Reserve Street and the plaintiffs, who were adjacent property owners, brought an action alleging that it resulted in diminution of their property values. The court found that it was not a compensable taking. **SENATOR LINDA NELSON** asked **Ms. Lund** to relate the bill to eminent domain. **Ms. Lund** replied

that the bill would not effect eminent domain as it currently is, although the eminent domain in Montana probably does need some work. **SENATOR LARRY BAER** said they had heard a lot of rhetoric trying to apply the 5th and 14th Amendments of the Constitution in regard to uncompensated wrongful takings. Being that the law is steadfastly in place and that the Supreme Court landmark case law governs its interpretation and it is considered to be an important part of the relationship between government and the people, isn't the bill just a safety net for people who are affected by agency actions that might infringe upon the 5th and 14th Amendments takings clause? Is it perhaps a government safety protection for these people who would otherwise be required to spend money they don't have to defend themselves in court for actions that might be deemed wrongful in regards to unconstitutional takings? **REPRESENTATIVE GRINDE** said he had hit the nail on the head. All the red flags thrown up did not have anything to do with the bill. HB 311 would protect the state government from lawsuits in the future and help people protect their private property. He said it would allow the government to work with a person when they see a takings situation to try to find another avenue to implement the program they want. It is another way to make sure everyone is satisfied and nobody gets hurt, he said. **SENATOR DOHERTY** asked about the language on Page 3 about actions with taking or damaging implications. It says, "some other environmental matter that if adopted and enforced would constitute a deprivation of private property in violation of the United State of Montana Constitution." He said words were important. Why use, "deprivation," instead of, "taking." **Ms. Baker** said she thought the definition would then be somewhat circular. They tried to make it as narrow as possible to say that an action only has taking implications if, when carried out, would violate the Constitution. **SENATOR BISHOP** asked the sponsor about the reason for the bill, probably not being created in a vacuum. He asked for specific problems he'd encountered. **REPRESENTATIVE GRINDE** said most of the things he had heard had to do with the county and city zoning areas. The reason he had the bill is because he had seen an encroachment by government over the last 20-30 years in all facets of their lives. He said it was no different than setting up water quality policy or air quality policy that protects the citizens of Montana. He hoped to get into the forefront and make sure the state did not get into a jackpot with lawsuits and protect themselves with property owners. He referred to the IST Law from Lady Bird Johnson. They didn't want the signs along the roads. Under the IST Law it was determined to have signs of certain proportion. There is a lot of registered cattle people having to take their signs down because the federal government is telling them they can't have their own sign on their own private property telling about their business. **SENATOR HOLDEN** asked **Ms. Baker** if there was a coordinated effort by herself and **SENATOR BARTLETT** to get a point across. **Ms. Baker** said she prepared the handout because two years ago a similar bill came before the legislature and a number of questions came up about the law. The date of the handout is January, 1995, anticipating questions on cases and actions

covered in the bill. She had not talked to **SENATOR BARTLETT** prior to the hearing on the bill.

Closing by Sponsor:

REPRESENTATIVE GRINDE said he felt like the Christians and the lions in the committee with all the lawyers. He was merely trying to get across a simple, important idea. An ounce of prevention is worth a pound of cure, he told **SENATOR BISHOP.** Why should they allow themselves to get into a situation that would cost millions of dollars down the road in a lawsuit? As the bill was put together in the last session, it was a change that moved in many directions. The bill would simply ask the state to look at possible takings and find another alternative. The bill would not have to do with city and county governments. He addressed the health and environment issue. He said opponents made it sound like the bill would rape, plunder and pillage. He said it was ludicrous. He was trying to protect the state and also trying to protect people who own private property. The red flag, or herrings, thrown out by the opponents, are covered in other areas of law. There was a police power government in which violations would be met. There was nuisance laws to take care of many of the concerns. He stated that he would not bring the bill if he thought it would affect the health of any individual in this state. The bill would not expand any laws, but merely ask the state to follow the Constitution, take another look, and "look before you leap." In testimony addressing the growth of MEPA, maybe it will need expanding, he said. He wanted everyone to know that the AFL-CIO supported the takings law in Arizona. Owning property is the cornerstone of any society, he said. He pointed out what was happening in the Russian states, particularly the Ukraine. These things happened because people did not have the opportunity to own property, to expand and improve upon it. He said he had been fortunate to have land from two generations of Norwegian immigrants. He said that 95 per cent of the people in agriculture ARE taking care of the land and are proud of it, as he was. He stated that he did not want the government to interfere with that. He said he had no ulterior motive to stop state regulations and allow the water and air to be desecrated. Any good-thinking individual would not do that. He said it was a good bill to prevent governmental interference and the taking of private property.

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HEARING ON HB 117

Opening Statement by Sponsor:

REPRESENTATIVE SHIELL ANDERSON, House District 25, Livingston, explained HB 117. If a person is accused of a criminal act, and

the person is unfit to stand trial because of his mental condition, that person does not stand trial. He goes to an institution at which point he can voluntarily undergo a treatment plan, which can include medication, to bring that person around to where he is able to understand the proceedings in that trial. If the person refuses to accept treatment, which he often is able to do, and may never stand and account for the crimes for which he is accused. This bill would allow an institution to develop a treatment plan whereby the person can either voluntarily undergo treatment, or if he refuses, the institution can apply to the court for an order allowing the institution to administer a treatment plan. The intent of the treatment is to bring the person to a mental state whereby he could stand trial.

Proponents' Testimony:

Dan Anderson, Administrator, Mental Health Division, Department of Corrections and Human Services, read from written testimony. **(EXHIBIT 7)**

Carl L. Keener, M.D., Medical Director, Montana State Hospital, spoke on behalf of the bill. He submitted written testimony and read from the same. **(EXHIBIT 8)**

Kelly Moorse, Executive Director, Mental Disabilities Board of Visitors, said that they review the patient care and treatment at state institutions as well as community Mental Health Centers. She spoke in favor of HB 117. She read from written testimony. **(EXHIBIT 9)**

Opponents' Testimony:

None.

Questions from the Committee:

SENATOR HALLIGAN asked **Dan Anderson** about the overriding justification for the order. Are the words used in another part of the statute? **Beta Lovitt, Department of Corrections and Human Services,** said that the language came from the Harper case, dealing with the Constitutional rights of someone unfit to proceed. She said it was a U.S. Supreme Court case. **CHAIRMAN CRIPPEN** said that the only real compelling argument for the bill was that the defendant may be able to avoid prosecution altogether. He asked the sponsor if there was a statutory defense for insanity? **REPRESENTATIVE ANDERSON** said he understood that was correct. **CHAIRMAN CRIPPEN** asked about a patient who did not realize what was going on when the crime was committed. Would that constitute a criminal defense at that point? **REPRESENTATIVE ANDERSON** said that the defense now is a lack of the requisite mental state. **CHAIRMAN CRIPPEN** asked if the person, even unwillingly, accepts treatment and becomes more aware of their surroundings, can the institution establish that they have a mental state to understand the charges against them

and proceed to trial? **REPRESENTATIVE ANDERSON** said that one of the safeguards of the bill is to make the person able to stand trial. If he was unable to appreciate the criminality of his conduct at the time of the offense, he can use that for a defense. He said there may be cases where the person was able to appreciate the criminality of the offense and went off medication purposely so he was unfit to stand trial and escape prosecution.

CHAIRMAN CRIPPEN asked if the individual underwent treatment forcibly by court order, and currently was aware of the criminality of the offense, would that person have any defense as to a mental state, or has that been removed? **REPRESENTATIVE ANDERSON** said he still has the defense of the lack of mental state at the time of the offense was committed. **CHAIRMAN CRIPPEN** asked how they would proceed to trial? **REPRESENTATIVE ANDERSON** said it would perhaps be made more difficult as a prosecutor. Even if the defendant were able to stand trial, he could still claim that at the time of the offense he was unable to appreciate the criminality, in which case he might be plead down to a lesser defense or even be exculpated from that offense. He said it does help in cases where the person simply avoids the prosecution because he doesn't stand trial. If he is able to put that off for 90 days, he basically escapes any penalty or punishment for that crime. He thought there were some medications given to people to effectively bring them into a state of understanding. If they go off of that, they lose track of what they're doing. **CHAIRMAN CRIPPEN** asked how the people came to the point to be declared unfit? **REPRESENTATIVE ANDERSON** said the defendant, the court, the defendant's counsel, or the prosecutor can raise the issue of the defendant's fitness to proceed prior to trial. **SENATOR REINY JABS** asked what would happen if the person goes to treatment and does not respond enough to stand trial. Did he stay in the hospital or was he released? **REPRESENTATIVE ANDERSON** said that he certainly did not go to trial. He would be in the institute's care for 90 days at which point they would institute a civil commitment and continue control.

Closing by Sponsor:

REPRESENTATIVE ANDERSON said that HB 117 would simply allow a safety net for people escaping prosecution because they claim they are unfit to stand trial. It is a good bill for the "get tough on crime" issue, he said. If the bill should pass the committee, **SENATOR VAN VALKENBURG** had agreed to carry the bill.

HEARING ON HB 501

Opening Statement by Sponsor:

REPRESENTATIVE SHIELL ANDERSON, House District 25, Livingston, presented HB 501 concerning actions taken by the State Lands Department. He introduced the bill on behalf of public schools and the state institutions which are the beneficiaries of Montana's trust lands. When Congress granted statehood to

Montana in 1889, it granted nearly 6 million acres of land to be sold or held in trust for common schools and other institutions including the Montana State University College of Agriculture (which gives us its status as a land grant university), the School for the Deaf and Blind, the School for the Mines at Butte, the University of Montana, the Normal School at Dillon, the Pine Hills School for Boys at Miles City, and the State Capitol Building's fund. Each individual tract of state land has a specific beneficiary to which all proceeds from that land accrue. In fact, it is purely coincidental that the proposed 7-Up Pete Joint Venture Project near Lincoln is located on land to which the School of Mines is the sole beneficiary. During the life of that mine, the School of Mines stands to receive about $60 million in mineral royalties. However, the vast majority of state land is held in trust for public schools. As **REPRESENTATIVE CURTISS** explained on the House floor on HB 263, the state and federal courts have consistently ruled that these land grants constitute a fiduciary trust. The legislature and the land board are responsible to ensure the interest of the beneficiary are protected. HB 501 is an attempt to safeguard the trust lands of Montana from frivolous lawsuits which cost the state money to defend and cost the beneficiaries, our schools, cold cash. The bill, quite simply, requires any party seeking to enjoin a revenue-producing activity on state trust lands, to post a security bond with the court in order to protect the trust against unjust financial loss. As examples, he offered two lawsuits which were dismissed by the judge. One that made the news was a case in which a resident sought to stop a timber sale on state land across from her ranch in the Tom Minor Basin. The lawsuit made the news because she had harvested three times as much timber from her own ranch ten years ago when the Department of State Lands was proposing to harvest across the road. The Seeley Lake School District intervened in that lawsuit attempting to force the court to recognize the state's trust responsibility. **Judge Honzel** in Helena subsequently dismissed the suit. No significant loss to the trust was incurred, but if the judge had enjoined the harvest, there certainly would have been. The second lawsuit was filed by a local sportsmens' association against a Department of State Lands grazing allotment. They alleged the domestic sheep could pass disease to wild Bighorn Sheep and they said the state had an obligation to protect wildlife. The judge dismissed the case but it has now been appealed to the Supreme Court by the National Wildlife Federation. They now argue that the state's responsibility to protect wildlife supersedes its obligation to generate revenue for beneficiaries of trust lands. In both cases, the Department of State Lands is spending its valuable resources defending its actions. The trust beneficiaries could have potentially lost income if the activity were unjustly enjoined by the court. If a group files a lawsuit to enjoin all Department of State Lands' grazing allotments for failure to comply with the Montana Environmental Policy Act, trust beneficiaries would lose about $4 million if the judge granted a one-year injunction. Assuming the court later would rule in favor of the state and says the

suit was brought without merit, the schools are out $4 million, hundreds of ranching operations are displaced and an environmental group walks away with nothing lost but legal fees and a bruised ego. The State of Idaho has a similar statute in place but it deals only with timber sales. Environmental groups have verbally challenged its Constitutionality but it has stood for two years. HB 501 ensures that beneficiaries of trust lands are protected from unjustified litigation. All parties to a lawsuit will have something more than philosophy at stake. Some of the organizations that will likely oppose this bill, claiming poverty, have more attorneys at their disposal than the Department of State Lands has on staff; and their ability to file lawsuits and pay attorneys to stop timber sales, mining permits and grazing leases seems almost limitless. Managing these trust lands is a fiduciary responsibility and the legislature has an obligation to protect the interest of the beneficiaries. He asked for a Do Pass recommendation. He further added that the court, under the bonding statute, 27-19-306, is allowed in its discretion, to waive the undertaking of a bond in the interest of justice. Therefore, if a person could convince the court that justice would NOT prevail if they were required to post a bond, the court has that in its discretion. That is the safety gate of the bill, he said. He submitted a letter from the **Seeley Lake Elementary School (EXHIBIT 10).**

Proponents' Testimony:

Cary Hegreberg, Executive Vice President, Montana Wood Products Association, expressed his organizations' support of HB 501. He read from written testimony. **(EXHIBIT 11)** He also submitted a legal ruling from a Chief Administrative Law Judge in Washington D.C., involving a timber sale on the Flathead Indian Reservation. **(EXHIBIT 12)**

Lorna Frank, Montana Farm Bureau, supported the passage of HB 501. Their organization felt it was a good bill because it would increase the funds going to the school trust fund. Also, some of the groups opposing the bill have already filed lawsuits causing delays, expenses, and expenses to the government. They felt it was only fair that these groups filing lawsuits should have to post a bond so that the money and the loss of income to the trust lands can be compensated in a different way. The groups that file the suits don't have a great deal of money invested in the interest of the state lands or the processes and she said this would be a way for them to have a vested interest in the lands.

John Bloomquist represented the Montana Stockgrowers Association. He echoed the comments of the sponsor as to the intent and the effect of the measure. He said it would cut both ways at times, but he believed that the bonding requirement would take some of the actions against the timber activities or the grazing activities and make the plaintiffs post at least a requirement that makes them think about bringing a lawsuit. He did not think the bonding requirement would be so great that it would prohibit

anyone from any access to the courts. They believe the intent and the effect would be positive for school trust lands.

Chuck Rose, Manager, Regulatory Affairs, 7-Up Pete Joint Venture, stated their concurrence with the bill's intent. He urged the passage of the legislation.

