

MINUTES

MONTANA HOUSE OF REPRESENTATIVES 54th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN BOB CLARK**, on March 21, 1995, at 8:00 AM.

ROLL CALL

Members Present:

Rep. Robert C. Clark, Chairman (R)
Rep. Shiell Anderson, Vice Chairman (Majority) (R)
Rep. Diana E. Wyatt, Vice Chairman (Minority) (D)
Rep. Chris Ahner (R)
Rep. Ellen Bergman (R)
Rep. William E. Boharski (R)
Rep. Bill Carey (D)
Rep. Aubyn A. Curtiss (R)
Rep. Joan Hurdle (D)
Rep. Deb Kottel (D)
Rep. Linda McCulloch (D)
Rep. Daniel W. McGee (R)
Rep. Debbie Shea (D)
Rep. Liz Smith (R)
Rep. Loren L. Soft (R)
Rep. Bill Tash (R)
Rep. Cliff Trexler (R)

Members Excused: Rep. Duane Grimes
Rep. Brad Molnar

Members Absent: None

Staff Present: John MacMaster, Legislative Council
Joanne Gunderson, Committee Secretary

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

Committee Business Summary:

Hearing: HB 597
Executive Action: HB 597 TABLED
SB 206 BE CONCURRED IN AS AMENDED
SJR 10 BE CONCURRED IN
SJR 16 BE CONCURRED IN

{Tape: 1; Side: A}

HEARING ON HB 597

Opening Statement by Sponsor:

REP. JACK WELLS, HD 27, characterized the original of HB 597 as a takings bill which addressed compensation for the taking of private property, and said that what was being offered instead was a substitute bill. The bill being introduced was more accurately a look-before-you-leap bill. This bill would use part of HB 311 and substitute it into HB 597 and change the application from state agencies to local government agencies. He distributed the latest version of HB 311. **EXHIBIT 1**

He said the background for the bill was one of basic property rights for the owners and the main advantage to having a look-before-you-leap bill was to save taxpayer monies. Property owners can avoid going to court if local governments recognize the rights of property owners and look before they enact zoning requirements, etc.

Proponents' Testimony:

Chris Racicot, Executive Director Montana Building Industry Association (MBIA), submitted written testimony. **EXHIBIT 2**

Larry Brown, Agriculture Preservation Association (APA), said they were strongly in favor of the bill. They felt it was important for everyone to be part of the process of establishing reasonable zoning. The intent of the bill was to help rein in all levels of government which have become powerful and which lack logic in setting regulations without regard to the public. Systematic planning and zoning is fundamental to Americans as well as Montana, and he thought this bill would address the issues.

Eugene Graf, MBIA, presented written testimony. **EXHIBIT 3**

Donald Hannah, Southwestern Montana MBIA, strongly supported HB 597. **EXHIBIT 4**

Lorne Frank, Montana Farm Bureau Federation (MFBF), submitted written testimony in favor of HB 597 which included an article from the local newspaper relating to the issue. **EXHIBIT 5**

{Tape: 1; Side: A; Approx. Counter: 24.6}

Collin Bangs, Montana Association of Realtors, stated that the reasons for supporting this bill had been explained by earlier testimony. He cited examples which backed up his support of HB 597.

Fred Happel, Montanans for Better Government, said they supported the bill in concept, however, Professor Natelson, a specialist in property law, had some serious concerns about some technical flaws in the drafting of the bill and recommended that those flaws be addressed through amendments before enacting it.

David Owen, Montana Chamber of Commerce, rose in support of the bill because they appreciated the healthy debate in the legislation about where to draw the line when it came to private property rights. He asked the committee to personalize the issue as they drew those lines.

Riley Johnson, National Federation of Independent Business (NFIB), stood in strong support of protection of private property rights. They saw the pendulum swinging from side to side and urged the committee to choose the middle ground.

John Bloomquist, Montana Stockgrowers Association, supported the concept of taking HB 311 to modify the bill for local government.

Tom Daubert, Ash Grove Cement Company, registered their support of HB 597.

Informational Testimony:

Maureen Cleary-Schwinden, Women Involved in Farm Economics, asked to go on record as neutral. They wanted to express the voice of moderation. They questioned the need for another bill dealing with the concerns of private property owners at the risk of the viability of county government. They had a concern about the impact on county government in regards to costs in takings. They asked the committee to proceed with caution and raised a question with regard to language in the bill--"unreasonable, substantial and significant"--which they felt could increase litigation because of the difficulty in proving those terms.

Opponents' Testimony:

Melissa Case, Montanans For a Healthy Future and Montanans Against Toxic Burning, came prepared to speak to HB 597 in its original form [before the proposed amendments for incorporation of language from HB 311] and said she had some serious difficulty with some of the terms used in this proposed legislation. Some of those were that the definition of "agency" seemed very broad. She said that they wanted to know what "substantially advanced" on page 3, line 6 meant. She was concerned that they seem to continually flip-flop the burden of proof depending on the actions taking place. Additionally, she wondered how often property would need to be assessed to determine fair market value. That had the potential of a large financial burden on local government and did not seem to change much in adding the provisions from HB 311. She said that local governments need flexibility to respond to their local needs and citizens. She felt this bill would put such a financial burden on local

government that they would not be able to zone. She did not believe that eliminating local control while increasing the financial burden was appropriate.

Ted Lange, Northern Plains Resource Council, said that extending HB 311 to the local level was a major improvement over HB 597 as introduced. He said they did still have concerns in HB 311 about some of the language they saw as ambiguous and which could be interpreted in a number of ways. They saw it imposing tremendous costs on local government and a key word in that concern was "rough proportionality" which would expose local government to law suits. It would also require a cost-benefit analysis for every action.

Ann Hedges, Montana Environmental Information Center, spoke to both bills. HB 597 as introduced would dramatically expand the definition of a taking. On the bottom of page 1 an owner was defined on the original bill as "the owner of property at the time an action is passed or promulgated." She described how this would affect the environment through various scenarios involving burning of hazardous or toxic waste. In looking at HB 311, she asked if inserting local government in the language would really address the concerns the proponents raised. Her understanding of HB 311 was that it would allow the Attorney General's office to develop a check list for agencies to review to determine if a taking had occurred, but did not expand the definition of a taking. She felt it was an unnecessary bill and urged tabling both bills.

Gordon Morris, Montana Association of Counties (MACO), said that both he and the county commissioners across the state which would be impacted by the legislation endorsed individual property rights. They stood in opposition to HB 311 during the 1993 session and stood in opposition to HB 597 and whatever the committee might do in mixing the two. He said that there wasn't a problem in Montana comparable to problems in other states. He said that local government can be best characterized as consensus building, looking to protect the environment within the community reflective of social and cultural values. He said that combining the two bills would only result in putting local governments in the situation of being forced to litigate virtually every local government consensus decision that they would be making prior to the implementation of this legislation. But, if the committee were to move in that direction, he suggested that they look at section 6 of the bill and amend the introduced version of the bill to strike \$25,000 and insert \$25 million. From the standpoint of the public, they ought to protest vehemently section 6 of the bill. He said this was not an appropriations matter and did not meet transmittal requirements, therefore, it was a violation of the public trust doctrine.

Jim Richards, Montana Wildlife Federation and the Montana Association of Planners, quoted articles in the Constitution which provide protection of private property and indicated that

the lack of protection addressed in this legislation was inaccurate. He refuted the testimony of **Mr. Racicot** and endorsed by **Mr. Brown** as being incorrect and described why. He said the regulations must meet a four-point constitutional test and outlined them. He supported HB 311 before the Senate Judiciary Committee which had been amended to reflect a reasonable opportunity for a look-before-you-leap bill and defined true takings. He was not sure that still applied and said he would oppose HB 597 even as amended. He said they should have the opportunity to see if it worked with state government before expanding it to local government.

Janet Ellis, Montana Audubon Legislative Fund, noted that HB 597 as introduced had the basic premise that people have the right to do anything they want with their land even if it would harm another. She said the fiscal impact of HB 597 as introduced would only give government a couple of options including the increase of taxes and stopping the program. Their assumption was that the intent was to stop the programs. They were also concerned that judges would decide everything because of the unclear provision for the determination of the property values. They understood the amendments to affect local governments with unfunded mandates.

Debbie Smith, Montana Chapter of the Sierra Club, said the title of the bill did not reflect what the bill actually would do with the proposed changes. She objected to the handling of the hearing in introducing the changes and that since it did not involve an appropriation, it should be tabled. She felt that because HB 311 had already been passed out of committee and was on third reading in the Senate and might be subject to a conference committee, that process should be followed. But she said that HB 597 did not fall within those parameters for consideration. She testified under protest to HB 597 as introduced since that was what she had prepared based on the public information which was provided. She submitted a newspaper article for the committee's information. **EXHIBIT 6**

{Tape: 1; Side: B}

Helen Christensen, Montana State AFL-CIO, presented written testimony in opposition to HB 597. **EXHIBIT 7**

{Tape: 1; Side: B; Approx. Counter: 6.1}

Don Spivey, Whitefish County Planning Board, said the provisions of this bill would effectively negate or cripple land use legislation in Montana. He gave several examples from his local area. He said that in their process throughout the county, the notion of public involvement in master plan development and update is paramount. He said the same was true in the establishment of zoning districts which is the vehicle to implement the master plan. He said litigation is costly and gave examples of the impact the bill would have in his area. He said

the bill would to stop the process and he would recommend a moratorium on development until the right people could understand the implications of the bill and work out procedures to work in accord with them and if they could not find those, maintain the moratorium until it could be reversed in the next session.

