MINUTES

MONTANA SENATE
55th LEGISLATURE - REGULAR SESSION

COMMITTEE ON NATURAL RESOURCES

Call to Order: By **CHAIRMAN LORENTS GROSFIELD**, on January 22, 1997, at 1:00 P.M., in ROOM 405

ROLL CALL

Members Present:
Sen. Lorents Grosfield, Chairman (R)
Sen. William S. Crismore, Vice Chairman (R)
Sen. Vivian M. Brooke (D)
Sen. Mack Cole (R)
Sen. Dale Mahlum (R)
Sen. Bea McCarthy (D)
Sen. Ken Miller (R)
Sen. Mike Taylor (R)
Sen. Fred R. Van Valkenburg (D)

Members Excused: Sen. Tom Keating (R)

Members Absent: None

Staff Present: Larry Mitchell, Legislative Services Division
Gayle Hayley, Committee Secretary

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

Committee Business Summary:
Hearing & Date Posted: HB 81; 1/17/97
Executive Action: SB 97; no final action

HEARING ON HB 81

Sponsor: **REP. CHARLES DEVANEY, HD 97, Plentywood**

Proponents: **Bud Clinch, Director, DNRC,**
Gail Abercrombie, Executive Director of Montana Petroleum Assoc.
Larry Brown, Northern Montana Oil & Gas Assoc.

Opponents: **None**

Opening Statement by Sponsor:

REP. CHARLES DEVANEY, HD 97, Plentywood, today I bring you **HB 81** at the request of the DNRC. The two divisions of DNRC, Trust Lands Minerals Leasing Dept. and the Board of Oil & Gas, both

have a hand in this. You'll find in front of you a description of the changes in all sections of the bill. The first 5 sections deal with leasing trust lands, the 6-8 sections deal with some programs of the DNRC. Section 1 clarifies that the automatic termination of the lease for nonpayment of rental will not be invoked if there is a well currently being drilled on the lease, a producing well or an approved shut-in well. The current statute says only a producing well and, if someone is actually drilling a well, we'll sit back and see if we can get some royalties even if they don't pay rentals. Section 2 is the provision to remove unnecessary reference to a 3,000 barrel royalty clause that is a holdover from the old step scale royalty clauses that were in leases in 1983. Section 3 clarifies that the lease shut-in payment is imposed per lease rather than per well. The reason being it only takes one producing well to hold a lease. Section 4 creates a clear audit time frame directly through the oil and gas leasing statutes. They have critiqued that particular section two or three times and this clarifies it when the department has the opportunity to audit records of a producing oil and gas company. Section 5 contains two substantial changes. State oil and gas leases provide for arbitration to sell the value of accruements if the former lessee and new lessee cannot agree. Each side chooses an appraiser then these two appraisers agree on a third. This provision gives two appraisers 15 days to choose a third. If they fail to do so, the director will appoint a third appraiser keeping the system moving along. Current statutes allow the former lessee to continue to operate the lease while the transfer to a new lessee is in progress. Depending upon the circumstances under which the lease was cancelled, the state may not want the former lessee to continue to operate the lease. This revision provides for the continued operation only upon the authorization of the Director of the Department of Natural Resources & Conservation.

As I stated, sections 6 through 8 deal with the Board of Oil & Gas Conservation. As requested by the 1995 Legislature, the board reviewed it's administrative rules with the purpose of eliminating obsolete or unnecessary requirements. Those rules which have been adopted to implement the Natural Gas Policy Act of 1978 have not been used for several years. The Board published notice to repeal the NGPA rules effective April 26, 1996 without any adverse comment. It is now time to remove the underlying statutes which establish the Natural Gas Policy Act authority. The Natural Gas Policy Act was passed in 1978 by Congress and it had to do with the deep wells or type sand production of gas, trying to raise the price of the expenses to produce gas and get a price differential there for the shallow gas. It never did work out. What happened was that the Natural Gas Policy Act finally just set a minimum for everything and it was repealed in a short period of time. The second request from the Board of Oil & Gas is that the Legislature repeal those statutes that provide permanent release of an operator's well plugging bond upon proof that (1) the well is producing and therefore paying into the RIT and (2) payment of

$125.00 into the production mitigation account. In 1989, the Legislature passed the Production Damage Mitigation Account. There was supposed to be transfers of large amount of dollars into this Production Damage Mitigation Account and this was supposed to offset the plug in abandoning costs of all the wells. Therefore, we didn't need the bonds; so if you paid $125.00 they gave you your bond back and then you were bonded by this account that was coming out of the RIT. They never did make any big transfers of money into this account so they quit using the whole thing. Somewhere along the line, since the Legislature never funded it, the Production Damage Mitigation Account never did occur. What we're doing here is just repealing the entire portion which deals with the nonexistent Production Mitigation Account. That is the bill in a nutshell. We'll be available to answer questions. **REP. DEVANEY** handed in his written testimony **(EXHIBIT 1).**