Opponents' Testimony:

Jim Jensen, Executive Director, Montana Environmental Center, spoke in opposition to HB 501. He pointed out a serious flaw in the bill and proposed an amendment. He said the bill presumed that any challenge to a land board decision would result in harm to the school trust when the opposite is just as likely to occur given the passage of HB 201. That bill compels the land board to sell no less than 45 million board feet of timber each year regardless of market conditions. If the market is in the dumps, they will have to accept fire sale prices, and taxpayers will likely challenge the decision because the trust will lose income. The land board needs to have the flexibility to manage the resource for the best benefit for both present and future beneficiaries. He urged an amendment to exempt from this requirement challenges which are intended to benefit the trust by increasing the revenue overall in the trust. It would prevent the small school districts and taxpayers in the local jurisdictions from organizing to prevent the loss. He asked the committee to examine a Supreme Court decision, Merchants' Association vs. Conger, 185 Montana 5-22. This was decided in December of 1979. The salient line from the decision, which dealt with a bond imposed by the legislature on appeals from justice court to district court, "while the undertaking may prevent some frivolous appeals, it also prevents meritorious appeals by the poor and does not prevent frivolous appeals by the rich." On that basis, the statute was held to be unconstitutional. He said they should be very careful with the bill because it was not as shallow or superficial as it was being presented.

Steve Kelly opposed HB 501 **on behalf of Friends of the Wild Swan,** which, he said, was a local Swan Valley conservation organization. Some of the reference earlier to their challenge to a BIA timber sale proposal was not as represented, and was not a suit to try to take money from the beneficiary of that trust, the tribe. It was simply an attempt to point out some deficiencies in a environ-mental assessment that failed to estimate the environmental damage to Flathead Lake. He said the bond obstacle has prevented them from pursuing the issue of protecting the Lake any further. He thought that the discretion given to the courts had been exercised in a fair manner. He maintained that the incident reported earlier of the frivolous timber sale case in the Yellowstone ecosystem had not resulted in a loss. **Mr. Kelly** said there was no real example of a problem. He agreed that some instructions could be given to the judge on school trusts, but to tie the judge's hands might obstruct the

three branches of government. He said their group was interested in full compensation to the school trusts, but were trying to prevent environmental degradation which would cost the taxpayers of Montana. He said they would be better off to try to reinforce the authority of the courts than to overreact to this measure.

Deborah Smith, representing the Montana Chapter of the Sierra Club, opposed HB 501. The club was opposed to any measure that would require a written injunction from a citizens' group or any citizen that is trying to protect the public trust when they make the serious and expensive decision to go to court already. She said there were adequate mechanisms to fight against abuses of the judicial system now through attorney sanctions and malicious prosecution actions. What this bill would do, is require a bond that, in no case that she knew of, no one could post.

Questions From Committee Members and Responses:

SENATOR HOLDEN questioned **Jim Richard of the Montana Wildlife Federation,** saying he understood that our forefathers did leave land to the schools to generate income for the school system. **REPRESENTATIVE ANDERSON** said that some environmental groups claim that protecting wildlife was greater than generating income on these lands, quoting some lawsuit the organization brought. He wanted to know if his was one of those groups? **Mr. Richard** said protecting wildlife has a greater priority over generating money for the trust. The two objectives are not mutually exclusive, he said. There are other options. He said the case dealt with disease passed from domestic sheep to Bighorn sheep. They felt another option could have been considered. **SENATOR HOLDEN** asked how the bill would deal with that case. **Mr. Richard** said they would be required to post a bond in order to proceed with a lawsuit. He said it would have made a difference in their decision to bring the lawsuit. He said many times their disputes were resolved as a result of administration action with the departments involved. **SENATOR DOHERTY** asked **Mr. Richard** if their organization had sought an injunction in that case. **Mr. Richard** said no. He asked **REPRESENTATIVE ANDERSON** about the suggestion that an administrative law hearing regarding Indian Trust Lands, was some similar to state trust lands. He asked if he knew of any legal cases that tied fiduciary responsibility that the U.S. owed Indian tribes to the same kind of fiduciary responsibilities that the Land Board owed state school lands. **REPRESENTATIVE ANDERSON** responded as far as a binding case, no, but he thought the philosophy behind it and the fiduciary relationship allowed the Indian case in the Swan to have some very good factual basis for the precedent they were trying to set in the hearing. **SENATOR DOHERTY** said he was glad the sponsor had brought up 27-19-306 and he wanted to make sure he understood this later-passed specific bill. He asked if it was the sponsor's intent that the petitioner could make a claim in the interest of justice, that the court (even though this was a later-passed and very specific bill that would be codified in the state land section), will understand that they can waive that undertaking if they want.

Was that his intent? **REPRESENTATIVE ANDERSON** said that's the way he understood it. He said that the bonding statute mentioned, it appeared that these people should be posting a bond anyway prior to receiving an injunction, so he thought the bill would clarify it. **SENATOR DOHERTY** said he knew many people concerned with the 7-up Pete Venture, many living in the Lincoln area for a long time. Would the passage of this bill prevent those folks from bringing suit to prevent their property value from plummeting? **REPRESENTATIVE ANDERSON** said that was not the intent of the bill. He said the point of the measure was for a person who wished to challenge the way they allowed for mining, grazing or logging. The correct approach would be through adjustment to the Montana Environmental Policy Act or some other means. If the Department of State Lands is acting outside the scope of what they are allowed under MEPA and other rules, they would not be out that money. They would get it back should they be successful in getting an injunction in the first place. The court could also look at the situation and if it determined the court was acting out its authority and the person is unable to post a bond, they might be represented by individuals acting through one of the fore-mentioned organizations. **SENATOR DOHERTY** asked if the person did not challenge with legal basis, are there currently available sanctions against the attorneys and the individuals who bring those kinds of frivolous lawsuits? **SENATOR ANDERSON** replied that there were sanctions in the cases that were determined to be blatantly frivolous, but at the point of the injunction, it may not be known.

Closing by Sponsor:

REPRESENTATIVE ANDERSON said that the bond posted by the person would be returned if he is successful in his legal challenge. **Mr. Jensen** spoke about declining timber markets in another bill that requires a certain amount of timber to be harvested. He thought that the bill was looked at closely before the amount was arrived at, also they could be harvesting in an up-cycle as well as a down-cycle. He stated that the proper approach if they do not like the guidelines of the Department of State Lands in providing money for the trust, is to address it through the guidelines that the Department must follow rather than bringing suits which cost trust money and State Lands' money to fend off the suits. **Ms. Smith** from the **Sierra Club** referred to the exclusion of citizens when they think the environment is being damaged, he said. The **Sierra Club** has a significant amount of resources and has brought suits and can bring suits. He said they made $950,000 on a suit that they brought on the Spotted Owl issue that was a reimbursement of their attorney's fees billed at $200 per hour. He maintained there were many safeguards and many group that bring these suits on behalf of individuals, not always with merit. He said that the was intention of this bill, to see that the suits brought had merit. He said it was the #1 responsibility of the land board to generate revenue for the trust for the schools and universities that benefit from trust lands. There are also safeguards built into MEPA that protect

our environment. He said it was not their intention to circumvent in any way those environmental safeguards.

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EXECUTIVE ACTION ON HB 117

Motion: **SENATOR HALLIGAN MOVED THAT HB 117 BE CONCURRED IN.**

Discussion: **CHAIRMAN CRIPPEN** said his only concern was to make sure it did not preclude an individual from asserting a defense of a proper mental state at the time of the commission of the crime. He understood that it did not.

Vote: The **MOTION PASSED UNANIMOUSLY** on an oral vote.

Adjournment

Adjournment: **CHAIRMAN CRIPPEN** adjourned the hearing at 11:30 a.m.

BRUCE D. CRIPPEN, Chairman

JUDY FELAND, Secretary

BDC/jf

MONTANA SENATE
1995 LEGISLATURE
JUDICIARY COMMITTEE

ROLL CALL DATE 3-9-95

NAME	PRESENT	ABSENT	EXCUSED
BRUCE CRIPPEN, CHAIRMAN	✓		
LARRY BAER	✓		
SUE BARTLETT	✓		
AL BISHOP, VICE CHAIRMAN	✓		
STEVE DOHERTY	✓		
SHARON ESTRADA	✓		
LORENTS GROSFIELD			✓
MIKE HALLIGAN	✓		
RIC HOLDEN	✓		
REINY JABS	✓		
LINDA NELSON	✓		

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SENATE STANDING COMMITTEE REPORT

March 9, 1995

MR. PRESIDENT:

We, your committee on Judiciary having had under consideration HB 117 (third reading copy -- blue), respectfully report that HB 117 be concurred in.

Signed: _____
Senator Bruce Crippen, Chair

Amd. Coord.
Sec. of Senate

_____
Senator Carrying Bill

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Myths abound in the realm of property rights legislation

Hertha Lund
Guest Columnist

A recent news article on property rights legislation (Economy page, Jan. 15) in the Chronicle exemplified the current misunderstanding and myth propagation surrounding what has become a national issue — property rights. In this short article I will attempt to provide a basic understanding of the takings law and to bust a few of the myths that attract news coverage.

The Fifth Amendment states, "No person shall be ... deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation."

The Supreme Court has interpreted the takings clause — Fifth Amendment — to establish two scenarios in which it is easy to determine whether a takings has occurred. The first scenario is when the government physically invades the property. The second scenario is when a government regulation denies all economically beneficial use of the property. The next question to be answered by the court is whether the Constitution requires compensation for a partial takings and/or how do you measure a partial takings — is a government taking of 10 of 20 acres a 50 percent taking of 20 acres or a 100 percent taking of 10 acres?

This third scenario has not been decided and it is the topic of much legal scholarship. Suffice it to say that this explanation is a current snapshot of an ongoing legal debate.

Now that we have the constitutional platform established, what is all of this hullabaloo about takings legislation? Since the late 1980s, many Americans have found that they cannot farm, ranch, or build homes on portions of their land. Why? They are blocked by state and federal regulations designed to protect endangered species, reduce conversion of wetlands, preserve historic districts or accomplish any number of other social goals.

The effect of many current regulations has been described as the "orange rind theory" by one leading property rights professor, Richard Epstein of the University of Chicago. He says that such regulations take all of the juice, pulp and seed from the orange (the property) leaving the property owner with the rind (the privilege to pay taxes). A growing number of people have joined together to oppose this government encroachment.

In response to what has been deemed the "property rights movement" many myths have been propagated. Instead of debating the issue squarely, it seems that the environmental lobbyists and others have been more interested in hyperbole and public relations. These tactics have clouded the debate for the average citizen.

In reality, the 13 property rights bills that have passed and the other 100 bills introduced in 44 states are not radical measures. Two types of bills are being offered. One, the "look before you leap" type of bill, would require government agencies to do an assessment of possible takings implications before an action is taken. This bill is analogous to an individual determining a budget or realizing that there are other means to attain the same goal.

This "look before you leap" type of bill would protect the taxpayers' pocket books while allowing government to achieve important government objectives. Montana House Majority Leader Larry Grinde's bill is this type of bill. It would not increase or decrease current constitutional protections. It simply calls for government to assess takings implications before an action is taken that could violate the Constitution.

The other type of bill being offered in other states would legislatively determine the definition of a partial takings. This type of bill is not being offered in Montana at the current time.

Contrary to some claims, property rights laws will not wreak havoc on environmental regulations. Most environmental regulations reflect the police power of the government. The regulations that endanger property rights by going beyond constitutional boundaries are those that require certain property owners to disproportionately shoulder burdens that properly belong to society as a whole.

In the most recent takings case, Chief Justice William Rehnquist, writing for the court, stated, "One of the principal purposes of the Takings Clause is to bar government from forcing some people alone to bear public burdens, which in all fairness and justice, should be borne by the public as a whole." He also stated that a desire to improve the public condition does not justify circumventing the "constitutional way" of paying for what government wants.

This basic quest for justice has implied a populist "property rights movement." It is not an attempt to gut environmental laws or an attempt to unleash the private sector to do what they want. In fact, Grinde's bill has no ability to do either dastardly deed because it simply asks government to do an assessment based on constitutional requirements.

Individual citizens often cannot afford to go all the way to the Supreme Court. Grinde's bill would require government agencies to do an assessment before there was a Lucas type situation. In Lucas v. South Carolina, David Lucas spent hundreds of thousands of dollars, as did the state of South Carolina, in a takings challenge. After the case was decided and the dust settled, the state paid Lucas around $1.5 million. Lucas barely broke even after expenses and the state subsequently sold the property for development. Grinde's bill would provide a mechanism to avoid costly litigation.

Numerous other myths arose in the Chronicle's story; however, due to space constraints I will only deal with one other myth — that zoning will be inhibited by property rights legislation. Property rights legislation is no safe haven for those who oppose zoning. Current takings jurisprudence has not found normal local zoning ordinances to violate the Fifth Amendment, so long as the ordinances equally affect the citizens. Therefore, property rights legislation such as Grinde's bill would have no effect on zoning. Those who oppose zoning have their remedy in local participation, not in property rights legislation.

In sum, myths abound in the realm of property rights legislation. Good policy is made based on informed public debate. In reality, property rights legislation is about citizens asking for efficient government upholding constitutional guarantees.

Hertha L. Lund is a third-year law student at the University of Montana. She wrote a booklet on property rights legislation while a PERC fellow in Bozeman last summer and helped write House Majority Leader Larry Grinde's bill on property rights.

REGULATORY TAKINGS ISSUES IN LAND USE DECISIONS

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I. OVERVIEW

A. Condemnation - The Power of Eminent Domain.

1. Eminent domain is the right to take private property for public use. Condemnation is the process by which private property is taken for public use.

2. Both the U.S. Constitution (5th Amendment) and state constitutions guarantee the right of just compensation to one whose land is taken for public use.

3. The power to condemn must be expressed by statute, and must clearly appear by express grant or necessary implication.

4. While a physical taking of private property usually exists, this is not necessary in order to entitle the landowner to just compensation. The landowner must show that some right or interest pertaining to his land not shared with the public generally has been destroyed or impaired by the government.

5. The court must determine that a public purpose is served by the proposed condemnation. Construction of public roads, airports, and parks, for example, meet this requirement.

6. Procedures for condemnation are established by statute and must be strictly followed.

B. Inverse Condemnation.

1. Where private property is taken by the government accidentally or without deference to ownership, i.e., without first following the procedures of the eminent domain statutes, an inverse condemnation occurs.

2. The landowner initiates suit for the value of the property taken and any other damages sustained.

C. The Power to Regulate Land Use.

1. Counties are subdivisions of state government and have only those powers expressly granted by statute or impliedly necessary to carry out express powers.

2. Counties act quasi-legislatively when they adopt broad policies or rules of general applicability. Counties act quasi-

judicially when they act on specific applications of facts to general criteria, usually after public notice and a hearing.

3. The police power, which is the legal basis for zoning regulations, must be balanced with the legitimate use of private property and other constitutional guarantees. This implicates not only the 5th Amendment takings clause but other constitutional protections such as the freedom of speech and the freedom of religion.

4. Land use regulations must be within the limitations of enabling legislation, must provide adequate constraints on the exercise of discretion, and must include established standards to provide notice to affected persons and to provide meaningful judicial review.

5. Procedural due process requires a) fundamental fairness; b) notice and opportunity to be heard; and c) that the local government adhere to its own rules and the applicable statutes.

6. Substantive due process requires a rational basis for the decision, and that the decision be made within the constraints of applicable constitutional and statutory provisions.

7. Equal protection requires that those similarly situated be treated equally. While reasonable distinctions or

classifications can be made, they must serve a legitimate purpose. Where "fundamental rights" are at issue, differing treatment will be more closely scrutinized.