Brad Martin, Montana Democratic Party, strongly supported property rights but strongly opposed this bill. He believed this bill would seriously thwart the ability of local governments to protect the health and safety in the community. He said the amendments made the bill less troubling depending upon how closely the content of HB 311 was mirrored. He was troubled by the handling of the presentation of HB 597 as different from the original bill and said that same thing had occurred at the hearing on HB 311 and said this caused him concern about how the goals were being accomplished. He said this should be a bipartisan concern. He added that hearing this type of bill after transmittal also should raise concern and it eroded public trust. For those reasons, he urged tabling the bill.

Edmund Caplis, Director, Montana Senior Citizens Association, testified that their concerns were that bringing buildings up to code to meet health and public safety standards could be viewed as a takings and therefore opposed HB 597.

J. V. Bennett, Montana Public Interest Research Group, submitted written testimony in opposition to HB 597. He felt the introduction of the bill in this way impeded public involvement in the process. **EXHIBIT 8**

Alec Hansen, Montana League of Cities and Towns, echoed the protest to handling of the hearing of the bill and the proposed amendments. He said he was opposed for the reason that he had not been given time to review it and prepare for the hearing.

Jim Kembel, City of Billings, said they city felt the legislation was unnecessary since currently there was substantial law in the taking of property and setting the value of the property.

Bill Kennedy, Yellowstone County Commissioner, was concerned over the changes being proposed at the last minute and voiced concern over increased litigation and not understanding what the bill proposed. He felt that safety and rights of neighbors should be examined. He believed it could result in unfunded mandates to local government. He suggested that the committee look at the processes which are involved in local government actions in planning and consider those processes in deciding on HB 597.

Bill Verwolf, City of Helena, rose in opposition to HB 597. Keys which caused them to rise in opposition were the property rights and the balance of that with local regulations for public health and safety as being a complicated process. He said they have a fairly stable set of regulations which the court has responded to in a consistent manner. He felt the bill could upset the balance

in the process and result in major errors as well as it could prevent the local governments from accomplishing the requirements of their role in these processes.

Howard Gipe, Flathead County Commissioner, said the counties would be the big losers if this bill were to pass. He asked that the bill be tabled.

Gloria Paladechek, Richland Development, went on record in opposition and registered the fact that they had not seen the amendments.

Beth Baker, Department of Justice, said her purpose initially was to caution the committee that HB 597 would likely result in significant increased litigation costs for the state of Montana due to its language going beyond current legal standards provided in federal and state constitutions. As to the substitute bill, assuming that it would still require the Attorney General to develop guidelines, it would add new dimensions to the Attorney General's responsibility and she said they don't typically advise local governments other than with respect to specific opinion requests.

{Tape: 1; Side: B; Approx. Counter: 29.6}

Questions From Committee Members and Responses:

REP. AUBYN CURTISS asked if there was written testimony from Professor Natelson.

Mr. Happel said that the bill did not come to his attention in time to prepare testimony but he would see if that could be provided.

REP. CURTISS asked if **Mr. Gipe** was testifying on behalf of the commission and if they had taken a position on it.

Mr. Gipe said he testified on behalf of himself.

REP. SHIELL ANDERSON proposed some examples and asked **Mr. Graf** if they constituted a taking. In particular he addressed incorporating handicapped access or a zoning which allowed for one home per 160 acres where the person in that zoned area wanted to be excluded.

Mr. Graf said the first example would not constitute a taking and that the second example was more complex and the reasonableness of the situation would have to be considered.

REP. ANDERSON continued to give specific examples and **Mr. Graf** responded to each according to the Dolan case as well as whether reasonable expectation for return had been eliminated or changed and how the courts had been dealing with those cases.

{Tape: 1; Side: B; Approx. Counter: 36.7}

REP. LIZ SMITH asked if this only pertained to private property.

Mr. Richards answered yes and the application of takings is only to private property.

REP. SMITH shared a story about her own community and inquired about the application as a takings. She was informed that because it involved public lands, it would not constitute a takings.

REP. SMITH was concerned about the homes at the mill site near Anaconda which was considered contaminated by EPA regulations and asked if that would be considered a takings.

Ms. Smith said that under current law physical invasion of the property by the government would be a taking. She was not familiar with the details in the case and addressed it hesitantly and examined several possible reasons for the decisions based on the facts reported by REP. SMITH. She advised the proper course if the people were objecting to the actions of the EPA.

REP. SMITH asked if this bill had been in place at the time of the action, what affect it would have had.

Ms. Smith said this bill would have no affect on that decision because it was a federal case. She answered hypothetically if it had been a state taking. Under the state takings provision the property owners would have been paid more than they would have under the U. S. Constitution. Montana provides for full compensation of property value.

REP. SMITH asked if there was any way the county government would have had impact on that particular situation.

Ms. Smith clarified that if it had been a county determination, the county would have had to pay.

REP. DEB KOTTEL and Mr. Racicot had a lengthy discussion about the effect of the proposed amendments to substitute language in HB 597 with language in HB 311 which would potentially delete the appropriations section. They also discussed language changes to HB 311.

REP. KOTTEL asked Mr. Bloomquist to explain to the committee if a county or a state were to attempt a taking of the property and offered money and it was refused, would they have the right to a hearing as to the value of the property under condemnation proceedings.

Mr. Bloomquist answered that if there were an imminent domain proceeding which was initiated by the county or state and the offer were not accepted, there would be a right to a hearing.

REP. KOTTEL asked if there was an imminent domain proceeding but the person felt it was a taking, would the person have the right to file an inverse condemnation proceeding.

Mr. Bloomquist said that was a right under the Constitution.

REP. KOTTEL asked if this bill would go back to the _____ (inaudible) doctrine of the 12th century.

Mr. Bloomquist answered, "No, what HB 311 does is establish an assessment process by state agencies on takings ramifications of their actions." He said he understood that HB 597 was amended to establish the impact assessment by local government. He said it was more of a procedural issue than a substantive issue.

REP. DIANA WYATT asked if Ms. Smith's understanding of Justice Renquist's ruling that lack of providing infrastructure; i.e., sewer and water, to a development was not sufficient grounds to deny that development.

Ms. Smith did not know and preferred not to speculate.

Mr. Richards answered the question by outlining the specific criteria under the Montana Subdivision Filing Act.

REP. WYATT asked if in the scenario where Justice Renquist said they cannot deny the infrastructure to this new area that requested development and an RSID was assessed against the others in the general area, would that be a takings for the rest of those being assessed.

Mr. Richards said it would not be a takings, but there might be some other kind of legal relief that a citizen could take.

REP. WYATT asked if the property became overdeveloped and the property went down in value as a result, would that be a takings.

Mr. Richards said there would be some legal avenue, but a takings would not be the appropriate one.

REP. BILL TASH asked if the amendments would take the state out of HB 311 and replace it with local governments.

Mr. Racicot said that was correct.

REP. TASH and Mr. Racicot had further discussion which cannot be heard on the tape because of others talking over the microphone.

Mr. Racicot said they were not changing HB 311 in substance at all. HB 311 is a look-before-you-leap bill and HB 597 is a takings and compensation bill. Takings and compensation bills are very severe and confined and they decided at the last minute to make it palatable to everyone concerned, they would back up and apply HB 311 language to HB 597 to remove its severity.

REP. TASH asked if the effect would be that HB 597 would be a look-before-you-leap procedure the same as HB 311.

Mr. Racicot said that was correct.

{Tape: 1; Side: B; Approx. Counter: 57.1}

REP. LINDA MC CULLOCH asked the sponsor if there was a fiscal note prepared for HB 597.

REP. WELLS did not get a fiscal note and if there was one presented, he was unaware of it.

REP. MC CULLOCH asked how HB 597 came about being presented to the committee so close to transmittal.

REP. WELLS replied that it had an appropriation in it and for that reason it could be presented.

REP. MC CULLOCH said she thought they were eliminating the section which had to do with appropriations.

REP. WELLS said he was not sure they would be taking out the appropriation and had not discussed the technical details of it with legal counsel.

REP. MC CULLOCH asked if it was fair to ask questions on HB 597.

REP. WELLS said he thought it was fair, but there was not much there which would now apply with the request for a substitute bill.

REP. MC CULLOCH asked questions regarding specifics of HB 597 regarding actual or projected values on page 1, lines 23 - 25.

REP. WELLS said the loss was fair market value and there could be business losses arising. He offered hypothetical examples.

REP. MC CULLOCH supposed from his answer that there could be future projected losses and the sponsor agreed that was possible.

REP. MC CULLOCH asked about line 25 and asked what "other means" might mean. The sponsor did not know what the legal definitions might mean.

Mr. Bloomquist stated that HB 597 as amended would take HB 311 and essentially substitute local government where state agency currently appeared. He said they did not have anything to do with HB 597 and did not have knowledge of the particular phrases or the language of HB 597. His testimony applied to the bill as amended.

REP. MC CULLOCH stated that HB 597 was the means for the hearing, and Mr. Bloomquist agreed that was the case but they had testified on the amended bill.

{Tape: 2; Side: A}

REP. TASH asked about the legal ramifications of HB 597 particularly in regards to condemnation proceedings and associated actions. He said the amendments would affect the procedural issues. He asked if the guidelines would have to be provided by local government.