Proponents' Testimony:

Bud Clinch, Director, DNRC. As **REP. DEVANEY** has mentioned, he has agreed to bring this bill forward on behalf of the department. Through executive reorganization which occurred through **SB 234** in the last session, we find ourselves in a situation of having two separate divisions within the department that are involved with various oil and gas issues. In this bill, it actually brings about changes affecting both of those divisions. Sections 1 through 5 affect various statutes and sections that pertain to state land leasing and Sections 6 through 7 pertain to regulatory authorities that are administered by the Board of Oil and Gas. I don't believe I need to go into the detail **REP. DEVANEY** has. I would tell you though that the changes brought about by this legislation are really intended to bring the statutes in line with the way the department, the State Trust and Management Division and the Board of Oil and Gas are currently operated. Basically, it is a clean-up and intended to make the statutes reflect the way that we are currently doing business. With that I'll be available for questions and I respectfully request that they do pass.

Gail Abercrombie, Executive Director of Montana Petroleum Assoc. Part of this bill, the audit portion regarding state lands was in a bill last session, but because it was teamed up with a controversial issue it got lost. We were rather chagrined that it got lost at that time. That is limiting the 7 year audit period so we are in favor of this bill. As it was said, the last parts, regarding the oil & gas provisions, are removing from statute those parts that aren't being used. We are in favor of the bill. Thank you.

Larry Brown, Northern Montana Oil & Gas Assoc. We also support the bill for the same reasons that you've heard from **REP. DEVANEY** and **Gail Abercrombie.**

Opponents' Testimony: None

Questions From Committee Members and Responses:

SEN. WILLIAM CRISMORE for **Director Clinch:** With respect to section 1, we're letting people off the hook for their rental payments if they're currently drilling. Presumably, if they hit something, we get the rental; if they don't hit something, I don't know if we get it or not. At $1.50 an acre, it's not a huge amount. When we're dealing with state lands, we're generally dealing with small parcels not larger than a section. Why are we letting them off the hook? **Director Clinch:** Section 1 is usually talking about the annual rental rate they pay to keep that lease in their name. Please remember that if it becomes a producing well, then there are additional royalties that are accrued to the state. What we find is that there's a time frame during the term of the lease. Often times when that gets to the point of termination, the lessee has decided to go about drilling a well and may in fact be in the process of that. This provision that's being added here is merely taking into consideration that if the well is under construction or is being drilled, they are not going to be subject to failure to make a payment. That will be considered meeting the due diligence requirement.

Monte Mason, Minerals Management Bureau Chief for DNRC: I might add this does not excuse the actual payment of the rental. It does clarify that the lease will not automatically terminate. If they're out there drilling a well they'll get notice and opportunity to pay their rental. It just won't automatically terminate.

CHAIRMAN GROSFIELD: If we were dealing with a private lease here on private land, certainly the lessor would be expected to make the payment whether they were drilling or not. Seems kind of odd to me that in the case of public lands we're letting them off the hook.

Monte Mason: For all leases to have the obligation, if they have a lease that's actually producing, they get notice and opportunity to correct the fact that they might have missed a rental payment. Under the current statute, however, for non-producing lease or lease where they're even drilling a well, it automatically terminates. Generally speaking, even on fee leases, a person will get notice and opportunity to correct when there's activity on the lease and that's what we're trying to portray here. If there's activity on the lease, we have this lessor/lessee relationship with them. They're drilling a well on our land and if they happen to miss a rental payment we will give them notice and opportunity to correct. What will still be in the law is that if they're not doing anything out there and if it's an inactive lease and they miss that rental payment, it will automatically terminate.

CHAIRMEN GROSFIELD: Am I correct in understanding the way it works in the private sector is that if there's a lease, we're

usually talking about a 10 year lease and there are annual payments. As long as those payments are made the lease is in force. What happens in practice is a company, say Texaco, has a lease and they make payments for 4 or 5 years and then they say we don't want that property after all. They don't necessarily call up the owner and inform them that they're dropping the lease. They just don't make the payment and then it automatically terminates. I presume that works the same with respect to public lands.

Monte Mason: Yes, it does. This modification would only allow notice and opportunity to correct if they're actually drilling a well.

CHAIRMAN GROSFIELD: Here is another unrelated question for **Mr. Clinch or Monte Mason.** We are getting rid of the production damage mitigation account and we're repealing the account because it's never been used. My question is why hasn't it been used? Why are you coming to repeal the account rather than to put some teeth into the account so that it does get used?

Bud Clinch: I believe there are some other provisions that have become more effective in terms of implementing that. I would defer to **Monte** or perhaps **Gail** to provide you the detailed information. This is a section that comes from the Board of Oil & Gas that is administratively attached to the department. I'm not as familiar with those aspects. Perhaps **Ms. Abercrombie** could refer to that.