8. Quasi-legislative action is reviewable in an action for a declaratory judgment. Quasi-judicial action is reviewable in an action for relief in the nature of certiorari. Such actions may be overturned where the government has exceeded its jurisdiction or abused its discretion.

D. Regulatory Takings.

1. A land use regulation or site-specific determination that "goes too far" in its impact on property rights constitutes a regulatory taking. This unsatisfactory standard, first stated by the U.S. Supreme Court in 1922, requires case-by-case application. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). A review of case law demonstrates the difficulty of determining in advance what "too far" means.

2. The power to condemn is not necessary for a regulatory taking to occur. Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 911 F.2d 1331 (9th Cir. 1990).

3. In an effort to refine the law of regulatory takings the U.S. Supreme Court has adopted a two-part test:

a. Legitimacy Test: A land use determination must "substantially advance" a "legitimate governmental purpose." AND

b. Economic Impact Test: A land use regulation or determination cannot deprive the landowner of "all reasonable economic use" of the property. Agins v. Tiburon, 447 U.S. 255 (1980). Factors to be considered are:

--- economic impact;

--- character of government action; and

--- interference with "reasonable investment-backed expectations."

Penn Central Transportation Co. v. New York, 438 U.S. 104 (1978).

4. Nuisance exception (or background principles of state property and nuisance law). A land use determination otherwise a taking may be exempt from takings analysis where necessary to protect the public health and safety: a landowner has no right to use land in a way that will harm others. Mugler v. Kansas, 123 U.S. 623 (1887).

5. A total taking, i.e., the landowner is deprived of all reasonable economic use, is a taking per se, unless principles of state property or nuisance law dictate otherwise. Lucas v. South Carolina Coastal Council, 505 U.S. _____, 112 S.Ct. 2886, 120 L.Ed 2nd 798 (1992).

6. Ripeness requirement. The courts will not consider a regulatory takings challenge to a land use determination until the landowner has a) obtained a final determination of uses allowed; and b) sought and been denied just compensation pursuant to state inverse condemnation procedures. "Facial" attacks on regulations usually fail.

7. The remedy for a regulatory taking may be invalidation and/or damages for the period of time the unconstitutional regulation is in effect. First English Evangelical Lutheran Church v. County of Los Angeles, 428 U.S. 304 (1987). The landowner must show causation and actual damages, usually measured as the difference in fair market value with and without the unconstitutional regulation.

E. Development Exactions and Impact Fees.

1. Land development creates the need for infrastructure. Many local governments require new development to "pay its own way" in the form of exactions (land dedications, capital facilities contributions) or development impact fees (monetary contributions used to construct facilities).

2. Development exactions and impact fees generally are authorized as conditions of approval of new development.

3. Counties must adopt sufficient standards and requirements in the form of regulations that are detailed enough to provide all users and potential users of land with notice of what is equitably required for development approval. Ad hoc conditions will not suffice.

4. The requirements of the "legitimacy test" for a regulatory taking must be carefully considered, i.e., there must be a reasonable nexus between the condition and its legitimate purpose. Nollan v. California Coastal Commission, 483 U.S. 825 (1987). Generally the conditions of approval must be such that they are necessary to mitigate the impacts of the project, alone or cumulatively, on identifiable public resources ("remoteness test"). The Supreme Court has said that if approval could be denied without the condition, the condition will withstand constitutional challenge.

5. Where the challenged regulation constitutes or authorizes a permanent, physical occupation of property, heightened scrutiny will be applied. This will occur, for example, where the requirement standing alone would constitute a taking.

6. Documentation of the need for exactions and impact fees must be undertaken where they are intended to fund or provide for off-site facilities, the need for which is attributable to the

cumulative effects of development projects. This should include projected growth (not correcting existing deficiencies), etc.

7. In addition to the Nollan "essential nexus" requirement, the U. S. Supreme Court also requires that there must be "rough proportionality" between permit conditions and needs erected by the development. Dolan v. City of Tigard, 114 S.Ct. 2309 (1994).

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II. U. S. SUPREME COURT CASES

A. Significant Earlier Cases.

1. Mugler v. Kansas, 123 U.S. 623, 31 L.Ed. 205 (1887). No one has the right to use property in a way which harms others; first "nuisance exception" case.

2. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922). A regulation which "goes too far" may constitute a taking; first regulatory taking case.

3. Armstrong v. U.S., 364 U.S. 40, 80 S.Ct. 1563, 4 L.Ed. 2d 1554 (1960). The regulation of property becomes a taking when it imposes on the landowner public burdens which in fairness and justice should be borne by the public as a whole.

4. Penn Central Transportation Co. v. New York, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed. 641 (1978). Factors to be considered in determining if taking has occurred: character of government action; impact on landowner; interference with reasonable investment-backed expectations.

5. Agins v. Tiburon, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed. 2d 106 (1980). Two-prong takings test articulated; final challenge to zoning not ripe where development proposal not submitted.

6. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed. 868 (1982). Physical invasion of property always constitutes a taking.

7. Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed. 126 (1985). Takings cases must be ripe for review: decision of government must be final; property owner must seek variances, and if denied, must pursue state inverse condemnation remedies.

8. MacDonald, Sommer & Frates v. Yolo County, 106 S.Ct. 2561, 91 L.Ed. 2d 285 (1986). Final government decision as to how property can be used required for takings claims to be ripe means at least one meaningful application, and may require multiple applications.

9. Hodel v. Irving, 481 U.S. 704 (1987). Some attributes of property ownership (i.e., the right to pass property to heirs) are so fundamental that their destruction constitutes a taking, even if economically viable use remains.

B. When Does A Regulatory Taking Occur? The impact of Keystone Bituminous Coal Assn. v. De Benedictis, 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed. 2d 472 (1987).

1. The majority opinion cites the takings test of Agins v. Tiburon, 447 U.S. 255 (1980), and Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978): "Land use regulation can effect a taking if it does not substantially advance legitimate state interests, ...or denies an owner economically viable use of his land."

2. No taking was found because the anti-subsidence statute at issue in the case was found to arrest a significant threat to common welfare, and because there was no record to support a finding that the statute makes it impossible for petitioners to profitably engage in their coal mining business or that there has been undue interference with their investment-backed expectations.

3. On almost identical facts, in the seminal takings case, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), a taking was found to occur based on findings that the anti-subsidence statute served primarily private interests, and that the statute made it commercially impractical to mine certain coal. (Compare Lucas on harm/benefit distinction).

4. The Keystone court gave great deference to legislative determination that statute served important public interest. The Pennsylvania Coal court paid no such deference and found

only private interests served. (Compare Lucas on presumption of constitutionality and deference to legislature).

5. In Keystone, the fact that up to 27 million tons of coal was required by statute to be left in place did not result in finding that the landowner was denied economically viable use. This was based on application of "bundle of rights" theory of property ownership which focused on value of what was left, not value of what was taken. In Pennsylvania Coal, the court focused on what was taken and did not apply "bundle of rights" analysis; it found taking because of value of specific coal which could not be mined. (This is now referred to as the "relevant parcel" issue).

6. Perhaps these two cases can only be reconciled by this statement in Justice Stevens' majority opinion in Keystone: "The Subsidence Act is a prime example that circumstances may so change in time...as to clothe with such a [public] interest what at other times...would be a matter of purely private concern."

7. Takings law continues to be defined on a case-by-case basis, and the court gave no greater guidance for future cases.

8. Application of "bundle of rights" theory of property law tends to minimize the significance of what is "taken" in a particular case, it also means that takings analysis becomes even more subjective: if 27 million tons of coal was all plaintiff owned in Keystone, taking would probably have been found to occur, and thus relative economic posture of plaintiff is at issue.

9. It is unclear how much deference courts will pay to legislative determinations regarding public welfare. (Compare Keystone with Pennsylvania Coal and Lucas).

10. The Keystone case recognizes distinction between physical invasion of property by government and regulatory taking. Pennsylvania Coal. This same confusion is perpetuated if one compares Keystone and the First English case on this issue.

C. What Is The Remedy For An Unconstitutional Taking? The impact of First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed. 2d 250 (1987).

1. Issue as framed by court is whether state can limit remedy for regulatory taking to nonmonetary relief for period in which the regulation is in effect. Court answers this question in the negative without deciding if a taking has occurred.

2. Majority opinion by C. J. Rehnquist, who authored dissent in Keystone, states: "We...have no occasion to decide whether the ordinance at issue actually denied appellant all use of its property or whether the county might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as a part of the State's authority to enact safety regulations (citations omitted)." Is this test for a taking different from the Keystone test? Compare Lucas.

3. Majority opinion states that 5th Amendment is designed to assure compensation in the event an otherwise proper interference with property rights, i.e., one for public benefit, amounts to taking. Dissent by J. Stevens, who authored majority opinion in Keystone, implies that there is no taking unless ordinance is invalid.

4. Court takes "substantial guidance" from cases where government has only temporarily exercised its right to physically appropriate private property. This is consistent with Rehnquist's dissent in Keystone, where he recognized no analytical distinction between regulatory taking and physical invasion cases. As a result the majority opinions in the two cases are inconsistent. The physical invasion cases focus only on value of owner's loss, and do not apply the "diminution of value" test applied in Keystone and as

discussed in Stevens' dissent in First English. Stevens notes that a regulation permanently reducing economic value by a fraction is not a taking, but a temporary restriction which postpones development for a fraction of the useful life of the development is a taking under First English, because extent of interference in not considered.

5. Damages are now available for regulatory taking during periods in which the unconstitutional regulation is in effect.

6. Upon takings determination or invalidation government must decide whether to withdraw the offending regulation, amend it, or exercise eminent domain powers.

7. Offending regulation at issue arguably denied plaintiff all use of property. It is unclear if damages are available for all interim takings or only those where regulation temporarily denies all use of property.

8. Ripeness requirement of Hamilton Bank (1985) and MacDonald (1986) and balancing test of Keystone will continue to apply and pose substantial burdens on plaintiffs to prove existence of a taking. Note that Stevens' dissent states that type of regulatory program at issue in First English cannot constitute a taking. Upon remand, the state courts agreed.

9. Local governments must still guess at where line is drawn establishing regulatory taking, as to both justification for the regulation and the extent of deprivation inflicted on property owner. If a taking does not occur unless landowner is denied all reasonable use, the occasions of risk to government treasury will be limited. But governments will of necessity be more cautious in those cases where this argument is made, given the existence of a compensation remedy.

D. Development Exactions: The impact of Nollan v. California Coastal Commission, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed. 2d 677 (1987).

1. Court reaffirms test for regulatory taking cited in Keystone case.

2. Court holds that condition in development permit requiring dedication of beach access easement fails to substantially advance legitimate state interest and therefore constitutes taking.

3. Only invalidation of the requirement was sought; no damages claim in inverse condemnation.

4. Court is willing to assume that governmental purpose involved was legitimate, but gave close scrutiny to whether such interests were "substantially advanced" by the condition.

5. Court holds that test for taking is more stringent where, as here, actual conveyance of property right (physical invasion) is the condition.

6. Court does not address issue of degree to which landowner was denied economically viable use, and implies that no balancing is necessary where legitimate state interest is not advanced by the condition.

7. Court recognizes distinction between physical invasion cases, regulatory takings, and tests for each. This is demonstrated by enunciation of more stringent nexus requirement where physical taking is involved; requirement for access not attached to a development permit might constitute taking where same requirement in permit would not constitute taking if requirements of balancing test are met.

8. Where need for exaction is generated by the development, conditions are probably acceptable, especially if actual conveyance of property right is not involved. Therefore this case does not change rules, except perhaps that a more

stringent test will be applied where the conveyance of a property right is involved.

9. The "nexus" required in the state and federal cases cited with approval by J. Scalia varies widely, and therefore the future application of the nexus requirement is not clear. Note that Call v. West Jordan, 614 P.2d 1257 (Utah 1980) is cited with approval.

10. Exactions, even concessions of property rights, will be upheld if valid purpose is demonstrated and if requirement advances that purpose.

E. Total Takings And The Nuisance Exception: The impact of Lucas v. South Carolina Coastal Council, 505 U.S. , 112 S.Ct. 2886 (1992).

F. U.S. Supreme Court Decision.

1. A taking occurs where governmental action denies all economically viable use, unless the governmental action is exempt from a takings challenge pursuant to state nuisance or property law.

2. The courts should not blindly accept legislative findings that development is inconsistent with the public

interest, and the State must identify "background principles of nuisance and property law" that prohibit the intended use.

3. The case was remanded for the determination of two issues:

a. Was the plaintiff denied all economically viable use?

b. If so, does state nuisance or property law justify the denial of all economically viable use?

G. What Lucas May Have Done For Landowners.

1. The scope of the nuisance exception is limited by reference to existing principles of state nuisance and property law.

2. Government must justify to the courts any conclusion that denial of all economically viable use is not a taking, and conclusory statements are not enough. The governmental justification must be "objectively reasonable."

3. Total wipeouts are subject to heightened judicial scrutiny in order to justify governmental action that denies all economically viable use.

4. The court left open the possibility that a denial of less than all economically viable use may be a taking, particularly if the deprivation is contrary to the landowners' reasonable expectations.

H. What Lucas May Have Done For Local Governments.

1. Lucas holds that a taking occurs in the exceptional situation, i.e., where government action denies all economically viable use, unless the action creating the total wipeout comports with state law principles of property or nuisance law. (Slip Op. at 21).

2. Lucas re-affirms the two-part regulatory taking test of Agins v. Tiburon, 447 U.S. 255 (1980), and does not establish a more stringent test for regulatory takings. (Slip Op. at 11).

3. Most contested governmental actions result in reductions in value of property not complete wipeouts, and such actions are unaffected by Lucas. In fact, Lucas re-affirms that even an action resulting in a 95% reduction in value may not be a taking. (Slip Op. at 13-14 n.8). Local governments can continue to defend against takings claims by making sure some value remains in the property.

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4. The court rejected Lucas' argument that he was entitled to compensation based solely on the denial of all economically viable use. The nuisance exception is preserved by Lucas. (Slip Op. at 26).

5. In grounding the nuisance exception on background principles of a state's property and nuisance law, which are continuously evolving, and by recognizing that "changed circumstances or new knowledge may make what was previously permissible no longer so," the nuisance exception remains a fluid, and not a fixed, concept. (Slip Op. at 25).

6. While the court held that it would not blindly accept legislative findings that certain types of development are nuisances (Slip Op. at 26), legislative enactments frequently define state nuisance law, and thus the legislative role is not foreclosed.

7. Similarly, State property law is defined by state legislatures and state courts. Some states have denied wetlands takings claims on the basis that state property law limits a landowner's right to use property in a way in which it is unsuited in its natural state. Accordingly, the court may not have limited the scope of the nuisance exception at all.

8. The Supreme Court did not accept the argument that harm prevention is the limit of the noncompensable police power. In fact, the court cited with approval the holding in Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978), that a compensation remedy need not accompany a land use restriction where a State "reasonably conclude(s) that 'the public health, safety, morals, or general welfare' would be promoted..." (Slip Op. at 17).

9. The court did not lay the harm/benefit distinction to rest. The "total taking inquiry" required by the court includes consideration of 1) "the degree of harm to public lands and resources, or adjacent private property,...", 2) "the social value of the claimant's activities and their suitability to the locality in question,....", and 3) the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners) alike..." (Slip Op. at 25).