Ms. Baker said she understood that the substitute bill would use the same language as in HB 311 and would require the Attorney General to develop guidelines for local government. She reiterated her previous testimony. Were it not for the bill, local governments would ordinarily receive advice on their decisions on a daily basis from the city attorney.

REP. TASH asked for more information about her testimony that this would result in increased litigation.

Ms. Baker said her concerns with increased litigation costs were with HB 597 in its introduced form. She did not think those same concerns would apply with the substitute bill though she could not speak for the local governments as to how it would apply.

REP. WYATT addressed the concerns expressed about how the bill was introduced and asked why they made the determination not to bring the bill forth as was written.

REP. WELLS said he was asked to carry the bill a short time previously and was not fully up to speed on the subject of the bill. During study and consultation with more expert people, it came to light that they were possibly attempting to enact legislation which was drastic and would possibly have a more severe impact than originally anticipated. He did not feel they had a bill written to take into account several different circumstances which might occur. Finally, it was brought in an effort to enact something more palatable and less exacting which would prescribe procedural requirements which local governments could utilize to help them and to prevent follow-on problems. He apologized that the conclusion was reached just the day before and being new to the system he had offered a substitute bill on the advice of others.

REP. WYATT asked if it was appropriate for the committee to consider the bill if the appropriations process was struck.

REP. WELLS answered that he did not have a judgment on that and did not know the process technically well enough to make a comment.

REP. WYATT discussed the provision of the rules which would allow the appropriate consideration of the bill under the circumstances.

REP. WILLIAM BOHARSKI commented on the procedure in questioning the appropriateness of introducing the bill and asked that the committee keep to the subject of the bill since it was brought in good faith to the committee under the rules as provided. He asked **Ms. Smith** some hypothetical questions and she clarified the provisions for compensation in those cases and whether takings had occurred.

Ms. Smith replied that the issue in regard to a regulatory taking under current law even by the most recent decisions by the U. S. Supreme Court could be answered by: "the extent to which the prohibition on building interferes with your reasonable investment-backed expectations and the extent to which it deprives you of substantially all economic value of the property." She cited Lucas v. South Carolina Postal Commission to illustrate. The case was won when Justice Scalia affirmed the proposition that one must be deprived of substantially all economic value of property. It further depended upon the fact that the property could not be used for other purposes than the owner intended and thus had no other value.

For it to be considered a taking when the land had other uses and other ways to measure value would be a dramatic and radical change in constitutional law in which one was not deprived of substantially all economic value.

REP. BOHARSKI said he though it would be a radical change from the Scalia opinion, but was not sure it would be a radical change of the original intent of the Constitution. In the two scenarios he related, one was need for construction of a road for public safety reasons while the other one was preference to maintain open space. He suggested that the legislature could set policy back the other way [pre-Scalia].

Ms. Smith questioned whether the legislature had the ability to do that to the extent that it might change what the actual writers of the Constitution intended but for the sake of argument she would grant that the legislature could do that but thought that it would be sued. She commented that Justice Scalia is among the most rigid in adherence to the original framers' intent and construction of the U. S. Constitution. She responded to his differentiation between need versus preference.

{Tape: 2; Side: A; Approx. Counter: 17.9}

REP. BOHARSKI continued to debate the difference between need and preference and **Ms. Smith** answered that it came down to the choice the committee had to make in dealing with these bills in their original or amended form.

REP. BOHARSKI restated his question and **Ms. Smith** responded that she understood that the issue was that by not doing anything with the land, it would make the land have no value. In fact that might not be the case. The prohibition on building could be to protect the ground water aquifer or to structure the way communities grow for instance. The owner might view that as rendering the land valueless because it could not be developed. She suggested that the decision to prevent development for public health or safety reasons does have value.

REP. BOHARSKI said the argument was not about value, but that in the case of need, there would be compensation, while in the other there would not be full compensation.

Ms. Smith responded with a historical view of takings and said the philosophical view and thought it presented an interesting debate.

REP. DANIEL MC GEE asked if HB 597 passed, would the Sierra Club sue the state of Montana.

Ms. Smith said she had not talked with her client about that. She said she only represents the Montana chapter and it rarely sues but prefers to work within the process. There had been no decision about that.

REP. MC GEE asked if the threat of a suit accomplish the same end.

Ms. Smith asked him not to characterize anything she said as a threat. She thought it had value to assume that someone would sue.

REP. MC GEE asked if she understood the purpose behind the bill and she said she believed she did. He asked if she would agree that litigation from an organized group had reached a state where private property owned by an individual really couldn't compete with groups which have the funding.

Ms. Smith said she could not agree with such a blanket statement.

REP. CLIFF TREXLER asked in page 4, line 13 how they would take title.

Mr. Racicot said the amendment would invalidate the concern. He would have to defer to a legal opinion in a hypothetical case.

REP. TREXLER said they were talking about adverse affects but the same ruling could constitute the diminishing of the property value of a neighbor and asked if it would allow that person compensation.

Mr. Racicot did not know the answer.

REP. TREXLER stated that they agreed there is a problem in a local zoning situation which would reduce the value of the property, but in master plans such as being presented in Ravalli County there would be some people who happen to live within three miles of Hamilton who will benefit greatly from the zoning master plan. He asked if they would in turn compensate the county back because the plan had made them money.

REP. WELLS said he did not believe there was a direct reversal of the law whereby they would reimburse for a gain. He thought the only repaying was in taxes on the increased value of the property.

REP. TREXLER said by doing this property values would go up and taxes would go up therefore the procedure would cost more taxes and asked if the county would reimburse him for the increased tax load.

REP. WELLS said the law did not call for that.

REP. TREXLER referred to the case where a man was fined for running over the kangaroo rat where they also took his tractor and he asked if that was considered a taking.

REP. WELLS said the application of the law in those kinds of situations was not a takings and though taking the tractor could be a taking, there were other aspects of the situation to consider.

REP. JOAN HURDLE asked the sponsor if he would provide the committee with the portions of the bill and the amendment which would go into HB 311 and also a fiscal note on the potential litigation.

REP. WELLS described the amendment and said that nothing from HB 597 would be inserted into HB 311. He said he would attempt to get a fiscal note. As far as a copy of a bill for their consideration, he felt that could easily be provided.

REP. HURDLE asked if state agencies would be included alongside local government.

REP. WELLS said that state agencies were already covered and this would just address local agencies.

REP. HURDLE asked if the appropriations would be addressed in the fiscal note and the sponsor affirmed.

REP. TASH asked if the purpose of this legislation was to make sure that state or local government would take a long look before they leap on the kind of situation which was described involving the kangaroo rat.

REP. WELLS said that was exactly what it was intended to do.

REP. KOTTEL stated that on original HB 597 there was an appropriations section which asked for \$25,000 for grants to the 56 counties for implementation, but that HB 311 had no similar appropriations. She asked if he would be willing to put another appropriations section in HB 311 at approximately \$1,000 or more per county so that they could implement it without an unfunded mandate.

REP. WELLS answered that he would consider some amount of appropriation to be appropriate. He did not know what amount should be set and wanted to consult with others to do that.

{Tape: 2; Side: A; Approx. Counter: 39.2}

Closing by Sponsor:

REP. WELLS reiterated that the attempt was to arrive at a procedural bill which would provide guidelines to local governments and to alert them to incorporate in their planning the kinds of things they were seeing arise in these issues. He rebutted comments made by the opponents about public safety and toxic waste burning which he said were addressed in current law and this bill would not change that. It would only protect persons to do legitimate things with their property rather than giving permission to do anything they would like. He said the bill did not address job rights as was contended in testimony, but only property rights.

EXECUTIVE ACTION ON SB 206

Informational Testimony: EXHIBIT 9 was offered as requested information.

Motion: REP. KOTTEL MOVED SB 206 BE CONCURRED IN.

Motion: REP. MC GEE MOVED TO AMEND BY RESTORING SB 206 TO ITS ORIGINAL FORM.

Discussion: REP. KOTTEL said one of the reasons for the Senate amendments had to do with the confusion in the bill concerning criminal law. The original bill confused the issue of criminal law with taking protective measures having to do with children in the civil arena of child neglect. She made general comments regarding the difficulties and potential dangers to a child when the child could not be removed from a home until a criminal trial was completed and cited a case to support her viewpoint. She could see no other place in the law which allowed the defendant to have ongoing contact with the victim thereby potentially influencing the victim's testimony. Her concern was that this would be an effort to swing the pendulum too far in the opposite direction from where it seemed to now be in order to correct some deficiencies in the current system.

REP. HURDLE asked for the Senate committee vote on SB 206.

CHAIRMAN CLARK gave her leave to go ask for that vote if she desired.

REP. MC GEE said, "There is nobody on this committee that does not love children. There is no one here that does not love children. I have three children and I love them with all my heart and I know you guys do too. So, the question here is where is the pendulum and where should it be." He further said his concern with the bill as amended and the concern that he has had with Department of Family Services (DFS) is "their ability to come in at any time, take a child without any charge against me as a parent." He discussed how this bill could have affected him adversely in his youth and gave personal testimony where the actions allowed by it would have been unjustified because of misinterpretation. He discussed how it could adversely affect families through misapplication. Further, he said, "This is an issue here that needs to be addressed. DFS has gone way overboard. Whenever they can walk in --- I understand what you are saying, err on the side of the kid, okay. And I'm saying, protect the kid, but have a judicial process, have due process for crying out loud. The way the law is written right now, I don't have to see my accuser, I don't have to know who they are, nobody has to say anything to anybody for DFS to show up at the door. There is no credentiality (sic) for their social workers, they can walk in, make a determination on the spot and take your child. I am not going to fight that in court, I'm going to fight it right here in my living room. This thing has to go back to the way it was and if the pendulum has swung too far the other way, then let's amend it from there. But I'm not going to amend it from where it is now, which is clear over here on this side."