Gail Abercrombie: The $125.00 was the amount, and at one point in time it was very difficult to get bonds for operators. There's still some problem but not as much as had happened back when this was put into place. The provision here was that if these wells were on a bond and an operator was able to get that size of bond, they could then remove one of the wells from that bond by paying this $125.00 fee into this fund, and therefore leave a space on their bond that they could put another well onto. That situation has corrected itself, and the removal of a well from a bond is not encouraged anymore. Therefore, the use of this provision is not only discouraged but is not being done. The bonds now out there cover the whole wells and wells are not excused from bond.

Closing by Sponsor:

REP. DEVANEY: As they say, the Production Damage Mitigation Account was never funded by the legislature either. So there was no money to back up any of the bonds anyway. I really appreciate your attention and time and we respectfully request a do pass out of committee.

CHAIRMAN GROSFIELD: Thank you. We will not take executive action today as **SEN. KEATING** is presenting a bill elsewhere and

I'd like to give him an opportunity to look at this since this is his line of work. That will close the hearing on **HB 81.**

CHAIRMAN GROSFIELD explained that he would like to discuss HB 97 even though executive action would not take place today. He had a handout from Holly Franz who has some concerns on this bill. I also have some amendments from DNRC. If we're going to get into amending this, I have a very minor amendment that I will offer.

EXECUTIVE ACTION ON SB 97

Amendments: Amendments to Senate Bill No. 097 by the Sponsor were introduced **(EXHIBIT 2).**

Discussion: **CHAIRMAN GROSFIELD:** Would you, **Mr. Don McIntyre, DNRC,** explain the amendment proposal, especially Section 19 and the significance of the clarification instructions as well.

Don McIntyre: The amendment on page 12, line 21 is just an edit. This language is taking the redundancy of consideration out, no substantive change.

Look at the amendment on page 36, following line 29. At the hearing a question was raised as to doing something within the interim; a vacuum would be created if you have a moratorium. This would give the department the ability to negotiate with the tribe or some interim mechanism for issuing water rights during a moratorium period. Codification instruction, of course, then follows with that. It would be codified as a part of the water use acts of that particular chapter. Coordination instruction, which is the third amendment, basically says that if **SEN. SWYSGOOD'S** bill, **SB 59,** the extension of the Compact Commission passes, the suspension of the adjudication goes on from 1999 until 2005. If that bill doesn't pass and it remains at 1999, then the moratorium provision would be void because it basically would be a two-year period. There isn't much we can do within that two-year period. That's what these amendments are. I would be happy to answer any questions.
CHAIRMAN GROSFIELD: Did this just come from the department or did you get together with some people and put this concept together?

Don McIntyre: This basically comes from the department; I did meet with the Compact Commission people to make sure it didn't have an adverse effect on their compacting and that it was consistent with what they were doing.

CHAIRMAN GROSFIELD: With the committee's permission, I would like to ask **Mr. Metropoulos** to address the amendments.

Jon Metropoulos: I believe the Legislature should address what happens during the period of this moratorium, but not beyond that. I do have a proposal here **(EXHIBIT 3).** What I proposed is

some more detailed guidelines as to what a cooperative agreement could contain. I believe the state had the authority anyway under Title 18 to enter cooperative agreements with Indian Tribes, but for the purposes of a cooperative agreement to issue permits during a moratorium I think more guidelines should be in place. One reason is that those permits, at some point, will have to be worked into the adjudication process. The criteria on which they're issued need to meet the standards of the Montana adjudication. I believe that we need to make sure that in entering into agreement with the tribes and the United States, the state is not allowing a situation to develop which I characterized in this memorandum as a reverse Pope situation. That is once you say okay, Tribes/US, you can issue permits, then they cannot say we've got this reserved right of many thousands of acre feet and we're going to permit people to use those and develop that water. That water has not been adjudicated yet. Their right to that water hasn't been adjudicated yet.

The state can't be issuing permits which might hypothetically impact those claims and I wouldn't think they should be able to issue permits to use water which they haven't yet had adjudicated or compacted. The Legislature should not put the department over a barrel by the Pope decision or in negotiations with the Department of Interior and tribes. It should be their authority to issue permits to non-members for their use on non-member owned land. In the Pope decision the Supreme Court said that under Montana statute, an applicant couldn't meet the burden of proof and so the department couldn't issue a permit. The tribes did not win the authority to administer the use of water, the issuance of permits, or the administration of water rights by non-members on non-member land. I think the department should not be put in the position in its negotiations with tribes andthe U.S. to have to even negotiate that issue. The stated law is the tribes do not have that authority at this time. They didn't acquire it in the Pope decision. I think that should be foreclosed from being a part of the cooperative agreement. As I started out in speaking to you a week ago, the primary reason for that is, for example on the Flathead Reservation 80 to 85% of the people there are non-members. There's only two reservations that will be affected: Flathead and the Crow Reservation. The non-members there receive their governmental services and are represented by the state and local governments, not by the tribal government. They look to you to protect their rights and administer their use of water. If that is to be compromised in some way and given to the tribes, then I think it should be a decision of the Legislature to do so and not an administrative decision made by the department in hard bargaining with the Dept. of Interior. That's the point of the first proposal here. When you get further into the bill, **Senator**, if I might speak to the second proposal I made, I'd appreciate it.