10. The court did not address one of the key issues in takings cases, i.e., the "property interest" against which the loss of value is to be measured. (Slip Op. at 11, n.7). In Penn Central and Keystone Bituminous Coal Assn. v. De Benedictis, 480 U.S. 470 (1987), the court looked to the "parcel as a whole." Some courts have not. See, e.g.,

Florida Rock Industries, Inc. v. U.S., 21 Cl.Ct. 161 (1990); Loveladies Harbor, Inc. v. U.S., 21 Cl.Ct. 153 (1990).

11. The court failed to resolve the confusion surrounding the relationship between the Agins economic impact test and the Penn Central factors. (Slip Op. at 13-14, n.8). Thus, while stating that less than total wipeouts may constitute takings, the court preserves consideration of the subjective Penn Central factors, including the "distinct investment-backed expectations" criterion, which is frequently cited in support of the denial of takings claims.

12. Lucas won only a remand. (Slip Op. at 26). The court did not eliminate the possibility that environmental regulation may justify the total wipeout. Some commentators argue that the examples used by the court of proposed uses that could justify a wipeout imply validation of such regulations. (Slip Op. at 24). On remand the court found for the plaintiff without much discussion of the issues.

13. The court accepted as an assumption that no economic-use remained on the property. (Slip Op. at 14, n.9). The South Carolina courts could have determined, on remand, but did not, that Lucas has not been denied all economically viable use. As stated by Justice Blackmun in dissent, "State courts frequently have recognized that land has economic value where

the only residual economic uses are recreation and camping." (Slip Op. at 9). Blackmun referred to other attributes that might establish value.

I. **"Rough Proportionality" under Dolan v. Tigard, 114 S.Ct. 2309 1994).**

1. The Court adopted a two-pronged analysis of the development exactions (land dedications) at issue; first, whether the Nollan "essential nexus" exists between the legitimate state interest and the permit conditions, i.e., easements for bikeways and floodways.

2. Finding the first requirement met, the Court adopted a "rough proportionality" requirement to further test the validity of the exactions. The purpose of this requirement is to determine whether the degree of the exactions imposed bears an appropriate relationship to the impact of the proposed development.

3. Even though the City had made findings regarding the impact of the development on increased stormwater flows and the generation of additional vehicular traffic, which would be offset by the exactions, the court found that a taking occurred under its new "rough proportionality" test.

4. No precise mathematical calculation is required, but the government must make an individualized determination that the

required dedication is related in both nature and extent to the impact of the proposed development.

5. The court placed the burden of proof upon the City to justify the required dedications. This may be the most significant change signalled by this case.

6. The court expressed concern for the requirement of public dedications as opposed to use restrictions, and implied that the least intrusive method of achieving the desired result should be utilized. This case highlights the need to emphasize regulation over dedication.

7. The use of impact fees over dedications is also implicated by Dolan for another reason. It is often impossible to "quantify" the proportionality of land dedications. Impact fees are more readily quantifiable in terms of both identifying the total funds needed for a particular purpose and apportioning the need to new development. Is it possible to meet the Dolan test for exactions which are location-based?

8. Implementing Dolan may be expensive. It requires studies to justify exactions and impact fees and more sophisticated planning.

9. The court cites with disapproval Billings Properties, Inc. v. Yellowstone County, 394 P.2d 182 (Mont. 1964), as articulating a standard that is too lax.

10. What is the impact of Dolan on conditions which do not involve exactions or impact fee requirements? The stated basis for the ruling is the law of "unconstitutional conditions." What happens, for example, where an ad hoc condition is designed to reduce the impact of a development on adjacent property, based on site specific considerations not reflected in regulatory criteria?

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

March 9, 1995

Good morning, Mr. Chairman, members of the committee, for the record I am Lorna Frank, representing the largest general farm organization in the state with over 6,000 members. The Montana Farm Bureau strongly supports HB-311.

Farm Bureau supports this bill because the members of the organization passed a resolution supporting legislation that would require government agencies to review their actions for possible takings of private property rights, and require that takings be minimized.

HB-311 does that, Section 4, page 3, provides for guidelines developed by the Attorney General for the state agencies to use in identifying and evaluating agency actions with taking or damaging implications. The Attorney General is to include obligations imposed by the 5th. and 14th Amendment to the Constitution of the United States and Article II, Section 29, of the Montana Constitution.

If there is the possibility of a takings or damage of private property, the agency should look at alternatives that would fulfill their obligations and reduce the risk of a taking or damage.

This bill is designed to prevent the state from being sued similar to what John Ingersol talks about in his article "A Delicate Balance", which is attached to my testimony. In one case that went to the Supreme Court, Mr. Lucas of South Carolina was awarded $1.5 million.

Why do we need this legislation in Montana when there have not been any cases lately in Montana? Why should Montana wait until it has to pay a bill of $1.5 million like the state of South Carolina did in the Lucas case or end up paying $120 million like the Federal Government owes a property owner in Wyoming for a takings judgement. Congressman Condit of California said the Federal Government owes around one billion dollars for takings cases. Why should Montana wait until a case comes up before they implement this type of legislation? That is not good government and we are for good government.

Thank you for listening to our concerns, I urge this committee to concur with HB-311 as it has been presented.

A Delicate Balance

Can doing what's right for the environment threaten our personal property rights?

By John H. Ingersoll

F.Y.I
NOT NANCY

What do the black-capped vireo and the golden-cheeked warbler have to do with property rights? You might be surprised.

Indirectly, these two rare, innocent birds have prevented Margaret Rector, 74, of Austin, Tex., from selling a 15-acre parcel of land to underwrite her retirement. She purchased the land in 1973 and tried to market it in 1990. The land was ideally situated for development, and a number of interested parties approached her. As soon as prospects discovered that, under the Endangered Species Act, the land had been designated as a critical habitat for these two birds, however, the sale collapsed.

As if that were not disappointment enough, because of its uncertain future, Mrs. Rector's 15-acre parcel—which had been assessed by the county at $803,000 just four years ago—has recently been reassessed for $30,380. Her land has effectively been put on hold since 1990 while the U.S. Fish and Wildlife Service and Austin officials try to hammer out a massive land plan that would set aside certain habitats for endangered species and allow development in the remaining areas.

"At present," says Mrs. Rector, "I'd say there are hundreds of families in the 33 counties around Austin who, like me, are unable to sell land that *may* be set aside for a habitat." All of these folks are billed regularly for taxes and mortgage payments and collect nary a penny in compensatory payments.

The Fish and Wildlife Service, the Environmental Protection Agency, and privately funded groups such as the Nature Conservancy generally hold the public's respect. Conserving wildlife and open spaces is certainly as honorable a goal as recycling and cleaning up industrial pollution. And surely no one wants to see rare birds disappear.

Today, though, there is a small army of angry property owners from all points of the United States whose land has been impacted, condemned, or reduced in value by government action in the name of conservation. Joining this expanding army are families that simply feel threatened by environmental takeovers.

Among the foot soldiers, of course, are groups with specific agendas such as the Douglas Timber Operators, Inc., or the Oregon Cattlemen's Assn. Yet many recently minted groups are made up of ordinary farmers and landowners—groups with names like Save Our Land and Stop Taking Our Property. Around the nation, more than 450 such local organizations have loosely coalesced to form Alliance for America, a networking political action group that can be contacted by writing to P.O. Box 449, Caroga Lake, N.Y. 12032.

Although every political group has its radicals, the great majority of Alliance members are much in favor of environmental conservation. Typical of these activists is Ann Corcoran, currently editor of the "Land Rights Letter" and a resident with her family on a farm bordering the Antietam National Battlefield in Maryland. Mrs. Corcoran, who studied forestry at Yale, worked briefly for the Nature Conservancy and for some years for the National Audubon Society in Washington, D.C. She and her family brought their Maryland property back to life after years of apparent neglect. They patiently restored its ancient farmhouse and put the land back into production.

Her philosophy on environmental conservation is simple: She is 100 percent in favor of it. On the other hand, she is, she says, "disturbed that protecting the environment has, for many, come to mean federal control. I'm convinced that it is the private landowners who have kept the land beautiful. They are perfectly capable of protecting the environment."

For Mrs. Corcoran and other concerned landowners, the tide may be turning, as evidenced by two recent U.S. Supreme Court decisions.

In June 1992, the Court ruled in favor of David Lucas and against the South Carolina Coastal Council, a unit created by the South Carolina legislature to protect the state's beachfront from erosion, among other environmental duties. Since 1988, the case had traveled through district and state courts at considerable cost to the defendant, a developer and builder.

In a nutshell, Mr. Lucas bought two beachfront lots on South Carolina's Isle of Palms. These two lots were among five remaining in a beachfront development of approximately 100 homes stretched along the shoreline. His lots, which lay between two completed homes, were zoned for single-family dwellings.

Soon after Mr. Lucas's purchase, the Coastal Council engaged a firm to draw a line on the coastal map, seaward of which no further beach development could begin. Their aim was to prevent beach erosion and protect existing communities.

The line ran in front of existing houses on the Isle of Palms, but, like a bubble in the line, took a detour behind Mr. Lucas's lots, eliminating his plans to build one home for himself and another for sale.

Naturally disappointed, Mr. Lucas shrugged off the decision and told the Coastal Council, "Okay, but you'll have to pay me the value of the lots [approximately $900,000]." The council refused, and Mr. Lucas sued to recoup his investment.

The case went through local and state courts and finally, in 1992, the U.S. Supreme Court ruled that a body of the South Carolina legislature cannot outlaw something today that was legal yesterday. In effect, the council's action amounted to

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GREAT COLLECTIONS

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and small gifts for their students. Carefully hand-lettered in old-style Germanic calligraphy, the frakturs (so named for the "fractured" appearance of the lettering style they employed) were typically ornamented with colored pen-and-ink drawings depicting such traditional motifs as birds, flowers, and hearts.

"A lot is made of the symbolism of these motifs—and sometimes the images do contain religious significance based on the Pennsylvania Germans' readings of the New Testament," remarks Pastor Frederick S. Weiser, a retired Lutheran clergyman who is an authority on fraktur art and the guest curator of an exhibition of presentation frakturs currently on view at the Museum of American Folk Art, in New York City. "We should remember, though, that we are dealing with folk art created by persons of rather limited artistic ability, and that flowers and birds are easy to draw."

In the insular and sometimes isolated villages of 18th- and early-19th-century Pennsylvania, farm people relied on the pastor or teacher who headed their church- or community-directed school to introduce their children not only to reading, writing, arithmetic, and religion but also to the arts in the form of music, poetry, and drawing. It was important, then, that a teacher's talents in these areas be made evident. The schoolmaster's well-practiced penmanship became one tool of gaining acknowledgment.

Christopher Dock, a mid-18th-century schoolmaster, explained his uses for presentation frakturs in a manual that advocated recruiting older children as monitors and helpers in the one-room schools of the day. He advised using frakturs not only as rewards of merit but as aids to learning.

Schoolmaster Dock suggested that when a child learned his ABC's, his parents reward him with a fried egg or two as positive reinforcement. When the youngster learned to read, the schoolmaster would present him with a drawing of a bird or flower. Older boys and girls would be given *Vorschriften* embellished with poems or Bible verses as tokens of appreciation for their having helped younger children in class.

These little works on paper, which generally measured about three by five inches or so, helped to endear the schoolmaster to his students and may have served to ingratiate him with their parents, who also served as members of the school's governing board, the body responsible for deciding whether that teacher would be rehired or fired at term's end.

Because these gifts were often tucked into Bibles or books for safekeeping, collectors have often mistaken the tokens of affection for bookplates, bookmarks, or awards of merit, explains Pastor Weiser. In an effort to clear up the confusion that surrounds presentation frakturs, he has assembled 100 such examples for the Museum of American Folk Art's exhibition "The Gift Is Small, the Love Is Great" and has documented them in a book of the same name that is being published in conjunction with the show.

—Marjorie E. Gage

COUNTRY PROPERTY

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a "taking," an action forbidden by the Fifth Amendment to the Constitution.

Eventually, Mr. Lucas received his $900,000, plus interest and legal fees. Then, mother of all ironies, to recoup their loss, the Coastal Council sold the two lots to another developer who plans to erect two houses!

A more recent decision by the U.S. Supreme Court strengthened citizens' rights. On June 15, 1994, the Court ruled in favor of the Dolan family and against the city of Tigard, Ore.

Briefly, the town had demanded that the Dolans cede 10 percent of their land to the town in exchange for a permit to expand the building that housed their plumbing firm. The Court, in effect, said no, that constitutes a taking and is unlawful.

As awareness about the need to conserve our countryside grows and issues become increasingly complex, one issue remains undebatable: The scales of justice ought to be level as government agencies and the pubic at large strive to work out their mutual problems to save the environment for tomorrow's generations.

SHOPPING GUIDE

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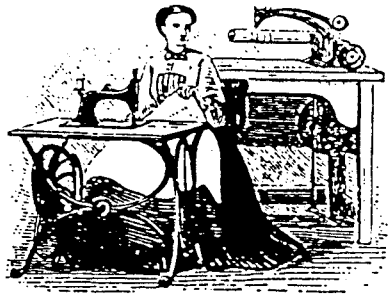
VISIT A COUNTRY INN

Page 110: (*Top*) Yellow 1930s Grandmother's Flower Garden quilt; Jabberwocky. (*Bottom left, on bunk beds*) Flag quilts and Log Cabin quilt, both by Judi Boisson American Country; available through Jabberwocky. (*Bottom, right*) Vintage Pendleton, Beakin, and serape collectible blankets; Jabberwocky.



SLEEPING BEAUTIES

The sewing patterns on these four pages are "Country Living Designs for Butterick." Ask for them at your local fabric store.

Pages 120-121: Butterick Pattern #3924, "Bed Cover & Accessories." **Furniture** from The Lane Co.: queen Poster Bed, charcoal finish #850-48; cherry Ladderback Side Chair #846-70; Cedar chest #2763-55; round Pedestal Table #11102-37, in plantation finish; Sisal and Iron Table (set of 3 stacking tables) #9460-61. All **fabrics** from Covington Fabric Corp.: "Mezzo" large-scale Check; "Maja" smaller check; "Malibu" stripe; lyrical "Adrian" print; "Harrington" Ticking Stripe; "Goodtex" bone solid. All **trimmings, buttons, and beads:** M&J Trimming. Custom-made bolster, pillow forms: The Company Store. Supercale Easy-Care 100-percent cotton Amethyst **fitted sheet,** Flax Elite Pinpoint pima cotton hemstitch **flat sheet, pillow sham:** Wamsutta. Paint #286: Benjamin Moore.