{Tape: 2; Side: A; Approx. Counter: 54.7}

REP. DEBBIE SHEA said she could sympathize with his position and told of a personal experience, but she understood the importance of the rule. She said the committee would have trouble relating to situations where parents abuse their children because they come from another background. She felt they should err on the side of the child.

REP. MC GEE said that his problem with it was that they would not ask first what happened when they saw bruises before taking the child. He was concerned about the lack of judicial process.

REP. KOTTEL gave her viewpoint that his statement was not true. She felt that teachers, etc. did the appropriate thing in reporting to the department where trained people could evaluate whether or not to temporarily remove a child. She was sure that there were situations where the department had erred on both sides, but that the bill provided good protections and clarification language. She pointed to line 17 on page 9 as providing security for the appropriate investigative process and

development of collaborative information for the investigation to continue.

REP. MC CULLOCH said the problem with the bill was that people on the committee knew they were good parents and gave a hypothetical situation which would involve a divorce and remarriage which resulted in suspected abuse by the step-parent and asked how long the parent would want those children to stay in that home and said that was the purpose of the bill.

CHAIRMAN CLARK addressed the statement that the people in the department are trained to spot abuse, but he said that he thought DFS would agree that in some cases their training is lacking, not only in how they operate and the methods they use but also in how to determine that abuse had occurred. He gave testimony of a situation which had been misinterpreted and misdiagnosed.

{Tape: 2; Side: B}

He said that the social workers were not always trained and there had been abuses by DFS and gave another example he knew of where actions had been inappropriately taken based on allegations only. He said this is the type of thing the original bill was intended to stop.

REP. ANDERSON said he would vote for the amendment so that it could be placed in conference committee for re-evaluation by the Senate.

REP. BOHARSKI agreed and urged the committee to act on it.

REP. TREXLER said he could relate similar stories of abuses by DFS and asked for clarification of the effect in the legislative process to add the amendment. **CHAIRMAN CLARK** explained.

REP. KOTTEL asked if what they wanted was something that met in the middle, but really didn't want the amendment but to proceed in some other way to reach the goal. **CHAIRMAN CLARK** explained further the reasons for the procedure being proposed.

REP. TASH spoke in favor of the amendment because he considered it essential to amend back into the bill the provision for reporting back into the local community.

REP. ELLEN BERGMAN thought the bill wasn't going to solve anything. She wanted to table the bill because it seemed to be aimed at the whole department. She thought there was another way to address the problems.

REP. LOREN SOFT asked if there was any other way to get it into conference committee. **CHAIRMAN CLARK** answered that they could amend it in any way to get it into conference committee. There was continued committee discussion about the technical aspects

involved in getting the bill into a free conference committee.
REP. MC GEE withdrew his motion.

Motion: REP. BOHARSKI MOVED TO AMEND TO REMOVE SENATE AMENDMENTS ON LINES 17 - 20 ON PAGE 9 TO RETURN IT TO ORIGINAL LANGUAGE.

REP. BRAD MOLNAR voiced his concern with the process not accomplishing the committee's goal and REP. ANDERSON explained how it would. He thought the risk was not great that it would not end up in a free conference committee and REP. SOFT and REP. MC GEE voiced their concern that it would be addressed in free conference committee.

REP. WYATT spoke about her concern about abdicating their responsibility to the free conference committee in forming the bill according to the wishes of the committee.

Vote: The motion carried 14 - 5. REPS. HURDLE, CAREY, KOTTEL, MC CULLOCH and WYATT voted no.

Motion/Vote: REP. MC GEE MOVED SB 206 BE CONCURRED IN AS AMENDED. The motion carried 11 - 8. REPS. BERGMAN, HURDLE, CAREY, SHEA, KOTTEL, WYATT, SMITH and MC CULLOCH voted no.

EXECUTIVE ACTION ON HB 597

Motion: REP. MC GEE MOVED HB 597 DO PASS.

Discussion: REP. MC GEE stated that this bill was a wake-up call. He said that over time the regulatory authorities and environmental groups have caused the pendulum to swing too far.

REP. TREXLER reiterated the intent of the amendments to retain the bill number but use the language of HB 311. He and REP. MC GEE discussed their understanding of the reason for the bill.

REP. TASH preferred HB 311 with amendments to include the counties. He testified about actual situations which influence his preference.

REP. MC CULLOCH objected to the method in which the bill was brought to the committee.

CHAIRMAN CLARK said that a fiscal note had been applied on HB 597 and explained that they take several days to be provided.

Motion/Vote: REP. MC GEE MOVED TO TABLE. The motion carried 13 - 6 by roll call vote.

EXECUTIVE ACTION ON SJR 16

Motion/Vote: REP. KOTTEL MOVED SJR 16 BE CONCURRED IN. The motion carried unanimously.

EXECUTIVE ACTION ON SJR 10

Motion: REP. MC GEE MOVED SJR 10 BE CONCURRED IN.

Motion: REP. BOHARSKI MOVED TO AMEND TO CHANGE THE TITLE AND LINE 10 AND PAGE 3, LINE 18 TO INCLUDE "ANOTHER."

Discussion: REP. CHRIS AHNER said that a judge who is on the Ninth Circuit Court was appointed while he was residing in Washington, D. C., and had not lived in the state for many years. She felt they would have a better chance of getting a Montana judge appointed if they left the word, "a," rather than "another."

The motion to amend was withdrawn and the discussion returned to the body of the bill.

REP. KOTTEL did not find the need persuasive to divide the court. She said that in times of rising deficit a division of court would cost more than they wanted to ask the federal government to spend.

Motion/Vote: REP. KOTTEL MOVED TO TABLE. The motion failed by voice vote.

Vote: The motion to concur carried 15 - 4. REPS. CAREY, MC CULLOCH, HURDLE, AND KOTTEL voted no.

Motion: REP. SHEA MOVED TO ADJOURN.

{Comments: The set of minutes is complete on two 60-minute tapes.}

ADJOURNMENT

Adjournment: The meeting was adjourned at 12:00 noon.



BOB CLARK, Chairman



JOANNE GUNDERSON, Secretary

BC/jg

HOUSE OF REPRESENTATIVES

Judiciary

ROLL CALL

DATE 3/21/95

NAME	PRESENT	ABSENT	EXCUSED
Rep. Bob Clark, Chairman	✓		
Rep. Shiell Anderson, Vice Chair, Majority	✓		
Rep. Diana Wyatt, Vice Chairman, Minority	✓		
Rep. Chris Ahner	✓ 8:15	✗	
Rep. Ellen Bergman	✓		
Rep. Bill Boharski	✓		
Rep. Bill Carey	✓		
Rep. Aubyn Curtiss	✓ 8:00	✗	
Rep. Duane Grimes	✗	✗	✓
Rep. Joan Hurdle	✓		
Rep. Deb Kottel	✓		
Rep. Linda McCulloch	✓ 8:10		
Rep. Daniel McGee	✓		
Rep. Brad Molnar	✓ 10:30	✗	✓
Rep. Debbie Shea	✓		
Rep. Liz Smith	✓ 8:15	✗	
Rep. Loren Soft	✓		
Rep. Bill Tash	✓		
Rep. Cliff Trexler	✓		



HOUSE STANDING COMMITTEE REPORT

March 21, 1995

Page 1 of 1

Mr. Speaker: We, the committee on Judiciary report that Senate Bill 206 (third reading copy -- blue) be concurred in as amended.

Signed: Bob Clark
Bob Clark, Chair

Carried by: Rep. Simpkins

And, that such amendments read:

1. Page 9, line 18.

Following: "hours"

Insert: "within 48 hours"

Following: "independent,"

Insert: "independent,"

2. Page 9, line 19.

Following: "attributable"

Insert: ", and attributable"

3. Page 9, line 20.

Following: "home,"

Insert: "Without the development of independent, corroborative, and attributable information, a child may not be removed from the home."

-END-

Committee Vote:

Yes 11, No 8.

651431SC.Hbk



HOUSE STANDING COMMITTEE REPORT

March 21, 1995

Page 1 of 1

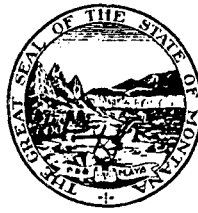
Mr. Speaker: We, the committee on Judiciary report that Senate Joint Resolution 16 (third reading copy -- blue) be concurred in.

Signed: Bob Clark
Bob Clark, Chair

Carried by: Rep. Shea

Committee Vote:
Yes 19, No 0.

651446SC.Hbk



HOUSE STANDING COMMITTEE REPORT

March 21, 1995

Page 1 of 1

Mr. Speaker: We, the committee on Judiciary report that Senate Joint Resolution 10 (third reading copy -- blue) be concurred in.

Signed: Bob Clark
Bob Clark, Chair

Carried by: Rep. Mercer

Committee Vote:
Yes 15, No 4.

651447SC.Hbk

HOUSE OF REPRESENTATIVES COMMITTEE PROXY

DATE 3-21-95

I request to be excused from the _____
Committee meeting this date because of other commitments. I desire
to leave my proxy vote with Linda McElhiney.

Indicate Bill Number and your vote Aye or No. If there are
amendments, list them by name and number under the bill and
indicate a separate vote for each amendment.