CHAIRMAN GROSFIELD: What's your gut feeling about a moratorium, period? Do you have one or not?

Jon Metropoulos: Yes, I think we should have one of a limited duration to give the state and the tribes and the federal government time to work things out.

CHAIRMAN GROSFIELD: Would you answer the same question, Mr. McIntyre.

Don McIntyre: The department agrees that a moratorium is beneficial and for the same reasons stated by Mr. Metropoulos.

CHAIRMAN GROSFIELD: SEN. TAYLOR, do you have any comments.

SEN. TAYLOR: No comment as long as some of this language we're talking about can be included to protect the information that I've received and as long as we don't establish the moratorium to be used in later years as a set principle. It could be extended easily and make a moratorium last forever. As long as that doesn't go on, I don't think we have any problem if we can put some language in here to do that.

CHAIRMAN GROSFIELD: Would the department care to respond to that? That's a concern of mine too; we put a moratorium in and then we can extend it 2 years, 4 years, 20 years. What about that?

Don McIntyre: I don't believe that extensions should occur. The reason that **SEN. SWYSGOOD'S** bill was put out into 2005 is there was a reasonable expectation as to a cut-off of negotiations. That, of course, is subject to the world in which we live and there are potentials for extension there. I would assume that. My guess is that the issue of permitting within reservations on a jurisdictional basis will continue to be litigated unless the State of Montana and the tribes agree to some kind of joint administration pending the final adjudication. If such an accord is reached, it does not matter with respect to extensions. You would have a mechanism in place that would allow state law to operate within exterior boundaries. My initial reaction is I'm not concerned about further extensions of this as long as there is the ability to negotiate and that negotiations take place for that purpose.

CHAIRMAN GROSFIELD: Susan, would you comment just a little bit with respect to the Flathead. Is that a front burner or a back burner issue? Are we going to be looking a compact plan?

Susan Cottingham, Staff Director for the Reserved Water Rights Compact Commission: We now have, once we present the Chippewa/Cree water rights compact to this legislature, three remaining tribes to compact with. The Blackfeet tribe has decided it does not want to negotiate. We've completed Northern Cheyenne, Fort Peck and Rocky Boy. That leaves Crow, Fort Belknap and Flathead as the three remaining tribes. Of those, Fort Belknap is the one that's prioritized by the Legislature by statute. We are supposed to focus on the Milk River because of

water shortages. A lot of our technical work is in process for that. We've also been doing technical work with the Crow. We've been in negotiations with Flathead for about the last year. We're just about ready to finalize the first step in our negotiation process which is, we negotiate a memorandum of understanding with whichever entity on how we're going to proceed the process, how we're going to deal with open meetings, how we're going to deal with the press, how we're going to deal with exchange of information, things like that. We hope to get that signed this spring. The federal government is reviewing it now and is to begin negotiations this year but I suspect there's going to be many, many years of negotiation. It's very complex, very controversial. Water rights have been litigated just about every year up there and so I do not expect that is going to be one that's resolved any time real soon. It's going to be years down the road before we get it done.

CHAIRMAN GROSFIELD: From the Compact Commission's perspective, what's your sense of the length of the moratorium we're looking at?

Susan Cottingham: I think you were at that meeting when the idea first came up of a limit on the moratorium. I guess I don't think the Commission has strong feelings about it. I don't think it's going to speed up our work and I guess the only concern I have is you've approved extending us to 2005. If in 2001 or 2003 we are right in the middle of negotiations to resolve Flathead and the moratorium goes off, I'm not sure where that leaves us. I don't know if that's a real problem. Perhaps the Flathead is one that one of these interim agreements would be the most appropriate for. We are certainly supportive of that provision and we've been suggesting that for sometime because I think there is a vacuum there. We were, in staff, the ones that did suggest the moratorium to try to preserve the status quo while we're negotiating and so if the committee feels there should be a time limit on the moratorium I don't think we have any great problem with that. It's just that it may go off while we're in the middle of negotiations and that may lead to something in limbo.

SEN. TAYLOR: Don, did you ever have the chance to read this proposal by the joint board?