Pages 122-123: Butterick Pattern #3923, "Duvet Cover and Accessories." **Iron bed** in verdigris finish: Charles P. Rogers Brass & Iron Bed Co. Pine Writing Table #6812-20: Lane. All **fabrics** from Waverly: "Country Life" toile; "Simsbury Stripe"; "Clapboard Check"; solid-white "Old World Linen"; white "Bradbury Border" eyelet; "Esprit" sheer. Twill Tape, red/creme ribbon: M&J Trimming. Body Pillow, **Featherbed, Comforter:** The Company Store. Supercale Plus "Gingham" in Indigo **fitted sheet,** Elite Pinpoint ivory **pillow sham:** Wamsutta. Crackle Finish Wallpaper, "The Good Natured Collection" by Carey Lind Designs: York. Whispering Pines is a shop (and also a catalogue) featuring cabin life, the Adirondacks, and handmade twig furniture.

HOPS AND BEER

Pages 136-137: Beer-Making Kit #10-285 ($39.95) and Continental Light Beer #10-286 ($24.95) were used to make 5 gallons or about fifty 12-ounce bottles (bottles not included) of home-brewed beer: Gardener's Supply Co.

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SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 4
DATE 3-9-95
BILL NO. HB 311

Testimony In Support of House Bill 311
March 9, 1995
Glenn Marx, Governor Racicot's Office
Senate Judiciary Committee

Mr. Chairman, for the record my name is Glenn Marx and I serve as Policy Director on the staff of Governor Marc Racicot.

The Governor supports the amended version of House Bill 311 and offers his appreciation to the sponsor and the Montana Farm Bureau for their cooperation in working with the administration to develop a consensus position on a series of important amendments.

The introduced version of this bill carried a fiscal note in excess of a quarter-million dollars and presented serious questions that would probably only be answered in court and contained enough vague language that both the intent and breadth of the bill were arguable.

But the amendments now focus the bill on natural resource issues, on rule-making, on permit stipulations disconnected from resource protection or agency statutory authority, and on real property. These three changes not only drop the fiscal note to one-tenth its orginal size, but make the bill practical, reasonable and implementable.

The governor would like to add a note a caution. The body of law pertaining to the emerging issue of private property "takings" is evolving and changing. Public policy, therefore, must be adaptive and flexible as well. In other words, depending upon future court actions, the state may seek future changes in this section of law.

But right now the bottom line is that when a state agency conducts rule-making under the Adminstrative Procedures Act, it ought to analyze the impact of those proposed rules on private property. And when a state agency requires a permit condition that has no connection to the permit itself or a protected public interest, the impact on private property of that permit condition should be looked at very closely.

It will be alleged that this bill is anti-environmental protection and that support of this bill will handicap the authority of state agencies to effectively regulate industries and issues or provide protection to Montana's environmental resources.

The state believes that allegation will be wrong. This bill simply asserts that state rules and permit conditions be researched, understood, disclosed, important and defensible.

Mr. Chairman, Marc Racicot has said several times that private property and private property rights are conerstones of our democracy. This bill represents a common sense approach to respect and protect those rights.

The Governor urges your approval of House Bill 311.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 5
DATE 3-9-95
BILL NO. HB 311

AMENDMENTS TO HOUSE BILL 311
SECOND READING COPY

Proposed by the Montana Wildlife Federation

1. Page 2, lines 4 and 5

Strike: "(6) WHETHER IN BALANCE, BENEFITS OF THE PROPOSED ACTION JUSTIFY THE BURDEN ON PRIVATE PROPERTY.

2. Page 3, lines 8 and 9

Strike: lines 8 and 9 in their entirety.

REGULATORY TAKINGS LAW IN MONTANA

Department of Justice, January 1995

Article II, section 29, Montana Constitution:

> **Eminent domain.** Private property shall not be taken or damaged for public use without just compensation to the full extent of the loss having been first made to or paid into court for the owner. In the event of litigation, just compensation shall include necessary expenses of litigation to be awarded by the court when the private property owner prevails.

Kudloff v. City of Billings, 260 Mont. 371, 860 P.2d 140 (1993):

> Annexation of plaintiff's property by city held not to constitute an unconstitutional taking of property without compensation. "[A] regulatory taking of property by a municipality is allowed even if the value of that property and its usefulness is diminished. ... It is only when the owner of the real property has been called upon to sacrifice all economically beneficial use of that property in the name of the common good that a constitutionally-protected taking has occurred." Although the annexation may have diminished the value and usefulness of the property, "'the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers.'"

Matter of Adjudication of Yellowstone River Water Rights, 253 Mont. 167, 832 P.2d 1210 (1992):

> Montana Supreme Court held that forfeiture of water rights for failure to file a timely claim does not constitute a taking without just compensation. The court applied a "threshold inquiry" to determine whether the statute is a constitutionally valid exercise of the state's police power.
>
> > The police power of the state is that which enables states to pass regulations for the health, safety and general welfare of the people. ... The police power regulation: must be reasonably adapted to its purpose and must injure or impair property rights only to the extent reasonably necessary to preserve the public welfare. ... Compensation is due ... in cases which exceed regulation or impairment and there is an appropriation of property which amounts to a taking or deprivation of property for public use. [Emphasis added.]

McElwain v. County of Flathead, 248 Mont. 231, 811 P.2d 1267 (1991):

> Enactment of septic regulations by Flathead County held not to constitute a taking without just compensation even though the effect was to diminish the value of plaintiff's property.

> [T]he question to determine whether a land-use regulation is properly invoked is whether the regulation is substantially related to the legitimate State interest of protecting the health, safety, morals, or general welfare of the public, and utilizes the least restrictive means necessary to achieve this end without denying the owner economically viable use of his or her land.

Because legislative enactments are presumed constitutional, the plaintiff bears the burden of proving that the governmental regulation constitutes a taking without just compensation.

Diminution in property value by itself is not sufficient to establish a taking. "The issue of economic viability must be resolved by focusing on the remaining use available to the landowner and the nature of the interference with the overall rights in the property, in addition to any reduction in value." Court holds that the public interest involved outweighs the encroachment upon the plaintiff's property.

Galt v. State Department of Fish, Wildlife and Parks, 230 Mont. 327, 749 P.2d 1089 (1988) (Galt II), and 225 Mont. 142, 731 P.2d 912 (1987) (Galt I):

In striking down portions of the Stream Access Act, the court held that "[o]nly that use [of property between high water marks] which is necessary for the public to enjoy its ownership of the water resources will be recognized as within the easement's scope." Thus, big game hunting, overnight camping, and construction of permanent objects between high water marks were held to be impermissible. (Galt I.) Based on this ruling, the court later held that the plaintiffs were entitled to attorney's fees under Art. II, sec. 29 of the Montana Constitution because the statutes invalidated by the court "served to take property without just compensation."

Western Energy Co. v. Genie Land Co., 227 Mont. 74, 737 P.2d 478 (1987):

Court held that the "owner consent" provision of the Strip and Underground Mine Reclamation Act, requiring consent or waiver by the owner of surface lands to entry and commencement of strip-mining operations by the owner of mineral estate, violates state constitutional prohibitions against taking of private property without due process or just compensation and impairment of obligation of contract.

Basis for the court's holding was that the statute "does not bear the requisite 'substantial relation to the public health, safety, morals, or general welfare.' ... The statute merely provides that when the owner of the minerals does not own the surface he cannot apply for a permit to mine without first receiving permission of the surface owner to enter and commence strip-mining operations on the land." The plaintiff's "entire bundle of rights" consisted of its rights to all the minerals beneath the land owned by the defendant.

Because the statute effectively destroyed these rights when the defendant did not consent, a taking resulted.

Knight v. City of Billings, 197 Mont. 165, 642 P.2d 141 (1982):

Under "unique facts," where City had condemned property on one side of street but had validly refused to amend its zoning ordinances with respect to plaintiffs' property on other side of street, the City "interfered with the private property interests of the plaintiff so as to constitute a 'taking' by inverse condemnation." Court careful to limit its holding to peculiar facts "where a physical taking across the street occurred."

State Department of Highways v. City of Helena, 193 Mont. 441, 632 P.2d 332 (1981):

Statute requiring relocation of city-owned utilities held not to constitute taking even though City was required to bear 25% of the cost. "The benefit to the public as a whole outweighed the temporary deprivation and inconvenience suffered by the City." The required relocation of the City's utilities was not a "taking in the constitutional sense, but rather a legitimate use of the police power for which no compensation is required."

Yellowstone Valley Electric Cooperative, Inc. v. Ostermiller, 187 Mont. 8, 608 P.2d 491 (1980):

Court held that statute requiring electric utilities and rural electric cooperatives to provide wire-raising services without reimbursement did not constitute a taking of property. Threshold inquiry is in determining whether the statute "is an exercise of the police power or, rather, sounds in the principles of eminent domain." The two principles were distinguished as follows:

> In the exercise of the police power, due process requirements of the Fourteenth Amendment may be met without just compensation. Eminent domain, however, is the right of the state to take private property for public use. ... In the exercise of the power of eminent domain, just compensation is required.

The court concluded that the statute in question was a valid exercise of the police power because it served several vital public interests, both in preventing harm to the public and in conferring public benefit. The court noted the "well settled" general rule that "acts conducted in the proper exercise of police power do not constitute a taking of property and do not entitle the owner of such property to compensation for the regulation or impairment thereof. Compensation is due, however, in cases which exceed regulation or impairment and there is an appropriation of property which amounts to a taking or deprivation of property for public use."

McTaggart v. Montana Power Co., 184 Mont. 329, 602 P.2d 992 (1979):

> Statutes allowing relocation of overhead utility line on petition by agricultural landowner held to constitute a permissible public purpose for eminent domain, but requiring the utility to pay half the cost of relocation was not just compensation. "The relocation of the powerline comes at the insistence of the landowner, and it is he who should properly bear the costs of relocation."

State v. Bernhard, 173 Mont. 464, 568 P.2d 136 (1977):

> Criminal conviction for operating a motor vehicle wrecking facility without a license upheld against challenge that Motor Vehicle Wrecking Facilities Act constituted a taking without just compensation. Beginning its analysis with a recognition that "[c]learly, when the police power has been properly invoked, compensation is not required[,]" the court found that the requirement that vehicles be shielded from public view was a legitimate exercise of police power. Based in part on the Montana Constitution's declaration of the right to a "clean and healthful environment," the court held "that a legislative purpose to preserve or enhance aesthetic values is a sufficient basis for the state's exercise of its police power in [the statute in question]."

PHYSICAL INVASION AND INVERSE CONDEMNATION CASES

Knight v. City of Missoula, 252 Mont. 232, 827 P.2d 1270 (1992):

> Inverse condemnation action arising from the creation and maintenance of a dirt road cut through a park at the end of plaintiff's road. Evidence showed increased traffic, dust, noise, and runoff problems as a result of the road. Plaintiff alleged a taking of private property without just compensation. Montana Supreme Court held that whether a taking had occurred was a question of fact that had to be decided at trial.
>
> > Generally, acts conducted in the proper exercise of a police power do not constitute a taking of property and do not entitle the owner [to] compensation for any impairment to such property. ... If state action is a proper exercise of the police power and is directly connected with matters of public health, safety and welfare, a reasonable burden may be imposed on private property.
>
> However, the court noted that a property owner may recover in an inverse condemnation action where actual physical damage is proximately caused to his property by a public improvement as deliberately planned and built. The extent of damage must "be of such a degree as to amount to a taking of an interest in the property damaged."

Adams v. Montana Department of Highways, 230 Mont. 393, 753 P.2d 846 (1988):

Plaintiffs owned property adjacent to Reserve Street in Missoula, and brought an inverse condemnation suit for diminution in their property values after the state constructed a bridge resulting in increased traffic, noise and air pollution.

> Inverse condemnation is "[a] cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency."

An inverse condemnation may occur without physical invasion of the property, and it is not a complete defense that the governmental defendant was acting in the exercise of its police power. However, any property that is adjacent to an improved roadway is going to suffer the adverse consequences of traffic increase. "To allow recovery for the landowners in this case would open a Pandora's Box which would ... make development or improvement of highways and roadways in the State of Montana cost-prohibitive." The Court noted that the detriments suffered by the plaintiffs were noncompensable, and added that they would receive a benefit in the form of increased value to their property for commercial purposes.

Rauser v. Toston Irrigation District, 172 Mont. 530, 565 P.2d 632 (1977):

Inverse condemnation action arising out of irrigation project that caused standing water on forty acres of plaintiffs' land. The court recognized that "there can be a taking without a total physical appropriation of land" and, even though the land was not condemned, it was permanently invaded by the percolation of water. Quoting a case decided under the 1889 Montana Constitution, the court stated:

> "Under constitutions which provide that property shall not be 'taken or damaged' it is universally held that 'it is not necessary that there be any physical invasion of the individual's property for public use to entitle him to compensation.' ... 'These easements are property, protected by the constitution from being taken or damaged without just compensation.' ... Moreover, it may frequently occur that 'the consequential damage may impose a more serious loss upon the owner than a temporary spoliation or invasion of the property.'"

The court adopted five factors to determine whether damage to the plaintiff's land was compensable: (1) the damage to the property, if reasonably foreseeable, would have entitled the property owners to compensation; (2) the likelihood of public works not being engaged in because of unforeseen and unforeseeable possible direct physical damage to real estate is remote; (3) the property owners

did suffer direct physical damage to their properties as the proximate result of the works as deliberately planned and carried out; (4) the cost of such damage can better be absorbed, and with infinitely less hardship, by the taxpayers as a whole, than by owners of the individual parcels, and (5) the owner of the damaged property if uncompensated would contribute more than his proper share to the public undertaking.

SUMMARY

Of the ten regulatory takings cases and three inverse condemnation cases that have been brought since passage of the 1972 Montana Constitution, five have arisen from actions taken by local governments and seven have been challenges to state statutes. Only one has been against a state agency, for actions taken to build a bridge on a federal-aid secondary highway system. Five of the 13 cases were found by the court to involve an actual or potential taking of private property, including one that involved a physical invasion of the plaintiff's property.

Testimony on HB 117 by Dan Anderson, Administrator, Mental health Division, Department of Corrections nd Human Services

The Department requested HB 117 in order to address a problem in providing services to persons who are patients at Montana State Hospital because they have been found to be "unfit to proceed" : too mentally ill to assist in their own defense against a criminal charge. These individuals are often placed in Montana State Hospital to be treated in order to regain fitness to aid in their defense.

In at least two recent cases, patients in this category have refused medications and the courts have ruled that current law does not allow us to force treatment.

This bill would require our staff to develop a treatment plan to assist the patient in regaining his/her fitness to proceed and, if the patient refuses to follow the plan, allow us to request an order for involuntary treatment.

Without the ability to treat these patients there are at least four potential negative results which can occur:

1. It is possible for the individual to avoid prosecution by maintaining unfitness until charges must be dropped.

2. Some persons who have untreated mental illness can disrupt treatment of other patients or be dangerous to staff or patients.

3. It is an inappropriate and wasteful use of Montana State Hospital to confine people there but not be able to treat them.

4. The longer an individual goes without treatment of a serious mental illness, the more difficult is to successfully treat and the more likely it is to cause a permanent disability.

As amended by the House, the bill assures the defendant of a hearing on the petition to treat and requires the court to document that there is an "overriding justification" for the order to treat involuntarily.