HOUSE BILL/AMENDMENT	AYE	NO
SB 2016		✓
<i>wydawn</i> McElhiney Amend		✓
Bohinski Amend		✓
HB 597 TABLE	✓	

SENATE BILL/AMENDMENT	AYE	NO

Rep. Bir Carey
(Signature)

HOUSE OF REPRESENTATIVES COMMITTEE PROXY

DATE

3/21/91

I request to be excused from the House Judiciary
Committee meeting this date because of other commitments. I desire
to leave my proxy vote with Staff.

Indicate Bill Number and your vote Aye or No. If there are
amendments, list them by name and number under the bill and
indicate a separate vote for each amendment.

HOUSE BILL/AMENDMENT	AYE	NO

SENATE BILL/AMENDMENT	AYE	NO
SJR 10	X	

Rep.

(Signature)

M. Gove

HOUSE OF REPRESENTATIVES COMMITTEE PROXY

DATE

3/1/95

I request to be excused from the Judiciary
Committee meeting this date because of other commitments. I desire
to leave my proxy vote with Shiell.

Indicate Bill Number and your vote Aye or No. If there are
amendments, list them by name and number under the bill and
indicate a separate vote for each amendment.

HOUSE BILL/AMENDMENT	AYE	NO
with Shiell		

SENATE BILL/AMENDMENT	AYE	NO
206 BOH. AMD	✓	
with Shiell		
TABLE HB 311		✓

Rep.

(Signature)

HOUSE OF REPRESENTATIVES COMMITTEE PROXY

DATE 3/21/95

I request to be excused from the HOUSE JUDICIARY
Committee meeting this date because of other commitments. I desire
to leave my proxy vote with Chairman.

Indicate Bill Number and your vote Aye or No. If there are
amendments, list them by name and number under the bill and
indicate a separate vote for each amendment.

HOUSE BILL/AMENDMENT	AYE	NO

SENATE BILL/AMENDMENT	AYE	NO
SJR 10 ^{no} amendmt	✓	
SJR 12	✓	
SJR 16	✓	
SB 174		
SB 206 ^{white} Bill	✓	
SB 229		
SB 237	✓	
SB 292 ^{(no} amend	✓	

Mr Chairman
Please vote me at your discretion
on any thing I've over looked
Thanks!
Rep. Subyn Curtis
(Signature)

HOUSE OF REPRESENTATIVES COMMITTEE PROXY

DATE

3/21

I request to be excused from the _____
Committee meeting this date because of other commitments. I desire
to leave my proxy vote with _____.

Indicate Bill Number and your vote Aye or No. If there are
amendments, list them by name and number under the bill and
indicate a separate vote for each amendment.

HOUSE BILL/AMENDMENT	AYE	NO
# 311		X

SENATE BILL/AMENDMENT	AYE	NO

Rep.

(Signature)

Edlen Bergman

HOUSE OF REPRESENTATIVES

ROLL CALL VOTE

Judiciary Committee

DATE 3/21/95 BILL NO. HB 597 NUMBER _____

MOTION: To Table

NAME	AYE	NO
Rep. Bob Clark, Chairman	✓	
Rep. Shiell Anderson, Vice Chairman, Majority		✓
Rep. Diana Wyatt, Vice Chairman, Minority	✓	
Rep. Chris Ahner		✓
Rep. Ellen Bergman	✓	
Rep. Bill Boharski		✓
Rep. Bill Carey	✓	
Rep. Aubyn Curtiss	✓	
Rep. Duane Grimes		✓
Rep. Joan Hurdle	✓	
Rep. Deb Kottel	✓	
Rep. Linda McCulloch	✓	
Rep. Daniel McGee	✓	
Rep. Brad Molnar		✓
Rep. Debbie Shea	✓	
Rep. Liz Smith	✓	
Rep. Loren Soft	✓	
Rep. Bill Tash		✓
Rep. Cliff Trexler	✓	

HOUSE BILL NO. 311

INTRODUCED BY GRINDE, BECK, HAYNE, HARGROVE, MURDOCK, BENEDICT, MOLNAR, MILLS,
FUCHS, SLITER, BAER, EMERSON, MESAROS, MOHL, BURNETT, COLE, REHBEIN, CRISMORE,
MASOLO, KEATING, HERTEL, SWYSGOOD, GROSFIELD, HARDING, TASH, AKLESTAD, FOSTER,
JENKINS, BARNETT, HARP, OHS, ROSE, GRIMES, HERRON, SOFT, ELLIS, TAYLOR, STORY, COBB,
WAGNER, TVEIT, ANDERSON, KEENAN, ZOOK, HOLLAND, DEBRUYCKER, GREEN, DEVANEY, M.
HANSON, SIMPKINS, L. SMITH, STOVALL, GRADY, KITZENBERG, MERCER, JORE, SOMERVILLE,
BOHARSKI, S. SMITH, DEVLIN, FORBES, MCGEE, JABS, JENKINS, TOEWS, SPRAGUE, ESTRADA,
FELAND

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR A REVIEW AND ASSESSMENT OF PROPOSED
STATE GOVERNMENT EXECUTIVE BRANCH ACTIONS THAT MIGHT RESULT IN DEPRIVING A PROPERTY
OWNER OF ALL OR PART OF THE USE OR ECONOMIC VALUE OF PRIVATE PROPERTY IN A MANNER
REQUIRING COMPENSATION UNDER THE 5TH AND 14TH AMENDMENTS TO THE UNITED STATES
CONSTITUTION OR ARTICLE II, SECTION 29, OF THE MONTANA CONSTITUTION."

STATEMENT OF INTENT

A STATEMENT OF INTENT IS REQUIRED FOR THIS BILL BECAUSE IT GRANTS THE ATTORNEY
GENERAL AUTHORITY TO DEVELOP GUIDELINES FOR STATE AGENCIES TO FOLLOW IN IDENTIFYING
AND EVALUATING AGENCY ACTIONS WITH TAKING IMPLICATIONS. THE ATTORNEY GENERAL, USING
A PUBLIC PROCESS, SHOULD DEVELOP AN ORDERLY, CONSISTENT, INTERNAL MANAGEMENT
PROCESS FOR STATE AGENCIES TO EVALUATE THE EFFECTS OF PROPOSED STATE ACTIONS ON
PRIVATE PROPERTY. CONSISTENT WITH THE MONTANA AND UNITED STATES CONSTITUTIONS, THE
ATTORNEY GENERAL SHOULD CONSIDER THE FOLLOWING ISSUES IN DEVELOPING GUIDELINES:

(1) WHETHER THERE IS A CONSTITUTIONALLY PROTECTED PROPERTY RIGHT THAT WILL BE
AFFECTED;

(2) WHETHER THE PROPOSED ACTION WOULD SUBSTANTIALLY ADVANCE A LEGITIMATE
STATE INTEREST;

(3) WHETHER THE ACTION WOULD DEPRIVE THE OWNER OF ECONOMICALLY VIABLE USE OF
THE PROPERTY OR RESULT IN A TEMPORARY OR PERMANENT PHYSICAL INVASION OF THE PROPERTY;

1 SOME OTHER ENVIRONMENTAL MATTER THAT IF ADOPTED AND ENFORCED WOULD CONSTITUTE A
2 DEPRIVATION OF PRIVATE PROPERTY IN VIOLATION OF THE UNITED STATES OR MONTANA
3 CONSTITUTION. It does not include:

- 4 (a) proposed eminent domain proceedings;
5 (b) a proposed seizure of property by law enforcement officials as evidence or under a state
6 forfeiture statute;
7 (c) a proposed forfeiture of property during or as a result of criminal proceedings; or
8 (d) a proposal to repeal a rule, discontinue a government program, or implement a proposed change
9 that has the effect of reducing regulation of private property.

10 (2) "Private property" means all real ~~and personal~~ property, INCLUDING BUT NOT LIMITED TO
11 WATER RIGHTS.

12 (3) "State agency" means an officer, board, commission, department, or other entity within the
13 executive branch of state government.

14 (4) "Taking OR DAMAGING" means depriving a property owner ~~of all or part of the use or~~
15 ~~economic value~~ of private property in a manner requiring compensation under the 5th and 14th
16 amendments to the constitution of the United States or Article II, section 29, of the Montana constitution.

17
18 NEW SECTION. Section 4. Guidelines for actions with taking implications. (1) ~~Each state agency~~
19 THE ATTORNEY GENERAL shall develop and ~~adopt~~ PROVIDE TO STATE AGENCIES guidelines, including
20 a checklist, to assist ~~it~~ THE AGENCIES in identifying and evaluating agency actions with taking OR
21 DAMAGING implications. ~~Each state agency~~ THE ATTORNEY GENERAL shall at least annually review its
22 THE guidelines and modify them as necessary to comply with changes in statutes and court decisions.

23 (2) In developing guidelines, ~~a state agency shall take into account the following requirements and~~
24 ~~considerations:~~

25 ~~(a) The state agency shall anticipate, must be sensitive to, and shall follow obligations imposed~~
26 ~~by the 5th and 14th amendments to the constitution of the United States and Article II, section 29, of the~~
27 ~~Montana constitution when considering and implementing an action with taking implications, in order to~~
28 ~~avoid unanticipated and undue burdens on the state treasury.~~

29 ~~(b) The following state agency actions with taking implications have the highest risk of taking~~
30 ~~private property:~~

1 time reduce the risk for a taking OR DAMAGING; and

2 (c) the estimated cost of any financial compensation by the state agency to one or more persons
3 that might be caused by the action and the source for payment of the compensation.