Don McIntyre: I have just briefly read it. I would, off the top of my head, say that I would not have a problem initially as I read this. It could be incorporated into the amendment we propose in new section 19 because I think the 3 criteria that are in here by the joint board are things that we would have been doing in any event. I think our language is a little broader in the sense that even though the moratorium doesn't apply to changes, it would give us the flexibility to talk in these negotiations about those so that if we were able to come up with a comprehensive agreement it may be wise to include both within it. It's a little broader. Ours also ties us into Title 18, chapter 11 which is the existing law on agreements with tribes

and I think subsection 2 is well to have because under our Constitution we're required to have open meetings and at times, in dealing with the tribes, it would be helpful to have this language. I think these two amendments could work together.

SEN. KEATING: That was the question. You thought if there's any changes they could be tweaked, right?

Don McIntyre: I think they can be. It may be best not to take executive action today.

SEN. KEATING: I just wanted to put that on the record.

CHAIRMAN GROSFIELD: With respect to that issue, if it's all right with the committee, I think based on this last exchange it might make sense to ask the Joint Board of Control and the department to work together and try to come up with something we can deal with. I agree, I don't think our time would be well served by wordsmithing here for the next hour on the details. Does anyone on the committee have a problem with having them go ahead with that conceptually?

SEN. BROOKE: In the language from the department, are changes included?

Don McIntyre: It would be broad enough to include them.

SEN. BROOKE: And in the one caused by the Joint Board it just goes to permits. I think to be broader if you try to bring in that language.

Don McIntyre: I think the reason the Joint Board is brought under this is because that's all the moratorium goes to.

CHAIRMAN GROSFIELD: With regard to amendment number 1 from the department, that's simple and straight forward except we don't have it in proper edited format before us. Also with regard to amendment 3, the coordination instruction with **SEN. SWYSGOOD'S** bill, it would seem to me it's something we want to do regardless of what we do with the rest of it. It's kind of a separate issue. Again, we don't have the right format of the amendment in front of us. A question to the committee members or anybody out there, with respect only to the moratorium, have we dealt with all the issues that need to be dealt with?

Jon Metropoulos: Last Wednesday, we had proposed that the bill be amended to have the moratorium expire in 2001. I don't know if that's considered by the department or the committee.

CHAIRMAN GROSFIELD: Does anybody have any thoughts about that? It is a question of how long do we want to go here.

SEN. COLE: Why do you want to move it up.

Jon Metropoulos: The reasoning, it seems to me, is the likelihood that the department and/or the Compact Commission will come to this committee and report whether substantial progress has been made or not. Unless their compact has been concluded and I think Susan will agree with me, it's very unlikely a compact will be concluded on Flathead even by 2003. My reasoning is, if what is actually going to happen is just a realistic assessment of the chances of concluding a compact, that can be done within 4 years rather than 6. We're not saying that they actually have to conclude a compact; we would all prefer that, I think, but realistically I don't think that will be done in 6 years. If they're only going to come back and say yes, we think we have a really strong chance, or no, it's not going to work here, let's just adjudicate it, I think that much can be done in 4 years.

SEN. COLE: One more question here. I noticed here that the JBC is imitating, or in your word, incorporating into the adjudication all of the permit rights, or something to that effect. What effect is that going to have as far as putting all these permits into the adjudication process along with the other water right issues involved. Is that going to tend to broaden the scope of the number of requests from the non-Indian water users for the same bucket of water.

Jon Metropoulos: Well, in a practical sense it may allow, it probably would allow, non-member water users or even tribal members to get permits in the interim. As a practical matter that's about 12 a year on the Flathead Reservation. Legally, would it complicate things? I think if permits are issued contrary to the standards that the Montana water court has to apply, that would complicate things greatly.

SEN. COLE: I have a little problem with this. Maybe if the gentleman from the JBC would stay up here. If you're going to be putting in these permits which are basically a water right that could be a 1997 water right, is that correct for all practical purposes? Let's say the permit is applied for and issued in 1996. And it is the policy of the state that all present uses are protected, as I understand. And when they do protect those present uses, that gives them basically the same water right as the establishment of the reservation? (Answer: No, the priority basis would be as of 1996.) Yes, but they are protected back to that point so they do as other negotiations, as I understand, that water right is there and being used at that time or whatever is still a water right that is not diminished by the negotiation.

Jon Metropoulos: I'm not sure that I fully understand your question. It sounds as if **Susan Cottingham** is better able to answer it as I think you're talking about Compact Commission policy which my client supports but it's not an absolute legal requirement of the Compact Commission.

CHAIRMAN GROSFIELD: I think what we're talking about here is the issue of subordination. It would seem to me that if we're going to set up some kind of process where the tribes can work with the state, and are trying to figure out an interim administration during the moratorium period, that's when this issue will be addressed. As a practical matter, with only 12 a year it may not be that troublesome. Can you comment, **Susan**?