Your support of HB 117 will assist both the criminal justice system and the public mental health system in carrying out our responsibilities.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 8
DATE 3-9-93

TESTIMONY TO THE SENATE JUDICIARY COMMITTEE HB117
HOUSE BILL 117

Carl L. Keener, M.D.
Medical Director
Montana State Hospital

Current law allows someone charged with a criminal act and found unfit to proceed to remain in Montana State Hospital untreated for ninety days or more. If, after ninety days, the defendant is not likely to become fit to proceed within the reasonably foreseeable future, the charges are dismissed. If the individual is seriously mentally ill he may then be committed to the State Hospital, given involuntary treatment, including medication and, when no longer seriously mentally ill, discharged without ever facing the criminal charges against him. To have an individual in the State Hospital who is unfit to proceed because of his mental illness for ninety days without treatment is destructive to that individual. Without treatment, serious mental illness is more likely to become chronic and resistant to treatment. Many of them suffer severely and needlessly because of their refusal to take medication and because of no clear legal provision allowing us to medicate. Having these individuals in the hospital is also very difficult for our staff, whose training and inclination is to provide relief through treatment for mentally ill individuals. To allow someone to avoid facing charges because of his mental illness fails to hold the individual responsible for this behavior and is not therapeutic.

~~I respectfully question whether it is legally sound and whether it is what the people of Montana want for those individuals who are mentally ill and charged with criminal behavior.~~ I strongly support this legislation which allows us to treat the individual and restore emotional wellbeing. It also provides for getting the individual fit to proceed in defending against the charges faced.

OFFICE OF THE GOVERNOR

MENTAL DISABILITIES BOARD OF VISITORS

MARC RACICOT, GOVERNOR

PO BOX 200804

STATE OF MONTANA

(406) 444-3955
TOLL FREE 1-(800) 332-2272

HELENA, MONTANA 59620-0804
FAX 406-444-3543

March 9, 1995

Senator Bruce Crippen, Chairman
Senate Judiciary Committee
State Capitol
Helena, MT 59620

RE: HB 117

Senator Crippen and Members of the Committee:

For the record, my name is Kelly Moorse and I am the Executive Director of the Board of Visitors. The Board reviews the quality of patient care and treatment at Montana State Hospital, the Center for the Aged and the community mental health centers. I am here to testify in support of HB 117, as amended by the House.

The Board of Visitors, and several volunteer mental health groups, (Meriwether Lewis Institute, Mental Health Association of Montana, Montana Alliance for the Mentally Ill) worked with the Department of Corrections and Human Services to develop the amendments for HB 117.

This legislation was introduced in response to the recent Vilensky and Curtis cases, in which the Montana Supreme Court said the statues did not provide for forced medications during the assessment of capacity to proceed to trial. The amendment addressed by the House Judiciary committee addressed the constitutional concerns raised by a 1992 U. S. Supreme Court case, Riggins v.Nevada. This decision basically stated that the Fourteenth Amendment affords at least as much protection to persons the State detains for trial. The courts referred to the Harper decision and stated that:

> "forcing antipsychotic drugs on a prisoner is impermissible absent a finding of overriding justification and a determination of medical appropriateness."

We urge your support of House Bill 117. Thank you.

Sincerely,

Kelly Moorse
Executive Director

SEELEY LAKE ELEMENTARY SCHOOL
SCHOOL DISTRICT #34
SEELEY LAKE, MONTANA 59868
JOHN W. HEBNES, SUPERINTENDENT

PHONE 406-677-2265

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 10
DATE 3-9-95
BILL NO. HB 501

February 13, 1995

Representitive Sheill Anderson
State of Montana
Capitol Station
Helena, MT 59602

Dear Representative Anderson,

The Board of Trustees of Seeley Lake Elementary School is very concerned about the rules and hardships that have been placed on the Department of State Lands and the school trust at the whims or wishes of groups or individuals.

A lawsuit can be filed at the drop of a hat. We feel that this happened in the Tom Miner Timber Sale Lawsuit. When the court ruled in favor of State Lands the case ended, but the states cost of legal fees was paid by the trust and the Montana taxpayer.

If a security bond had been posted, the trust and the state of Montana would be a little richer today.

With this in mind, the trustees of Seeley Lake Elementary School recommend a do pass for HB 501.

Thank you for your attention and support.

P.S. From what we understand the Indian Reservations can demand security bonds now.

Sincerely,

John W Hebnes

John W. Hebnes
Superintendent

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 11
DATE 3-9-95
BILL NO. HB 501

HB 501

Testimony of Cary Hegreberg
Montana Wood Products Association

Mr. Chairman, members of the committee, for the record my name is Cary Hegreberg, executive vice president of Montana Wood Products Association. Our members are in support of HB 501.

In recent years, lawsuits against the USFS have virtually ground that agency's land management activities to a halt. In some cases, the mere threat of a lawsuit has caused national forest supervisors to withdraw timber sales which had been years in the planning and analysis. We don't want state trust lands to succumb to the same tangled web of litigation that federal lands have.

You have already heard some of the case law surrounding trust land management in conjunction with other bills pending before the Legislature. The courts are clear on several points: 1) state trust lands are not like other public land; 2) An explicit, enforceable trust exists which the State cannot abridge; 3) The State must manage trust lands for the exclusive benefit of intended beneficiaries, not the general public.

This bill provides legal safeguards against frivolous lawsuits which could unjustly damage the beneficiaries. From the standpoint of the forest products industry, it may stem the tidal wave of lawsuits which have plagued public land managers in recent years.

HB 501 is <u>not</u> an attempt to preclude citizens from exercising their constitutional right to petition their government. It **is** an attempt to recognize that trust lands do have a different management objective, which must be protected. The bill <u>does not say</u> that court costs of the state or third parties will be paid. It <u>does not say</u> that financial damages **to any party other than the trust beneficiary** will be paid.

Opponents to this bill will claim it is unconstitutional. However, I will submit with my testimony, a copy of a legal ruling from a chief administrative law judge in Washington, D.C. involving a timber sale on the Flathead Indian Reservation here in Montana. Friends of the Wild Swan, an organization which has sued DSL on two timber sales, sought to appeal a timber sale on the Flathead reservation. The Bureau of Indian Affairs asked the group to post a security bond to protect the financial interest of the tribe. Friends of the Wild Swan challenged that decision, which led to the administrative law review, which affirmed the agency's legal right to impose a bond.

I would like to quote from Judge Lynn's decision so the relevance to HB 501 becomes clear: "The cases appellant cites concerned lands owned in fee by the United States...Here, the lands involved are owned by the United States in trust for the Tribes. In taking actions relating to these lands, the Department is acting in a fiduciary capacity of the highest nature. Based upon appellants' statement that it is merely trying to enforce Federal environmental protection laws upon a public land management agency, it appears that appellant equates the Department's responsibilities as an owner/manager of public lands with its responsibilities as a trustee of Indian lands.

"The Board has held, however, that Indian lands are not public lands and the laws applicable to public lands do not necessarily apply to trust lands. As this difference between public lands and Indian trust lands relates to this case, the Board is not aware of any regulation allowing the imposition of an appeal bond in relation to administrative review of NEPA challenges to the use of the public lands. The fact that the Department has promulgated regulations which allow the imposition of a bond in relation to the use of Indian trust lands shows that it views its responsibilities in this area differently."

Now, here is the crux of Judge Lynn's decision, and I hope you recognize its relevance and significance to HB 501. He said, "the issue is one of reconciling two very important Federal policies--the trust responsibility and environmental protection--in the Department's administrative proceedings. The trust responsibility requires the Department to consider issues in addressing actions on Indian trust lands that it would not normally consider when taking actions on the public lands. These different issues arise in all cases, not just ones under NEPA. Not to consider these issues would subject the Department to suit for breach of trust. The trust responsibility requires the Department to act in the best interest of the beneficiary owners in any action it takes in regard to Indian trust land."

Members of the committee, the term state trust lands could be inserted into that judges decision in place of Indian trust lands, and it would retain 100 percent of its legal validity. HB 501 is good trust management and good public policy. I urge a do-pass recommendation. Thank you.

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
Interior Board of Indian Appeals
4015 Wilson Boulevard
Arlington, Virginia 22203

IN REPLY REFER TO

[redacted]

16 pages

FRIENDS OF THE WILD SWAN
v.
PORTLAND AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 94-181-A Decided November 14, 1994

Appeal from the imposition of an appeal bond.

Docketed; affirmed as modified.

1. Indians: Lands: Generally--Indians: Lands: Environmental Impact Statements--National Environmental Policy Act of 1969: Generally

   Actions taken by the Bureau of Indian Affairs on lands held in trust for an Indian tribe or individual are subject to the requirements of the National Environmental Policy Act, 42 U.S.C. §§ 4321-4335 (1988).

2. Indians: Generally--Regulations: Generally

   A specific provision in Bureau of Indian Affairs program regulations will normally supersede a general regulation dealing with the same subject.

3. Administrative Procedure: Administrative Procedure Act--Administrative Procedure: Rulemaking--Indians: Generally--Regulations: Force and Effect as Law

   A specific reference in duly promulgated regulations to the applicability of a section of the Bureau of Indian Affairs Manual allows that section to be relied on, used, and cited as precedent by the agency in cases arising under those regulations.

APPEARANCES: Arlene Montgomery, Swan Lake, Montana, and Kathy M. Togni, Washington, D.C., for appellant; Michael E. Drais, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Portland, Oregon, for the Area Director.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Friends of the Wild Swan seeks review of an August 11, 1994, decision of the Portland Area Director, Bureau of Indian Affairs (Area Director; BIA), imposing a $29,000 appeal bond (bond). The bond was required in connection with appellant's appeal from a July 1, 1994, decision issued by the Flathead Agency Superintendent, BIA (Superintendent), approving a

Finding of No Significant Impact (FONSI) in relation to the Yellow Bay Timber Sale (timber sale) on the Flathead Indian Reservation in Montana. 1/ The FONSI was issued under the provisions of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4335 (1988). 2/ For the reasons discussed below, the Area Director's imposition of a bond is affirmed, but the amount of the bond is reduced to $27,619.

Background

On August 8, 1994, the Area Director received a notice of appeal from appellant challenging the FONSI prepared for the timber sale. By memorandum dated August 11, 1994, the Superintendent requested that the Area Director impose a bond in the amount of $29,000. The memorandum states:

> The basis for this figure is as follows:
>
> INTEREST: Interest cost to Tribes as a result of borrowing from reserve accounts to replace the $650,000 in lost revenue for this fiscal year. Delay in receipt of funds is estimated to be a minimum of 10 months, with cost of capital being 5% per annum. ($27,619)
>
> SALE PACKAGE REVIEW AND RECONCILIATION: 20 Man-hours for GS-9 Forester to recompile sale package necessary after dates, sale minimums, and other pertinent items change. ($385)
>
> COPYING AND MAILING COSTS FOR FUTURE SALE ($100)
>
> SALE RE-ADVERTISEMENT AT A FUTURE DATE IN 5 PAPERS ($900)

The Area Director imposed a bond on August 11, 1994, stating:

> In accordance with 25 CFR 2.5 [3/] I am requiring an appeal bond of $29,000 in the form of cash, Irrevocable Letter of Credit,

1/ The Forest Officer's Report for the timber sale, which is included in the administrative record, indicates that the sale was to cover 663 acres held in trust for the Confederated Salish and Kootenai Tribes (Tribes) and 22 acres held in trust for individual Indians. For all practical purposes, this was a sale of tribal timber.

2/ All further citations to the United States Code are to the 1988 edition.

3/ Section 2.5 provides in pertinent part:

"(a) If a person believes that he/she may suffer a measurable and substantial financial loss as a direct result of the delay caused by an appeal, that person may request that the official before whom the appeal is pending require the posting of a reasonable bond by the appellant adequate to protect against that financial loss.

"(b) A person requesting that a bond be posted bears the burden of proving the likelihood that he/she may suffer a measurable and substantial financial loss as a direct result of the delay caused by the appeal."

> or Negotiable U.S. Government Securities. You are directed to furnish the bond * * * by C.O.B., August 30, 1994. Failure to post the $29,000 appeal bond * * * will result in dismissal of your appeal. 25 CFR 2.17(b)(2). [4/]
>
> Alternatively, you may advise me in writing by C.O.B., August 30, 1994 that you elect not to post the appeal bond. In that event, pursuant to 25 CFR 163.26 [5/], I shall direct that there is no stay of action pending my decision of your appeal, and that the Yellow Bay Timber Sale contract may be awarded, approved and harvested under contract terms.

(Letter at 1). The Area Director also informed appellant of its right to appeal to the Board.

Appellant elected to file a notice of appeal, which the Board received on August 30, 1994. Because of the appeal, the Area Director took no further action in regard to the bond, in accordance with 43 CFR 4.314(a), which stays the effect of an Area Director's decision when an appeal is filed with the Board. Accordingly, the present posture of this matter is that no bond has been posted pending the Board's decision, and the underlying appeal from the Superintendent's FONSI decision is before the Area Director.

Appellant filed a detailed statement of its position with its notice of appeal. In its August 31, 1994, predocketing notice, the Board indicated its intention to expedite consideration of this appeal. The Area Director filed a statement of his position in a September 2, 1994, request for expedited decision. Both appellant and the Area Director filed supplemental statements.

Discussion and Conclusions

[1] The Board begins its analysis of this appeal with the undisputed conclusion of law that BIA actions in regard to lands held in trust for the benefit of an Indian tribe or individual are subject to NEPA. See, e.g., Manygoats v. Kleppe, 558 F.2d 556 (10th Cir. 1977); Davis v. Morton,

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4/ Section 2.17 provides: "(b) An appeal under this part may be subject to summary dismissal for the following causes: * * * (2) If the appellant has been required to post a bond and fails to do so."

5/ Section 163.26 states in pertinent part:

"Any action taken by an approving officer exercising delegated authority from the Secretary of the Interior or by a subordinate official of the Department of the Interior exercising an authority by the terms of the contract may be appealed. Such appeal shall not stay any action under the contract unless otherwise directed by the Secretary of the Interior. Such appeals shall be filed in accordance with the provisions of 25 CFR part 2, Appeals from Administrative Actions, or any other applicable general regulations covering appeals."

469 F.2d 593 (10th Cir. 1972). The Department explicitly recognized its NEPA obligations in regard to timber sales from trust lands in 25 CFR 163.27, which provides:

> Before implementing these regulations, forestry personnel will review their timber sale activities for potential environmental impacts in accordance with [NEPA] and applicable Council on Environmental Quality [CEQ] regulations (40 CFR 1500-1508). NEPA compliance is further explained in Departmental Manual Part 516 DM (Environmental Quality) and 30 BIAM [Bureau of Indian Affairs Manual] Supplement 1 (NEPA Handbook) * * *, from which specific guidance is obtained.

Amendments to 25 CFR Part 163, the General Forestry Regulations, were proposed in 1983. Section 163.27 was not included in the proposal. See 48 FR 11459 (Mar. 18, 1983). The preamble to the final rule states: "Several commenters noted that requirements for environmental protection were inadequately referenced. The Bureau considered this and agrees. Consequently, a new § 163.27 is added to clearly affirm the Bureau's policy concerning compliance with environmental quality and requirements relative to the General Forest Regulations" (49 FR 1686 (Jan. 13, 1984)). BIA acknowledged its responsibilities under NEPA in this case by preparing the FONSI which is the subject of the appeal pending before the Area Director.