4 (3) A copy of the impact assessment ~~must be given to the senate finance and claims committee~~
5 ~~and house appropriations committee if the legislature is in session, to the legislative finance committee if~~
6 ~~the legislature is not in session, and to the governor before the action with taking implications may be~~
7 ~~taken, except that an action taken before the impact assessment is completed to avoid a threat to public~~
8 ~~health or safety may be reported to the committees and governor after the action is taken. FOR A~~
9 PROPOSED ACTION WITH TAKING OR DAMAGING IMPLICATIONS MUST BE GIVEN TO THE GOVERNOR
10 BEFORE THE ACTION IS TAKEN, EXCEPT THAT AN ACTION TO AVOID AN IMMEDIATE THREAT TO
11 PUBLIC HEALTH OR SAFETY MAY BE TAKEN BEFORE THE IMPACT ASSESSMENT IS COMPLETED AND
12 THE ASSESSMENT MAY BE REPORTED TO THE GOVERNOR AFTER THE ACTION IS TAKEN.

13 -END-



EXHIBIT 2
DATE 3/21/95
HB 597

Christopher J. Racicot
Executive Director
Suite 4D, Power Block
Helena, Montana 59601
(406) 442-4479
(406) 442-4483 Fax

1994-1995 Officers
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Stan Helgeson, Billings
First Vice President
Bob Ross Jr., Kalispell
Second Vice President
Sam Gates, Missoula
Treasurer
Mark Meek, Helena
Past President
Eugene Graf, Bozeman
Builder Director
Mark Lindsay, Helena
National Representative
Tim Dean, Bozeman
Associate Director
Frank Armknecht, Bozeman
Build PAC Director
Jim Caras, Missoula

March 21, 1995

House Judiciary Committee
Montana State Legislature
Helena, Montana

Re: House Bill 597

Chairman Clark and Committee Members:

The Montana Building Industry Association is an organization of nearly 1,000 small building trade businesses from the around the state of Montana. The MBIA is the home-building leader in encouraging responsible and professional business, planning and building standards. The members of the MBIA are also the individuals who constantly try to work within the framework of the regulations local governments impose on individual property owners.

It is for these reasons the MBIA has initiated the effort behind HB 597. The MBIA has been a long-standing proponent of sound planning and building practices. Sensible regulations and proper planning and zoning are essential to protecting both Montana's resources and the rights of property owners.

However, regulations, prudent land use planning and zoning should only be conducted through widespread consent of both the effected public or property owners, and elected officials. This type of consent can only be achieved through an unemotional assessment of the facts and a sincere commitment to include each surveyed opinion.

Property rights is an issue that is as old as this country. But the current movement dates to the mid 1980s, and has been inspired by an ever-increasing number of environmental regulations. HB 597 seeks to underscore and augment the Fifth Amendment to the Constitution, which says private property shall not "be taken for public use, without just compensation." It also seeks to ensure that property owners are not improperly circumvented in any planning or regulatory process.

By constitutional right, "taking" property need not mean taking possession of it - that by regulations, when the government takes away control of property and the value of it, the government should pay.

We have gone to being the most regulated society in history, and we are starting to see the effects of it. People are tired of getting their property taken and this is the recoil.

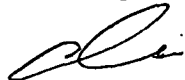
Some will say this measure impedes the government's ability to protect the public safety, or that this is an unfunded mandate. Well, neither is accurate, this measure simply taps local governments on the shoulder and reminds them to be responsible and sensible in their regulation and zoning practices. If this is done, it should cost the governments little or nothing at all.

Environmental protection benefits society, therefore, society should bear the costs. It is inequitable for government to shift the costs of environmental protection to a small number of private property owners who are coerced into donating their assets to the public without just compensation. Besides, such arguments as public safety and the environment are not based on logic and seem to be aimed at generating fear rather than sound public policy.

Ideally, Montana should be defining "a taking and just compensation" in statute. By which we could create a trigger-point at which a regulation is presumed to have become a taking. However, this may be premature without first reminding local governments (with this look before you leap legislation) of their civic responsibilities and obligations.

Sound regulation, zoning and land use planning should not be conducted by the private agenda of a self-serving few manipulating the law for their cause. Rather, it must come from the people - from you - as all worthwhile government change should.

Please give your favorable consideration to HB 597, the public deserves to be part of such a effectual process.



Christopher J Racicot
Executive Director, MBIA

Testimony to
House Judiciary Committee
HB 597
by
Eugene Graf
Box 906
Bozeman, MT 50771
Immediate Past President
Montana Building Industry Association
March 21, 1995

Good morning, Mister Chairman and members of the Committee. Thank you for considering this important legislation which in truth does nothing more than maintain the private property rights protected in the U. S. Constitution. During the past several years the U. S. Supreme Court has been on a consistent path of reaffirming these rights, the most recent being *Dolan vs. City of Tigard*.

In Dolan, the United States Supreme Court restricted the ability of local governments to exact property as a condition to new development. This decision adopted a "rough proportionality" test for reviewing dedication requirements. This test requires local governments to show that the exaction or dedication is "related both in nature and extent to the impact of the proposed development." While the requirement is not mathematically precise, the burden of showing "rough proportionality" is clearly upon the government.

The need for passage of HB 597 is because the bureaucracy still doesn't get it. Unless we affirm the Fifth Amendment very clearly the local agencies continue to believe that *Dolan* doesn't pertain to their specific actions. When the NIMBY's demand more open space, or the anti-growth forces demand preservation of "quote critical lands", or the city will not accept a storm water retention area as dedicated park land because it may be inundated for a day or a week, or a property zoned and annexed to the city since 1972 as residential now is viewed as nice for the birds and small animals, it is time to offer some relief to the private property owner.

I have no problem with the idea that if a property truly is viewed as too valuable to develop and use for economically beneficial purposes that it be preserved. My contention is that those making these judgments must shoulder the burden of their beliefs; pay for the confiscated land. In truth, the people really shouldering this burden now are those poor souls trying to afford a house in cities like Bozeman.

Let me site you from an application denial in Bozeman:

A motion was made to deny the subdivision based on the findings that the subdivision will disturb an environmentally sensitive area, and impact agriculture. This on a 100 acre parcel that had been annexed and zoned residential since 1972.

I believe it is time to spell out loud and clear that government regulation or action which deprives the partial use or economic value of

private property must be compensated. This in no way is a bill to allow nuisance or harm to adjoining property through the indiscriminate use of one's property. The extreme cost of litigation clearly discourages private property owners from affirming their rights through the courts - fighting city hall. HB 597 hopefully will be passed and understood so we don't need to go to court in the first place.

The U. S. House of Representatives has adopted legislation that protects the rights of property owners and provides compensation when the use of property is restricted by the federal government. I believe similar legislation dealing with actions of state agencies has passed this session. I believe it only makes sense to extend this protection to the local level where most land use decisions are made.

Thank you for this opportunity to appear before you today. I would be happy to answer any questions the Committee might have of me.

Good Morning Mister Chairman and Members of the Committee

My name is Don Hannah, and I am a developer from Bozeman. I'm a member of the Board of Directors from the S.W.M.B.I.A., and I represent them here today.

We strongly support House Bill 597 and strongly support reversing the law relating to taking of private property by local government agencies.

I have personally been in the process of trying to develop a 147 acre parcel of land in Bozeman. I have been struggling for over 2 years in this process, and I have only been able to annex the property. I'm now in Subdivision review.

The local Planning Dept, County and City Commissions are putting pressure on me to:

- 1) not develop within the 500 year flood plain.
This creates a loss of over \$300,000 to the project
- 2) provide significantly more than 30% open space.
They want 45-50% open space which is an additional 23-29 acres. This creates another large revenue loss.
- 3) The City Commission called for a Critical lands study.
They tried to stop the project until this study was completed. This study is still not completed.

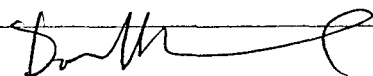
In conclusion, the local government agencies have simply overstepped their bounds. They are imposing conditions far beyond what our existing law states.

Gene Graf's property is a perfect example of this misuse. His property has been Master Planned for residential development for 22 years, annexed, and zoned R-2 for the same. He was denied his development rights on the rational that the property was too sensitive.

This is a taking. If the City of Bozeman believes this property should be saved, then fair compensation should be given him.

The local governmental agencies are not being held accountable, and this is why we strongly support private property rights legislation.

Don Hannah



Bozeman, Montana



MONTANA FARM BUREAU FEDERATION

502 South 19th • Bozeman, Montana 59715

Phone: (406) 587-3153

March 21, 1995

EXHIBIT 5
DATE 3/21/95
HB 597

Mr. Chairman, members of the committee, for the record, I am Lorna Frank representing Montana Farm Bureau, the largest general farm organization in the state with over 6,000 members.

Farm Bureau supports HB-597, it is very much like Rep Grinde's HB-311 in that it addresses the taking of private property. However, HB-597 goes much further in that it includes state, county, city or other political subdivision. I want the members of this committee and everyone in this room to understand that Farm Bureau had nothing to do with the drafting of this bill. The reason it was drafted was because some people felt that HB-311 did not go far enough, that could be. The reason HB-311 did not include all entities of government is because we did not want to battle all agencies of government and the environmental groups at the same time.