Susan Cottingham: The issue gets to the permits that have been issued since 1973, and yes, it is indeed the policy of the Compact Commission to attempt to protect all existing users as of the date of the compacts. Say we miraculously reached a settlement with Flathead in the year 2000. We would be asking the tribe to protect all the existing permittees as of the year 2000. The difficulty, to be quite honest, of the tribe's concern and somewhat the commission's concern, is that the more permits issued every year, the more the political pressure goes to the tribe and the Compact Commission to protect more and more users. Since 1973 there have been, between surface and ground water, about 350 permits issued that we will seek the tribe to subordinate. So that's their concern. As to the interim agreement, I suspect that might be an issue that would come up and I would think the Compact Commission would work closely with the department to try to ensure that as we deal with that concern during the interim, this notion of interim agreement is a new one to me and I'll be honest with you, I don't think we've thought through how this all would work. I think we support it because we realize there are concerns and people might want to continue but I think we'll just have to work with the department and try to deal with that issue. To get back to the moratorium, we suggested a moratorium because we felt if there wasn't such a thing and this bill went forward that there might cause quite a political problem with the rest of the tribes that we concluded negotiations with.

SEN COLE: Even though I understand only 12 per year, if people think in any way that they better get in with their permits if we do open up this moratorium before we get something done we're probably have permits coming out of the woodwork all over the place. This may be only hypothetical, but sometimes you see these things happen.

CHAIRMAN GROSFIELD: I guess I would respond to that, **SEN. COLE,** by saying that what I think what we're visualizing here is some kind of an agreement between the tribe and the state as to how to accommodate. If you look at the language from the department, it says it appears to be to the common advantage of the state and the tribes to cooperate. Where the tribes see that it will be to their common advantage, they will probably go right along with it. If they sense there's going to be 300 applications and 50 CFS each, they're going to address that in this process. I understand conceptually your concern but I think as a practical matter it might be not quite so troublesome. I guess that does bring a question to my mind, **Susan, Don or Jon**, have we had any

indication from particularly the Flathead that they would agree to something like this or that they would want something like this? Has there been any discussions or is this just conceptually coming from us so far?

Susan Cottingham: If I might begin, I do believe the letter that you received from the Dept. of Interior made the suggestion that this would be a good idea. I don't know whether that's something that came from discussions with the tribe or not. I suspect they did.

Don McIntyre: It's my understanding in talking to the Attorney General's office that they had direct discussions with an attorney with the tribe by dealing with sending back of the Supreme Court's decision to the District Court reversing, and in that discussion, the tribe brought up the issue of some sort of a joint cooperative way of handling permitting within the Flathead Indian Reservation. The Deputy Attorney General asked him to confer that. We haven't had a current confirmation but that's the extent that I know.

CHAIRMAN GROSFIELD: Anything else on this issue.

SEN. MAHLUM: May I ask **Jon** a question. If, let's say by the year 2001, all agreements are made between the state and the Flathead Tribe, and everybody is happy, and about 2 years later there's a new tribal council with the Confederated Kootenai Salish Council and they decide they don't like that old agreement, what would happen then?

Jon Metropoulos: Are you talking about a compact or an interim agreement.

SEN. MAHLUM: I'm talking about an interim agreement. One signs it and another one says we don't like it a couple years later.

Jon Metropoulos: A tribal council is a political body just like this one. It can change significantly, so I suppose perhaps they could come in and say they want to cancel it. I presume any agreement would have some sort of cancellation provision. Let me say that the Flathead Tribal Council is, in my perception, in reading their minutes and news accounts, very aware of continuity. Their legal department is very sophisticated in negotiating. I think that if they came to an agreement with the state it would be unlikely that in a short period of time they would repudiate it.

CHAIRMAN GROSFIELD: Anything further on the moratorium issue. We'll ask you all to try and work on some language. I'd like to deal with that issue on Friday, if we can. Now we have some suggestions from Holly Franz and I don't want to preempt her since she couldn't be here today, but on the other hand I would like to at least give the committee an idea of what she's proposing here. On the issue of Section 311, the permitting

process could you, **Don**, talk just a little bit about what she's proposing?