Despite appellant's expressed belief that BIA did not understand and/or fulfill its NEPA obligations in this case, the Board emphasizes that the merits of the FONSI are not presently before it. It will not consider here any issues or arguments relating to the FONSI.

Appellant raised different, although sometimes interrelated, arguments in its notice of appeal and supplemental statement. Appellant's arguments can be divided into three major categories: (1) the bond is not appropriate, (2) the bond should be waived, and (3) BIA has interfered with appellant's right to appeal. The Board will address these arguments in the order just listed, without specifying where, or in what order, appellant raised each argument.

Appellant contends that the bond is not reasonable within the meaning of 25 CFR 2.5(a) because appellant was required to post a cash, or cash-equivalent, bond on only 15 days' notice. In general support of this argument, appellant cites United States of America v. Kombol, No. C86-1764(M)WD (W.D. Wash. June 15, 1989), in which the court remanded a case to the Department after finding, in appellant's words, that an "appeal bond requirement had the effect of unreasonably depriving Kombol of his right to appeal" (Supplemental Statement at 4). Appellant apparently contends that an appeal bond is per se unreasonable.

Although the Board essentially agrees with appellant's statement of the holding in Kombol, it does not agree that Kombol supports appellant's

position here. The appeal bond regulation at issue in Kombol provided only that "[t]he officer to whom the appeal is directed may require an adequate bond to protect the interest of any Indian, Indian tribe, or other party involved during the pendency of the appeal" (25 CFR 2.3(b) (1981)). That regulation, inter alia, did not require proof that a party might suffer a measurable financial loss because of the appeal, lacked standards for determining the amount of a bond, did not allocate the burden of proof, and provided no right of appeal from the imposition of a bond. During the course of the Kombol litigation, the Department realized that the court was not sympathetic to the appeal bond regulation as it then existed. The Department amended the regulation in February 1989, specifically addressing the concerns the court would later discuss in its decision. The Board concludes that an appeal bond is not per se unreasonable, and that this case is not controlled by Kombol.

Appellant raises two specific arguments against the reasonableness of the bond. One argument is that the bond was unreasonable because appellant had only 15 days to post it. However, appellant's appeal from the imposition of the bond mooted the requirement that it post the bond in 15 days. As noted supra, when appellant filed its notice of appeal from the imposition of the bond, the Area Director's decision was automatically stayed pending the Board's decision. Appellant has now had over 2 months to obtain the resources to post the bond. Although the Board does not decide whether it is unreasonable to require a bond to be posted in 15 days, it concludes that a requirement to post an appeal bond within 15 days is not unreasonable when the filing of an appeal from the imposition of the bond automatically stays the time for posting it.

Appellant's second specific argument against the bond is that a cash or cash-equivalent bond is unreasonable. Appellant ties this argument to the fact that it is an environmental group with few resources.

The Area Director responds that cash, negotiable U.S. Securities, or an irrevocable letter of credit "are the standard forms of bonds permitted * * * in conjunction with any timber contracts. Surety bonds are no longer accepted because they do not work" (Response at 3). The parties disagree over whether an irrevocable letter of credit is the "equivalent" of cash. The Board finds it unnecessary to address this dispute because it finds unpersuasive appellant's argument that the form of the bond is unreasonable, especially in light of the Area Director's statement that the forms of bond authorized are standard with respect to timber contracts.

The Board rejects appellant's argument that the bond is unreasonable under 25 CFR 2.5(a).

Appellant next argues that it should not be required to post a bond because any financial loss in this case is not "a direct result of the delay caused by an appeal" within the meaning of 25 CFR 2.5, but instead is the direct result of BIA's decision to advertise the contract prior to the

expiration of the appeal period. 6/ Appellant contends that the decision was automatically stayed under 25 CFR 2.6(b) during the 30 days in which an appeal could be filed. 7/ It further asserts that the Superintendent was on notice, based on its stated concerns about the FONSI, that an appeal is likely.

Appellant does not dispute that there may be financial loss because of delayed implementation of the timber sale. Appellant's argument appears to be, however, that if BIA had followed its regulations, the timber sale would not have gone forward and there would have been no expectation that income would have been received before the conclusion of any administrative appeal. Apparently appellant contends that if there was no expectation of income, there is no justification for an appeal bond.

The Area Director responds that 25 CFR 2.6(b) does not apply in this case. He first argues that, although 25 CFR 163.26 allows an approving officer's actions to be appealed under BIA's general appeal regulations in 25 CFR Part 2 (Part 2), the action itself is not stayed pending that appeal because section 163.26 supersedes 25 CFR 2.6(b), which generally stays a BIA decision during the time in which it can be appealed.

[2] The Board agrees with the Area Director to the extent of holding that a specific provision in program regulations will normally supersede a general regulation dealing with the same subject. However, it cannot as readily agree with the remainder of the argument. The title of 25 CFR 163.26 is "Appeals under timber contracts and permits," and the second sentence states that the appeal "shall not stay any action under the contract" (emphasis added). The Board finds the regulation ambiguous at best concerning whether the advertising and/or awarding of a contract is an action "under" a contract. The regulatory history provides no guidance in this area because there is little discussion of section 163.26. 8/ In the

6/ According to information before the Board, the FONSI was issued on July 1, 1994; the sale was advertised on July 15, 1994; and the bids were opened on Aug. 10, 1994. It is not clear whether the contract was awarded. An Aug. 11, 1994, letter to the Area Director from Plum Creek Manufacturing, L.P., sought intervenor status in the FONSI appeal because Plum Creek was "the successful bidder" for the timber sale contract. The Area Director's Aug. 11, 1994, letter imposing a bond suggests that the contract has not yet been awarded.

7/ Section 2.6(b) provides:

"Decisions made by officials of the Bureau of Indian Affairs shall be effective when the time for filing a notice of appeal has expired and no notice of appeal has been filed."

8/ The preamble to amendments to the timber regulations proposed in 1958 states only: "The more noteworthy of these changes include: provision of an appeals procedure for the first time * * *" (23 FR 9188 (Nov. 27, 1958)). See also 24 FR 7872 (Sept. 30, 1959), 48 FR 11459 (Mar. 18, 1983), and 49 FR 1686 (Jan. 13, 1984).

absence of any analysis supporting the reading of section 163.26 advanced here, the Board declines to hold that the section supersedes the automatic stay provision of 25 CFR 2.6(b) when the decision at issue is the initial advertising and/or awarding of a timber contract.

The Area Director next argues that section 2.6(b), and in fact all of Part 2, is superseded by CEQ's NEPA regulations, 516 DM, and the NEPA Handbook. The Area Director contends:

> Neither 40 C.F.R. 1500-1508 nor [DM] Part 516, provide for appeal of FONSI determinations under 25 C.F.R. Part 2. Instead, these regulations establish a "different" procedure: that is, "when a FONSI has been signed and notice published, as described in this chapter, NEPA compliance is completed." 30 BIAM Supplement 1, Part 5.
>
> * * * "[T]he CEQ regulations do not prescribe any minimum time period between the signing of the FONSI and implementation of the action." 30 BIAM Supp. 1, § 5.5. The only requirement of delay between issuing the FONSI and implementing the action is the internal requirement of 10 working days for review by higher officials, unless the higher official advises concurrence in the FONSI. See 30 BIAM Supp. 1, § 5.5.
>
> * * * * * * *
>
> In any event, the procedures governing FONSI preparation and notice (for example 40 C.F.R. § 1506) are incompatible with and supersede the notice requirements of 25 C.F.R. Part 2. No administrative appeal of a FONSI may be taken.

(Response at 6-7).

With these arguments, the Area Director has injected a new issue into this appeal; i.e., whether there is a right to administrative review of a FONSI decision under Part 2. But for the Area Director's raising of this argument as justification for implementing the FONSI, the question would not be before the Board.

With regard to the effect of the NEPA Handbook, the Board has consistently held that the BIAM does not have the force and effect of law, and that provisions appearing only in the BIAM cannot be used against a party, but may be applied against BIA. See, e.g., Robles v. Sacramento Area Director, 23 IBIA 276 (1993), and cases cited therein. This holding is based on the requirements of 5 U.S.C. § 552, which provides:

> A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by the agency against a party other than an agency only if--

(i) it has been indexed and either made available or published as provided in this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

[3] However, 25 CFR 163.27 specifically references the NEPA Handbook, part of the BIAM, and provides actual and timely notice to the public of the applicability of this section of the BIAM. The Board concludes that the NEPA Handbook can be relied upon, used, and cited as precedent in addressing timber sales from trust lands.

The Area Director first argues that Part 2 does not apply to BIA FONSI decisions because Part 2 is not referenced in the CEQ regulations or the DM. The Board rejects this argument. The CEQ regulations provide general guidance to all Federal agencies, while the DM provides slightly more specific guidance to Departmental bureaus and offices. There is no reason for either of these publications to refer to any applicable appeal provisions for specific offices. The fact that neither the CEQ regulations nor the DM reference Part 2 does not determine whether there is a right of appeal under that Part.

The Area Director also argues that the NEPA Handbook supersedes Part 2 by establishing a "different procedure" for FONSI review. 25 CFR 2.3(b) states that Part 2 "does not apply if any other regulation or Federal statute provides a different administrative appeal procedure applicable to a specific type of decision." Similarly, 43 CFR 4.331 establishes a right to appeal to the Board from an Area Director's decision "except * * * (c) Where otherwise provided by law or regulation." 9/

Although section 5.1 of the NEPA Handbook states that "when a FONSI has been signed and notice published, * * * NEPA compliance is completed," "NEPA compliance" is not defined. The Area Director's argument suggests that when the FONSI is signed and notice is published, the FONSI is final for the Department without administrative review.

This reading of section 5.1 is inconsistent with the position taken by the Area Director in Poo-sa'-kev v. Portland Area Director, 25 IBIA 181 (1994), in which he informed an appellant that his FONSI decision could be appealed to the Board. Although the Board has held that a BIA official can change an interpretation of law in order to correct prior error, it has also held that any such decision must clearly state how the prior interpretation was erroneous in order to show that the change is not arbitrary or capricious. See, e.g., Hopi Indian Tribe v. Director, Office of Trust and Economic

9/ One example of a "different administrative appeal procedure" is found in 25 CFR 88.1(c), which makes Area Director decisions approving, disapproving, or conditionally approving an attorney contract with an Indian tribe final for the Department without further review. See Welch v. Minneapolis Area Director, 17 IBIA 56 (1989).

Development, 22 IBIA 10, 16 (1992). No reasons whatsoever have been offered for the present change in position.

The position also appears to be inconsistent with BIA's actions in this case prior to the filing of the response to appellant's supplemental statement. The Superintendent obviously believed the FONSI could be appealed under Part 2, because he stated in section V of the FONSI, Implementation Date and Appeal Opportunities:

> This Decision Notice and [FONSI] is subject to appeal pursuant to 25 CFR Subchapter A, Part 2. A written notice of appeal must be filed within 30 days following the date of the first newspaper publication of the decision notice. The appeal must be filed in accordance with 25 CFR 2.9.

In accordance with these instructions, an administrative appeal under Part 2 is presently pending before the Area Director. It would seem unlikely that the Area Director would have accepted that appeal and allowed an opportunity for briefing if he intended to dismiss the appeal on the grounds that there was no right to appeal from the Superintendent's FONSI decision, especially considering the fact that he then imposed a bond to protect the Tribes' interests during the period the appeal was under consideration. If there were no right to appeal, an immediate dismissal for that reason would have obviated any need for a bond.

In the context of this case, the Board does not find persuasive the argument that the NEPA Handbook establishes a "different procedure" for consideration of FONSI decisions by making those decisions final for the Department.

The Area Director next contends that the CEQ regulations do not prescribe a minimum time period between the signing of a FONSI and its implementation and that section 5.5 of the NEPA Handbook requires only a 10-day review period before implementation of a FONSI signed by a Superintendent. This argument appears to be that because the 10-day waiting period established in the NEPA Handbook is inconsistent with the stay provision of 25 CFR 2.6(b), section 2.6(b) is superseded by the NEPA Handbook.

The Board agrees that the CEQ regulations do not establish a minimum time period for implementation of a FONSI, but concludes that this fact is not determinative for the same reasons as were discussed supra.

The major problem with the portion of this argument based on the NEPA Handbook is that it overlooks other provisions in section 5.5. The section also states: "If circumstances permit, however, it is generally advisable to allow a reasonable time period for interested parties to make known their views on the FONSI before implementing the action." Although the timing provisions of the NEPA Handbook and Part 2 are clearly different, the Board believes that those differences can be quite easily reconciled, with the result that effect can be given to both the NEPA Handbook and Part 2. The NEPA Handbook encourages delayed implementation of FONSIs in appropriate

cases, but allows implementation in 10 days when necessary or when there is no opposition. 25 CFR 2.6(b) ordinarily stays action on any matter appealed under Part 2, but 25 CFR 2.6(a) provides a mechanism for placing a decision into immediate effect when necessitated by concerns over "public safety, protection of trust resources, or other public exigency." If it is necessary to implement a FONSI quickly, procedures are available under Part 2 to do so.

Based on the arguments presented in this case, the Board declines to hold that the NEPA Handbook supersedes Part 2 simply because the NEPA Handbook allows a FONSI to be implemented in 10 days.

Finally, the Area Director contends that because the notice provisions in the NEPA Handbook and CEQ regulations and those in 25 CFR 2.7 are incompatible, no administrative appeal may be taken from a FONSI.

The notice provisions in section 2.7 and those in the NEPA Handbook are different. The Board cannot agree, however, that those differences amount to "incompatibility." As discussed supra, to the extent that the NEPA Handbook requires notice to be given to different people in different ways than would be necessary under Part 2, the NEPA Handbook controls. That fact does not, however, require a finding that Part 2 is completely superseded.

The Area Director has failed in this case to persuade the Board that there is no right of appeal from a FONSI decision under Part 2. The Board is also disturbed that the arguments raised ignore the fact that interested persons to this NEPA proceeding were specifically informed that there was a right of appeal under Part 2. Based on its analysis of the Area Director's arguments on this issue, the Board declines to hold that the FONSI decision was not governed by 25 CFR 2.6(b). It therefore concludes that advertisement of the timber sale prior to the expiration of the appeal period violated the stay provision.

* Despite this conclusion, the real question that must be decided is whether BIA's error was the proximate cause for any financial loss that might be incurred by the Tribes. The Board concludes that it was not. If there had been no appeal from the FONSI, the timber sale could have been advertised and awarded, and harvesting could have begun during calendar year 1994. 10/ The advertisement would have been delayed, at most, an additional 20 days, or until approximately August 5, 1994. Regardless of whether BIA implemented the FONSI prematurely, but for appellant's appeal, the decision would have already been implemented, and the Tribes would already have received income under the sale contract.