One could argue that there is a need for a bill such as HB-597 when you hear of cases like the Waterline Trial south of Helena. Don Hurni put up "no trespassing" signs last fall on his land near the new Upper Hale Reservoir — land that for years had been used as a popular hiking, bicycle trail.

Mr. Hurni closed the trail because he was concerned about vandalism and the liability issue, what happens if someone gets hurt while on the trail? In today's society suing someone for what should be your responsibility is the thing to do. What would many of you here in this room do under the same circumstances?

Judging by the letters to the editor and reports on city commission meetings in the Independent Record many citizens of Helena were outraged because the land had been closed. The city and county formed a Land Conservation and Development Advisory Committee to help in planning and to identify problem areas and to work toward solutions. But some citizens of Helena are not satisfied and are presently collecting money to sue Mr Hurni. Why should citizens of this state have to go to court to protect their private property and their right to use that property.

As a Jan. 11, 1995, article in the Independent Record said, "As the population continues to spread out into surrounding areas, people will be encroaching more and more on private land. Similar troubles seem inevitable--provided we continue to do little more than we are now to prevent them". The same article concluded by stating that "Land disputes aren't going to go away,

but working together sounds a lot better than an endless series of lawsuits, condemnations, and arrests of wayward hikers".

HB-597 is designed to prevent lawsuits and to get people and state agencies to working together. Situations like the one I mentioned and regulations that endanger property rights are going beyond constitutional boundaries and require certain property owners to disproportionately shoulder burdens that properly belong to society as a whole.

Thank you for your attention and for allowing me the opportunity to testify on this important matter. Farm Bureau urges this committee to give HB-597 a do pass recommendation.

Trail

Continued from Page 5A

"It's not so much liability, but a philosophical position. Private is private and if a person wants to close off the trail, they should be able to," Burdick said. "I think the types of situations that have contributed to that attitude hardening is what I would characterize as 'slob recreationalists,' who are similar to 'slob hunters' — people who ride or walk off the existing trail, who de-

face signs or take down fences, who are loud at night when they don't realize people's homes are near the trail, or ... people who throw rocks onto roofs."

Also upsetting some of these landowners are people who yell at the landowners when they're driving motorized vehicles across their property.

"On lands in Helena that people perceived as public, they'll challenge people in vehicles. But usually those in the vehicles are the owners and they don't feel this is right," Burdick said.

One possible resolution is moving the trail to the east, but it would become much steeper than the existing trail, which could lead to erosion problems, Burdick said. That also could turn the trail into a seasonal, rather than year-round, path.

The city also could consider buying the land for the trail, but that could be expensive because the trail bisects some parcels. In those situations, the property owners might want the city to purchase the entire lot.

"That might be quite expensive and there might be other lands more worthwhile for the city to buy," Burdick said. "And even with compensation, it's not clear if the property owners would want to go forward."

"But nothing is totally discarded until something finally happens."

Trail dispute on hold

Mediator, city want more time to discuss Waterline issue

By EVE BYRON
IR Staff Writer

A work session to discuss the Waterline Trail in Helena has been postponed for one month.

Katie Burdick, a consultant called in to try to mediate the dispute over access to the popular hiking and biking trail, said city commissioners want more time for her to investigate possible options before bringing all the parties together to try to work out an agreement.

"For the past few weeks I've been contacting each of the property owners and citizens representatives to talk to them individually to see if there is some room for additional discussion or if we had reached the end of the line," Burdick said. "The city wanted me to follow up on some pieces of information I brought back to them before they had this work session with the public. ... So instead of it being a meeting where people get to come and listen, it would be more of a participatory meeting."

THE WATERLINE TRAIL DISPUTE erupted in early December when Don Hurni put up no trespassing signs on his land at the top of Rodney Street — land that includes the starting point for the trail, which accesses Forest Service and Bureau of Land Management parcels. Hurni wants to limit access to his land because he's concerned about liability if someone is hurt, he's tired of vandalism in the area and he wants to graze his horses there.

That action angered some Helenians who had used the trail for years. One person was convicted of trespassing after she used the trail in January.

Residents asked city commissioners for help in the dispute; since Hurni is Helena's fire chief, Burdick was called in so no questions of impropriety might arise.

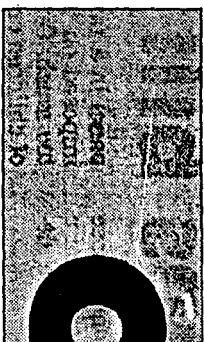
SHE SAID THE OTHER FIVE property owners along the trail also are concerned about people abusing the land along the trail, and may want to cut off use.

(More on TRAIL, page 6A)



4A

Bruce Whittenberg..... **PUBLISHER**
Charles Wood..... **EDITOR**
David Shors..... **ASSOCIATE EDITOR**
Bill Skidmore..... **EDITORIAL PAGE EDITOR**



Let's cut off trail dispute

If there's a lesson in the current hassle over the Waterline Trail south of Helena it's that such disputes can only

grow with our city.

As the population continues to spread out into surrounding areas, people will be encroaching more and more on private land. Similar troubles seem inevitable — provided we continue to do little more than we are now to prevent them.

The trail dispute that came to a head late last year when Helena Fire Chief Don Hurmi put up "no trespassing" signs on his land on the ridge near the new Upper Hale Reservoir — land that for years has been crossed

AN IR VIEW

by a popular hiking trail. The owner cites concerns about vandalism and liability issues, and he also wants to graze his horses on the property. And after all, he says, it is private property.

Hikers say the closure of Hurmi's land cuts off a trail that has been used by Helens for years. Their degree of outrage went up a few notches last week after a woman using the trail was arrested by police for trespassing.

City officials are working to find a com-

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But that is the poin
ture problems of this

DIALOGUE

The Environment vs. Property Rights

Want a Toxic Dump Next Door?

By Dan Gordon

A PHILADELPHIA homeowner and real estate developer, I believe in landowners' rights and in preserving property values.

It is precisely why I am against the so-called property rights bill passed by the House this month and comparable ones proposed in the Senate and in state legislatures throughout the country.

Details of the bills vary, but they would all establish a general rule. Taxpayers must pay a landowner when a zoning rule, environmental law or other governmental regulation limits the value of the land.

At first glance, that may seem fair, even attractive. But on closer inspection, it is clear that such supposedly pro-landowner legislation would hurt most homeowners.

Many of the bills under debate in state legislatures would require that taxpayers pay landowners affected by zoning laws. But zoning laws have a purpose; they are typically designed to prohibit incompatible uses in the same area — for example, landfills or shopping centers in residential districts. So while a few landowners might make less money because they aren't allowed to create a landfill, the property values of the rest of the neighborhood are protected.

Similarly, the House has already passed a so-called takings bill targeting wetland, water and wildlife areas that would require taxpayers to pay owners for foregone profit. In the Senate, Orrin Hatch, Republican of Utah, has introduced a bill that would require payment to landowners affected by any environmental safety standard, including Federal rules that require cleaning up of toxic sites, prevent strip mining from ruining landscapes, keep air and water clean and limit development in flood-prone areas.

Yes, these standards might limit the potential profit from some land or even prohibit development in some areas, which could lower the value of the property. But the rules also protect the value of surrounding homes.

The advocates of these laws seem to have ignored the cliché that the factors that most affect home values are location, location and location. An incinerator built close by or polluted water will immediately reduce home values in a neighborhood. Coastal protection and wetland laws

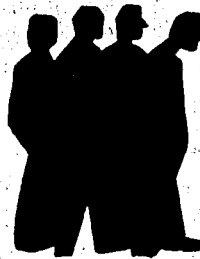
protect property values by keeping communities attractive and by buffering floods and ocean storms. A band of wetlands along the coast invariably increases the value of homes behind it.

So under the new 'anti-regulation' agenda, homeowners' property values are threatened. Also, the sheer cost of paying property owners for their claims and the specter of continual litigation would dramatically undermine our environmental and zoning laws.

The new takings bills assume that landowners have the right to do anything they want with their property regardless of the impact on others. But I rely on a contrary view: property owners have a right to be protected against abuses by others.

Some big farm operations, timber and paper companies, mining companies or shopping center developers would benefit from these bills. They have little concern about what their neighbors do with their land, and they can afford lawyers to seek payment in return for Government regulation. And 3 percent of all private landowners in these industries own 80 percent of all private land.

But the 2 percent of the land committed to housing possesses the majority of all real estate value. And most landowners own only the prop-



Seth Tobocman

Federal rules can protect property values.

erty around their home. Their investment is vulnerable to abuses by others.

I have experienced both the headaches and benefits of regulation when buying properties in two historic districts in towns on the Hudson River. Although I squabble with inspectors about the costs of replacing a roof with the original slate, I am confident that such rules have

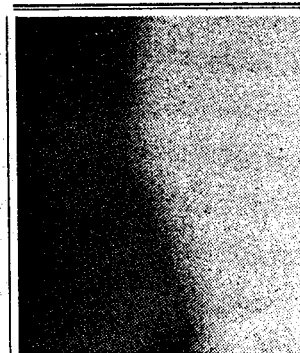
helped land values in these districts remain higher than the land values outside them.

Because of Federal and state programs of the last two decades, Americans have safer water supplies, fish are returning to waterways long abandoned and woodlands are being restored. This trend benefits not only the environment but also the homeowner.

Over time, communities that tolerate high levels of pollution tend to decline. Homes lose their value because people do not want to live in polluted, unattractive places. Communities with strict standards tend to rise in value.