Don McIntyre: First, if I might, Mr. Chairman, the other day when we had the brief seminar on water law, the issue came up as to how many permits had been issued by the department since 1973. Permits issued have been 11,894. Change applications have been 3,287. There have been almost 70,000 ground water developments. The issue that comes up, the criteria for issuance of permits under 85-2-311, MCA, come up in the context that what the Montana Supreme Court has said, and I think what every attorney that's stood up here has said, is that it's not a question of jurisdiction. The State of Montana can be on the reservation for permits. That's not to say the issue cited was under Montana statutory scheme. An applicant could prove the burden of proof, and the way the Montana Supreme Court read the decision was that under the criteria that exist that an applicant could not until the qualification was done. That is basically the same decision that was rendered in the Don Brown case, Montana Power Co. case and the Bureau of Rec. case against the Montana Dept. of Natural Resources back in early 1990's in which Judge Bennett virtually held the same thing. The state chose not to appeal that case but rather entered into a three way agreement with the litigating parties as to how water right permits would be effectuated until the adjudication was complete. This decision of the agency in the State of Montana at that time not to set any case precedents outside Lewis & Clark County to help permitting to go forward. The Don Brown case basically says the State of Montana should not even be allowed into the courts to argue the issue anymore because it was argued in Don Brown and decided against the state. So that particular judge would say that under legal doctrines the State of Montana is bound by that decision, not just in Lewis & Clark County, but apparently throughout the state, which means then that no permitting or changes can take place in the State of Montana. That fear is expressed in Chief Justice Turnage's dissent. But there is no logical reason for the extension of this case, the Pope case, off of the reservation, anywhere in Montana. So then, in effect, you're making a policy decision whether to go on with permitting or not.
One of the key elements of the whole package is 85-2-311 criteria.
One of the things Ms. Franz argues in here is, with the 311 criteria, we're changing burden of proof, to make it easier to get a water right and stretching the burden to objectors of existing rights. That certainly is not the intent of what we've put in the bill and I don't even read it in there. I don't know why that's being said. What we're trying to do is really two things. The first thing is simply make it clear that the adjudication and permitting can go along side by side. When we say in our language we're talking about legal availability, we're talking based on records of acquirement and other evidence provided the department. That basically means there's a recognition the adjudication isn't complete. Whatever records you have that can help you establish this criteria you can use,

but it doesn't have to be adjudication. Quite frankly, since the Don Brown case, the Dept. of Natural Resources came to the Legislature and made changes in the 311 criteria, which we believe changed the impact of Don Brown. Justice Nelson says that's not true; Justice Turnage says he thinks it is true. So we know if we're going back up there we're left with a conflict between two judges: one of which was the majority and one which was not. We're trying to clear that up. What I have here is the Information Instruction for Application for Beneficial Use, prepared on August 1, 1995 **(EXHIBIT 4)**. This is the guideline and instructions given to any water user who wants to apply for a permit. Given the fact, remember that Dept. of Natural Resources, that the Don Brown case has been successfully dealt with and now we're faced with this case. You'll note if you start on page 11 these are the specific instructions for going through and showing physical availability, examining existing field water rights and then an analysis of the water availability and field rights. This is essentially how we're interpreting the law, to make sense out of the water law to allow for water permitting to go forward that's still protecting the existing rights by requiring applicants to do these kinds of studies. And all that we've really done to the language in 311 is to take it and make it consistent with how we interpret the law as it is now. We're not changing any burden upon anyone; there is no intent to do that. It's not intended to make it easier on applicants, it's not intended to make it harder on objectors. All it is, is facing the reality of the world in which we work in water rights. In water rights, there really are, in terms of permitting new uses, really two basic criteria. One, is the water physically there; two, is it legally there? That is what we're grappling with. The other criteria of beneficial use is still there, and only in the permitting section, we've left the term adverse affect, but we've defined adverse affect in terms of legal availability. We do not change adverse affect in terms of changes, it changes the laws that exist developed in case law since the beginning of Montana Water Law and continues into the present. What we're trying to do with 311 is simply that we are definitely responding to the Don Brown case and what Justice Nelson said with respect to it. Because if we don't, then it doesn't matter what you're doing with respect to the Indian reservations because Don Brown says it's over. You're making a policy decision here.

CHAIRMAN GROSFIELD: Okay, I understand that. You're saying this language doesn't change how you do it now. My question is, you want the change so that Justice Nelson can't make the estoppel argument which is that it's already been decided. You're saying you're not making any change here, so can't he say you may have changed a few words but you didn't change what it's doing and therefore you can't deal with it?

Don McIntyre: No, because I think what he may say, remember as I caution, what we've done is we tried to interpret the law as we thought it had changed and Justice Nelson said you haven't

changed the law, so he would probably say this has to be thrown out because you don't have the statutory basis to do it. We just want to ingrain this into the law.

CHAIRMAN GROSFIELD: So with that sort of a summary, the specific ideas offered by **Holly** and **Jim**, at least by **Holly**, what do they do with that concept, with the concept that you just explained?