Although appellant's argument concerning the expectation of income has a superficial attraction, and despite the fact that the Area Director's

10/ Although the Superintendent spoke in terms of income during fiscal year 1994, the Board does not know what fiscal year the Tribes use.

arguments are not persuasive, the Board concludes that the proximate cause of any financial loss to the Tribes is appellant's appeal of the FONSI. 11/

Appellant also raises other arguments based on the failure to await the expiration of the appeal period before implementing the FONSI. It states that this timber sale has been under consideration since January 1991, and has been withdrawn and revised three times. Appellant asserts that, in view of the already lengthy delays, "any delay caused by the appeal of this timber sale is minimal by comparison" (Notice of Appeal at 3). This argument is unpersuasive. Regardless of how long the sale had been contemplated, the FONSI was approved in time to be implemented during 1994. Again, but for appellant's appeal, performance would have begun under the sale contract. Any delays at this point are caused by the appeal, the precise situation addressed by 25 CFR 2.5.

Appellant next contends that "any loss to a contractor from delay of this sale does not lie with the appellant" (Ibid.). This argument is not relevant. Appellant is not being asked to post a bond to protect the financial interests of the contractor; rather the bond is to protect the financial interests of the Tribes.

Finally, appellant raises two arguments against the bond based on an assertion that the Tribes will actually benefit from the appeal. It first argues "that the wholesale value of sawlogs has increased in Montana from $527 million in 1992 to $724 million in 1993 * * *. Delay of this timber sale pending compliance with NEPA stands to increase revenues to the * * * Tribes" (Ibid.). In response to this argument, the Area Director presents evidence indicating that the value of sawlogs decreased in 1994.

The Board takes official notice of the extreme volatility of the timber market. Even assuming that increased revenues to the Tribes could ultimately be assured, which is impossible without a crystal ball, the fact remains that the Tribes have lost revenue in 1994 because of the FONSI appeal, and will have to make up for this loss through the use of other resources.

Appellant also asserts that "[d]elay of this timber sale * * * [will] result in an overall net benefit to the tribes by ensuring compliance with environmental laws that will protect the overall diversity of tribal lands" (Notice of Appeal at 3), and that "the non-commercial forest values that [it] seeks to protect through its appeal * * * are encompassed within the interests of the Indian beneficiaries that the federal trust created by [25 U.S.C.] §§ 406-407 is designed to protect" (Supplemental Statement at 9). Appellant argues that Congress intended that Indian timber be managed not "solely in terms of immediate monetary gain," but also "for values

11/ In effect what the advertisement of the timber sale has done is to provide a concrete measure of damages for the amount of the potential financial loss. Without the advertisement and the proof that it provides of the terms under which a willing purchaser would contract, the amount of potential damages would have been speculative to some extent.

other than the sale of timber where such uses further the goals of trust" (Ibid.). Appellant concludes that "the numerous * * * environmental benefits that [it] seeks to protect in its appeal accrue to the Indian beneficiaries and their heirs. Moreover these gains offset any short-term financial loss that might result from delaying the sale until the BIA satisfies the requirements of NEPA" (Ibid.).

The Area Director responds that this timber sale must be judged by the standards of 25 U.S.C. § 407, which concerns the sale of tribal timber, not section 406, which concerns the sale of allotted timber, and from which appellant quotes. 12/

The Board does not address the Area Director's response because it finds that appellant's belief that the protection of overall diversity of tribal lands and of non-commercial forest values is to the Tribes' benefit, even assuming arguendo that these issues are encompassed within sections 406 and 407, is simply not relevant to a determination of whether the Tribes may be financially harmed by the delay of the timber sale caused by this appeal.

Therefore, the Board rejects appellant's arguments that a bond is not appropriate.

Appellant's second major argument is that the Board should waive a bond "in the interests of justice" (Notice of Appeal at 1) because appellant does not have the resources to post a substantial bond. Appellant contends:

> It is against public policy to require [a bond from] * * * a non-profit group, with no financial stake in the outcome of this case[, which seeks] only to require that the United States' environmental protection laws be enforced upon a public land management agency. To require anything more than a

12/ Section 406(a) provides in pertinent part:

"The timber on any Indian land held under a trust or other patent containing restrictions on alienations may be sold by the owner or owners with the consent of the Secretary of the Interior * * *. Sales of timber under this subsection shall be based upon a consideration of the needs and best interests of the Indian owner and his heirs. The Secretary shall take into consideration, among other things, (1) the state of growth of the timber and the need for maintaining the productive capacity of the land for the benefit of the owner and his heirs, (2) the highest and best use of the land, including the advisability and practicality of devoting it to other uses for the benefit of the owner and his heirs, and (3) the present and future financial needs of the owner and his heirs."

Section 407 provides in pertinent part:

"Under regulations prescribed by the Secretary of the Interior, the timber on unallotted trust land in Indian reservations or on other land held in trust for tribes may be sold in accordance with the principles of sustained-yield management or to convert the land to a more desirable use."

nominal bond runs contrary to NEPA's purpose of promoting public involvement and would discourage citizen suits. [13/]

(Id. at 1-2).

Appellant cites Natural Resources Defense Council, Inc. v. Morton, 377 F. Supp. 167 (D.D.C. 1971), and several similar cases, in support of its position. The Board has carefully read all of the cases cited by appellant and finds there are two significant factual differences between this case and the cases cited.

First, each of the cited cases concerns whether a Federal court would require the posting of security under Rule 65(c) of the Federal Rules of Civil Procedure in order for a non-profit-organization plaintiff to obtain a restraining order or injunction in Federal court. 14/ In summary, the courts have generally determined that requiring the posting of more than nominal security would deprive citizens and concerned groups of the opportunity to obtain judicial review and would thwart the intent of Congress to encourage citizen suits under NEPA.

The present case involves administrative review of an agency decision. Appellant presents no analysis as to why administrative procedures before the Department must be identical to the procedures employed by the Federal courts. The intent of the courts in creating this exemption was clearly to provide a judicial forum for citizen suits under NEPA. This intent is consistent with NEPA's expressed goal of encouraging citizen participation. However, judicial review is not limited by the imposition of an appeal bond in an administrative forum. Appellant has the option of filing suit in Federal court. If the court accepts the case, appellant would then be subject to the rules of that court, rather than those of the Department.

The Board's initial belief that the Department is not prohibited from imposing an appeal bond in an administrative proceeding under NEPA because of the possibility that a Federal court would not require the posting of

13/ 42 U.S.C. § 4331(a) provides in pertinent part:
"The Congress * * * declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures * * * in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans."

14/ Rule 65(c) provides:
"(c) Security. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof."

security in a judicial proceeding, is strengthened by its analysis of the second factual difference between this case and the cases cited by appellant, i.e., the fact that none of those cases involved the Department's management of Indian trust lands.

The cases appellant cites concerned lands owned in fee by the United States, or privately owned fee lands that were in some way impacted by the expenditure of Federal funds. Here, the lands involved are owned by the United States in trust for the Tribes. In taking actions relating to these lands, the Department is acting in a fiduciary capacity of the highest nature. See, e.g., Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942). Based upon appellant's statement that it is merely trying to enforce Federal environmental protection laws "upon a public land management agency" (Notice of Appeal at 2), it appears that appellant equates the Department's responsibilities as an owner/manager of public lands with its responsibilities as a trustee of Indian lands. 15/

The Board has held, however, that Indian lands are not public lands, and the laws applicable to public lands do not necessarily apply to trust lands. See, e.g., Star Lake Railroad Co. v. Navajo Area Director, 15 IBIA 220, 94 I.D. 353, recon. denied, 15 IBIA 271 (1987); dismissed, Star Lake Railroad Co. v. Lujan, 737 F. Supp. 103 (D.D.C. 1990); aff'd, 925 F.2d 490 (D.C. Cir. 1991) (requirements of statutes governing rights-of-way on the public lands are not to be read into statutes governing rights-of-way on Indian trust lands). As this difference between public lands and Indian trust lands relates to this case, the Board is not aware of any regulation allowing the imposition of an appeal bond in relation to administrative review of NEPA challenges to the use of the public lands. The fact that the Department has promulgated regulations which allow the imposition of a bond in relation to the use of Indian trust lands shows that it views its responsibilities in this area differently.

Appellant contends that the Area Director believes the appeal bond regulation supersedes NEPA requirements. The Board disagrees. There is no question of "superseding" here; rather, the issue is one of reconciling two very important Federal policies--the trust responsibility and environmental protection--in the Department's administrative proceedings. The trust responsibility requires the Department to consider issues in addressing actions on Indian trust lands that it would not normally consider when taking actions on the public lands. These different issues arise in all cases, not just ones under NEPA. Not to consider these issues would subject the Department to suit for breach of trust.

15/ The Board is aware that in Davis, supra, the court based its decision that Indian trust lands were subject to NEPA in part on its statement that the Department also held public lands in trust for the people of the United States. The Board is not aware of any judicial decision holding the United States to the same high fiduciary standards in regard to its actions on the public lands as the Supreme Court has required in regard to its actions relative to Indian trust lands.

The trust responsibility requires the Department to act in the best interest of the beneficial owners in any action it takes in regard to Indian trust land. Here, the tribal owner expected income in 1994 from the timber sale. The fact that no income will be generated in 1994 as a result of appellant's appeal is a fact which the Department must address in acting in the best interests of the beneficial owner.

After considering appellant's argument for a waiver of the bond in light of the important policies expressed in NEPA and the trust responsibility, the Board declines to waive the bond.

Appellant's final group of arguments allege that BIA has hampered appellant's efforts to obtain review of the merits of the FONSI decision. Appellant first asserts that BIA failed to respond to two requests, dated September 20 and September 23, 1994, for financial information necessary for the preparation of this appeal. The Area Director submits evidence that a response was provided on September 29, 1994, informing appellant that some of the requested information was protected by Federal law from public disclosure and the remaining information would be provided. In his response to appellant's supplemental statement, the Area Director clarifies that the Federal law prohibiting disclosure is the Privacy Act, 5 U.S.C. § 552a. The Board finds that appellant received a response; it was just not the one it wanted.

Furthermore, the Board concludes that, contrary to appellant's assertions, the information it requested in the September 20 and 23 letters was not relevant to this appeal. Appellant requested: "1. Financial statements for the BIA Timber Program for the [Tribes] for the years 1991 through 1994. 2. Size of proposed cutting units and silvicultural prescriptions for the * * * timber sale" (Sept. 20, 1994, letter at 1), and 3. "a copy of the Timber Sale Prospectus" (Sept. 23, 1994, letter at 1). Items 2 and 3 relate to the FONSI appeal, not to the imposition of a bond. Item 1 is not relevant to the bond appeal, and, based on the limited information before the Board, does not appear to be relevant to the FONSI appeal. Even assuming there was delay by BIA in responding to the letters, a matter the Board does not decide, appellant was not harmed in preparing this appeal by any such delay. 16/

Appellant also suggests "that the appeal bond mechanism is another method being used to discourage [its] pursuit of administrative relief" (Supplemental Statement at 8). Realistically, the imposition of a bond may well result in a decision not to pursue administrative remedies or to seek judicial review immediately. This is true whenever a bond is required and regardless of the nature of the underlying controversy.

16/ Any delay in BIA's response may be attributable to the fact that appellant sent its letters to the Area Director, not to counsel representing the Area Director. The Board agrees with the Area Director that appellant should have known that inquiries in on-going litigation in which counsel has entered an appearance should be directed to counsel, not the person represented.

Under the circumstances of this case and based upon the conclusory arguments made by appellant, the Board cannot conclude that a bond was imposed for the purpose of discouraging appellant's substantive appeal, rather than protecting the Tribes' financial interests.

Appellant did not challenge the specific amount of the bond, but the Board addresses this issue under its authority to correct manifest injustice or error. 17/ The Superintendent based his request for a $29,000 bond on $27,619 in interest which would be lost by the Tribes, and $1,385 for sale package review and reconciliation, copying and mailing, and readvertisement. Neither the Superintendent nor the Area Director provided information concerning whether the $1,385 would be spent by the Tribes or by BIA. However, the description of the sale package review and reconciliation amount states that this function would be performed by a "GS-9 Forester," which suggests that the expense would be incurred by BIA. Furthermore, as discussed supra, these funds were initially expended in violation of the stay provision of 25 CFR 2.6(b).

Even if the Board were to hold that financial losses that might be sustained by BIA could be covered in an appeal bond, a holding it specifically does not make, the fact that these costs can be considered financial losses only because BIA did not delay the timber sale advertisement until the appeal period had expired convinces the Board that they should not be covered in any bond.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, this appeal from the Portland Area Director's August 11, 1994, imposition of an appeal bond is docketed, and the decision is affirmed, although the amount of the bond is reduced to $27,619.

Kathryn A. Lynn
Chief Administrative Judge

I concur:

Anita Vogt
Administrative Judge

End

17/ 43 CFR 4.318 provides:
"An appeal shall be limited to those issues which were * * * before the official of the Bureau of Indian Affairs on review. However, except as specifically limited in this part or in title 25 of the Code of Federal Regulations, the Board shall not be limited in its scope of review and may exercise the inherent authority of the Secretary to correct a manifest injustice or error where appropriate."

DATE _____

SENATE COMMITTEE ON _____

BILLS BEING HEARD TODAY: _____

_____

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Name	Representing	Bill No.	Check One: Support	Check One: Oppose
Cliff Cox	13th Jud Dist FD, self	HB311	✓	
Beth Baker	Dept of Justice	311	Technical Information	
Deborah Smith	Sierra Club	311		X
Melissa Case	Montanans Against Toxic Burning Montanans for a Healthy Future	311		✓
ERIC WELLE AMS	PEGASUS GOLD	311	X	
MIKE MURPHY	MT. WATERWAYS. ASSN	311	X	
FRANK NORMAN	FARMER	311	X	
FLORENCE YOUNG	SELF	311	X	
Glenn Mary	Governor's office	311	X	
Don Allen	MT. Wood Prod. Assn	311	✓	
Cli Racicot	MBIA	311	X	
Peggy Trew	WETA	311	X	
Chuck Rose	Seven-Up Pete Joint venture	311 501	X	
J.V. Bennett	MontPIRG	311	~~X~~	X

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SENATE COMMITTEE ON _____

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Check One

Name	Representing	Bill No.	Support	Oppose
Cary Hegreberg	MT Wood Prod. Asso.	501	X	
Kelly Moore	Brd of Visit	117	X	

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DATE 3-9-95

SENATE COMMITTEE ON Judiciary

BILLS BEING HEARD TODAY: HB 311, HB 117, HB 501, HB 217

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Name	Representing	Bill No.	Check One: Support	Check One: Oppose
Jim Jensen	MEIC	HB501		X
Riley Johnson	NFIB	HB 311	X	
Janet Ellis	MT Audubon	HB 311		X
Martha Lund	MFBF	HB311	X	
Don Judge	MT STATE AFL-CIO	HB311		X
Dan Anderson	DCHS - mtl	HB117	X	
Carl L. Keener MD	MSH	HB117	X	
John Bloomquist	Mt. Stockgrowers	HB 311 HB 521	X	
Jim Richard	MT Wildlife Fed	HB311	X	
Pete McHugh	L+C C. Farm Bureau	HB 311	X	
Lee Cummins	MT Farm Bureau	HB311	X	
Lorna Frank	MT. Farm Bureau	HB501 HB311	X	
Wade Sikorski	Self	HB 311		X
Ted Lange	NPRC	HB 311		X

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