I chafe at regulations and red tape when I develop my own properties. But I'm generally very happy to have these safeguards in place to protect these sites. So-called prop-

erty rights bills would not protect property but simply transfer control of property values from homeowners to large owners of undeveloped land. □



Re: KB597

Intro by
Mr Chapter
of the Sierra
Club



Montana State AFL-CIO

110 West 13th Street, P.O. Box 1176, Helena, Montana 59624

406-442-1708

TESTIMONY OF HELEN CHRISTENSEN ON HOUSE BILL 597 BEFORE THE HOUSE JUDICIARY COMMITTEE, MARCH 21, 1995

=====

Mr. Chairman, members of the committee, for the record my name is Helen Christensen and I am here to represent the Montana State AFL-CIO in opposing HB597.

"Takings" became a popular buzzword of the Wise Use movement after President Reagan signed Executive Order 12630 in 1988 requiring federal agencies to examine how extensively proposed regulatory actions might interfere with private property rights. According to former U.S. Solicitor General Charles Fried, the "takings" scheme was developed by then-Attorney General Ed Meese and other Reagan Administration officials in order to block legally prescribed, appropriately promulgated and congressionally-ordered regulations with which the executive branch bureaucrats disagreed.

Executive Order 12630 has since been repealed, but its spirit lives on in similar politically motivated legislation like HB597. Given enough time and an opportunity for deliberative and open debate, we are confident that Montana voters would discover the same thing about "takings" legislation that prompted the conservative voters of Arizona only last fall to repeal their state's "takings" law. Masquerading as protection for private property owners, "takings" is really just a means to strangle worker protection and public health and safety regulations by raising the cost of implementation beyond the fiscal reach of public agencies.

However, the sponsors of this bill may not have understood that the "takings" door swings both ways. Let us consider just one example of how this legislation might paralyze public decision-making and eliminate legislative prerogative:

There is a court case currently pending in Helena District Court involving the question of whether or not a person's job is considered a "property right" under the law. If you wish to check, the case is called Boreen vs. the State of Montana. Let's say the plaintiff in the case wins and the court orders that state employees' jobs are henceforth "property." Let's also assume that HB597 becomes law.

The Montanans who have been hired to work for state and local government agencies have what this bill calls a "future interest" and "reasonable expectation" that their jobs will continue to exist. In keeping with this legislature's goal to shrink the size of government, HB2 presently contains provisions to cut 160 jobs from one state agency alone. If those 160 state employees lose their livelihood because their positions are eliminated by legislative action, the employees would stand to be compensated, according to this bill, "equal to the full extent of the loss of their property." With HB597 in force, you would be obligated to find a way to pay those 160 state employees their full wages and benefits for the rest of their working lives, whether you "take" their jobs or not.

MontPIRG

Montana Public Interest Research Group

360 Corbin Hall - Missoula, MT - (406) 243-2908

Testimony Against House Bill 597, March 13, 1995

Chairman Clark and members of the House Judiciary Committee:

For the record, my name is J.V. Bennett, for the Montana Public Interest Research Group, or MontPIRG.

MontPIRG is a non-profit, non-partisan research and advocacy organization working for good government, consumer rights and sound environmental protection. MontPIRG represents over 4000 members in Montana, with 2200 student members, and is funded with membership donations.

As an organization advocating good government, MontPIRG rises in opposition to House Bill 597.

House Bill 597 is bad government policy. While this bill purports to be in the interest of protecting private property rights, it extends the concept of "takings" far beyond anything envisioned by the writers of the United States Constitution or the Montana Constitution. Private property rights are currently well protected and the meaning of a private property takings is well defined. House Bill 597 attempts to tinker with legal concepts of "takings" in ways that have serious consequences for not only the effectiveness of our state government, but also for Montana's taxpayers.

The main effect of House Bill 597 would be to cause all regulation in the state to cease. The provisions of this bill are so broad that the enforcement almost any regulation to protect public health, environmental quality or to protect property values would result in a taking requiring compensation. Since House Bill 597 would require the compensation to come from an agency's budget, state agencies would either cease enforcement or run out of money. It is likely that agencies would cease to enforce state laws, at least until they could ask for appropriations to cover "takings" compensations under this bill.

However, it appears that departments would still have to issue permits, since denial or cancellation of a permit seems to qualify under this bill as a "taking". This is particularly troubling. Apparently, if the someone wished to have a

permit to pollute our air, water or land, we would have to grant them a permit under whatever conditions that person wanted to pollute. Nor would the state be likely to enforce any conditions it did secure in the permit if this bill passes.

Moreover, at a time when Montana is expected to experience significant growth in our population, House Bill 597 would cripple the ability of local governments to manage this growth in a way that preserves our quality of life in Montana.

The citizens of Montana have shown that they want to protect the quality of their air, land and water. House Bill 597 will create a situation where the taxpayers of Montana are likely to have to pay exorbitant amounts to stop polluters. It is unlikely that they will be happy with paying higher taxes to pay off polluters or be content to allow environmental protection to cease.

Montana's Constitution not only grants its citizens the right to a clean and healthy environment, but also imposes a duty to maintain and improve the environment. House Bill 597 would require some persons to be paid to fulfill their civic obligations. This may sound like an attractive windfall for some individuals, but is bad policy for Montana and its citizens.

Because of the serious implications for Montana, MontPIRG urges you to table House Bill 597.

EXHIBIT 9
DATE 3/21/95
SB 206

March 13, 1995

TO: Richard Kerstein
Division Administrator

FR: Beth McLaughlin
Personnel Specialist

RE: Hiring

I have listed the most recently hired employees including a brief description of each person's education and experience. We are receiving about 30-50 applications for each opening, which has allowed the department to hire highly qualified individuals. The majority of our new social workers now far surpass the minimum qualifications of a bachelor's degree in social work or a like field and at least one year of social work experience.

Position 355
Hill County
Hire date - March 1995
BA - Human Services
DFS internship - 9 months
Rehab Tech - 2 years

Position 552
Gallatin County
Hire date - March 1995
BA - Corrections/Social Work
Senior CPS Worker (CA) - 10 years
Probation Office Intern - 1 year
Police Academy Trainer - 7 years

Position 437
Rosebud County
Hire date - February 1995
BA - Social Work
Youth Counselor - 1 year
Foster Care Management - 1 year

Position 313
Custer County
Hire date - December 1994
BA - Social Work/Psychology

Youth Counselor - 2 years
Rec Therapy Ass't - 1 year

Position 285
Cascade County
Hire date - December 1994,
BA - Social Work
DFS internship - 6 months
Shodair Counselor - 1 year

Position 627
Jefferson County
Hire date - October 1994
BA - Social Work
Mountain View Social Worker - 6 months
Senior Case Manager (ID) - 4 years
Case Manager (CO) - 2 years

Position 476
Yellowstone County
Hire date - October 1994
BA - Rehab Counseling
Youth Services Counselor - 1 year
Psych Tech - 4 years
Group Home Supervisor - 6 years
Correctional Officer - 1 year

Position 559
Musselshell County
Hire date - October 1994
BA - Human Services
Youth Counselor - 1 year
Boys and Girls Club Supervisor - 6 months

Position 323
Fergus County
Hire date - September 1994
MA - Education
Juvenile Rehab Counselor - 3 years
Crisis Counselor - 2 years
Senior Therapist - 3 years

HOUSE OF REPRESENTATIVES
VISITORS REGISTER

JUDICIARY

COMMITTEE

DATE

3/21/95

BILL NO.

HB 597

SPONSOR(S)

Rep Wells

PLEASE PRINT

PLEASE PRINT

PLEASE PRINT

NAME AND ADDRESS	REPRESENTING	Support	Oppose
Malissa Case	Montanans For a Healthy Future Montanans Against Toxic Burning		X
Gordon Morris	MALC		X
Howard W Gipe	Flathead County		+
EUGENE GRAF	MT. BLDG IND. ASSOC.	✓	
W James Kembel	City of Billings		X
Donald F. Hannah	Bozeman	✓	
Helen Christensen	Montana AFL-CIO		X
Deborah Smith	Sierra Club		X
Don Spiey	SELF		X
Gloria Paladecki	Richland Develop.		X
Maureen Cleary-Schwinden	WIFE	← neutral	
Larry Brown	Ag Pres. Assoc	X	
Tom Daubert	Ash Grove Cement Co	X	

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

HR:1993

wp:vissbcom.man

CS-14

HOUSE OF REPRESENTATIVES
VISITORS REGISTER

JUDICIARY

COMMITTEE

DATE 3/21/95

BILL NO. 597

SPONSOR(S) _____

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PLEASE PRINT

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NAME AND ADDRESS	REPRESENTING	Support	Oppose
STAR KALECTYC	MT MUNICIPAL INSURANCE AUTHORITY		X
COLLIN BANGS	REACTORS	X	
Riley Johnson	NFIB	X	
Beth Wheatley	Self		X
John Bloomingquist	Mt. Statesman	X w/Amendments	
Lorna Frank	Farm Bureau	X	
Bill Verwolf	City of Helena		✓
Fred Happel	MT Fox Bottom Co. MT.	X	
Brod Martin	MT Democratic Party		✓
David Owen	MT Chamber	X	
MIKE MURPHY	MT. WATER RES. ASSN	As Amended X	
CHRIS IMHOFF	MT LEAGUE OF WOMEN VOTERS		✓
J.V. Bennett	MontPIRG		✓

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

HR:1993

wp:visbcom.man

CS-14

JUDICIARY

COMMITTEE

DATE 3/21/95

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