Don McIntyre: Specifically in the 311 criteria, she would basically take all the changes that you see so that section would come back in as it originally was and section B would go back in as it originally was. All of the other lined material from lines 19 through 24 would go out and the law would be retained as it was before. On lines 28 and 29, she would put that material back in and add to it the term "state water reservation". On that issue, let me just briefly deviate, the other day **SEN. VAN VALKENBURG** brought up the issue of one of the tribes and how come they hadn't come in yet. One of the things we did is we sent to the federal government asking for input and did get a lot back. This morning I did receive a letter from the Northern Cheyenne that was sent to the Governor and then came down through **Director Clinch** and to me. That's why I was late, I was looking at that letter trying to see if there was something that could alleviate their concern. One of their concerns is taking out Section e, because the court interpreted that as having federal reserved water rights in it. But the state has never construed it that way. We have always construed the tribes as being prior appropriators and that their federal reserved rights fell within that. They seem to be reading our amendments to say that we've taken that out. This is a similar handout to the one you already looked at. There's a new No. 1 on page 12, line 19, and all it does is put after the word prior, appropriation; it then defines what constitutes a prior appropriator, and to the best of my knowledge uses only 4 ways in which water rights can be held in Montana. Even though historically we've always done it under prior appropriator without this amendment, this would make it more clear and would alleviate some of their concerns. Anyway, Holly's amendments basically return it back to the way it was as the law was when Don Brown was decided.

CHAIRMAN GROSFIELD: Which gets us into trouble if we get back into court again.

Don McIntyre: Well, we believe that's true because that's one of the basic issues, and that is whether the statutory criteria can be met.

SEN. BROOKE: Do you have a booklet like this for objectors.

Don McIntyre: There isn't a booklet for objectors on how to object. This booklet is also available for objectors so they can review it to see how the information is being developed. They can, in addition, develop their own information to show why these

tests cannot be met. There isn't a specific pamphlet on how to object to water right applications.

SEN. BROOKE: Is there anything for the public, a brochure or general kind of information that those who are concerned about a new applicant can go to?

Don McIntyre: The department does have brochures dealing with water right law and try to explain it in more simple terms than the law.

SEN BROOKE: You won't revise any of that language even if this bill passes, is that correct? Is that what I'm hearing you say, the 311 amendment you're proposing is reflected with what your current practice is?

Don McIntyre: I believe the general information that is in most of the publications don't get into the kind of detail that affects the criteria. If there were, we would have to change some of those, but generally speaking, we believe that as of this publication that's how the law should be interpreted. We're concerned now that we'll not be able to interpret it that way.

CHAIRMAN GROSFIELD: Members of the committee, we have gone through a couple of different concepts: the thing about the moratorium; the thing about the proposal from Montana Power; and the importance of the Don Brown decision with respect to this. Also this last issue that came up this morning from the tribe. That is three possible sets of amendments that could be before us presuming that some member of this committee wants to request that they be drafted. I, as sponsor of the bill, will ask the last issue, the one that just came from the tribes, be drafted as an amendment and I would be happy to request whatever the department, working together with the Joint Board, asked for. I will not request the Montana Power amendments because I don't believe they do what we're trying to do here, but anyone else is welcome to do that if they want to. In addition to that we have Ms. Rehberg's proposed amendments regarding late claims that could be before us if someone wants to request them. I'm getting a little nervous about the time because I know that through that door is going to walk somebody that needs me down at the other committee to present my bill. We're about done here but I want to ask, in addition to those issues, is there anything else here that anybody wants to bring up with respect to this bill as to what we ought to be doing, any members of the committee or members of the public. This is a major piece of legislation, I think we all understand that it's pretty important and I want to deal with all the issues. Is there any thing else from the department other than what we've discussed? Anything else from Joint Board?

Jon Metropoulos: Mr. Chairman, in that handout I gave you, I tried to make a proposal for dealing with this section 311 issue.

If you don't mind I'll talk with Don and the others and see if they can be of some help.

CHAIRMAN GROSFIELD: Ms. Rehberg?

Ms. Rehberg: I was just wondering, will Holly be able to discuss her proposed amendments? I have not seen those; she and I had talked earlier and I haven't seen what she put together. There will be further discussion on 311, is that true?

CHAIRMAN GROSFIELD: She had a court hearing today and as a matter of courtesy I told her we would not finish executive action on this bill, but I think we will try to do it on Friday. On Friday we have SB 175 and HB 182. I would guess that would not take a huge amount of time so I would like to shoot at least towards being done with this bill by the end of Friday's session. My goal here, as sponsor of this bill, would be to send it out of committee in good shape, but obviously I want the bill to pass. I want to have a process that works in our water laws so we can keep going and so that we do not end up in a Supreme Court decision junking the whole process, which is one of the possibilities here. With that, committee members, any other information you want or any other talk about amendments.

CHAIRMAN GROSFIELD: Is that it? We still do not have very many bills. We have those 2 bills on Friday. **SEN. BISHOP'S** bill is identical to the bill that just passed the house. **SEN. BISHOP** has asked us to table his bill and we'll deal with the house bill.

ADJOURNMENT

Adjournment: Adjourned at 2:18

SEN. LORENTS GROSFIELD, Chairman

GAYLE HAYLEY, Secretary

LG/GH