MINUTES

MONTANA SENATE
55th LEGISLATURE - REGULAR SESSION

COMMITTEE ON NATURAL RESOURCES

Call to Order: By **CHAIRMAN LORENTS GROSFIELD**, on January 24, 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. Thomas F. Keating (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: None

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(s) & Date(s) Posted: HB 118; Posted 1/20/97
Executive Action: SB 97 AMENDMENTS

HEARING ON HB 118

Sponsor: **REP. ED GRADY, HD 55, Canyon Creek**

Proponents: **Denise Mills, Department of Environmental Quality**

Opponents: **None**

Opening Statement by Sponsor:

REP. ED GRADY, HD 55, Canyon Creek, introduced HB 118, saying it was a non-controversial clarification bill in one division in the state deferment status. The bill sought to clarify that an environmental clean-up action undertaken by the Department of

Environmental Quality (DEQ) was not the construction of a state building requiring the express approval of the legislature as a part of the state's building program. He said on its face it seemed obvious and unnecessary; however, the law could be read to require advance legislation approval on most of the clean-up and mine reclamations projects conducted by the Department. HB 118 attempted to correct the problem through a narrow-drawn amendment, i.e. specifically exempting environmental remediation in mine reclamation projects from the definition of "building" in section 18-2-102. **REP. GRADY** explained this would be done in much the same manner as highway construction projects and water conservation projects were currently exempt. He told the Committee he had become aware of the problem in the Butte pole yard where some minor buildings had to be constructed. Under current law, this project could have been held up pending the approval of the legislature.

Proponents' Testimony:

Denise Mills, Mediation Division Administrator of the Department of Environmental Quality (DEQ), spoke in favor of the bill, saying the problem had come up when they were trying to find a contractor for remedial action at the Montana Pole Facility in Butte. The work could have been construed as erections of facilities and structures requiring legislative approval. Money for this project had been contributed by private parties who were liable for the clean-up, as deemed in an EPA settlement, and DEQ was overseeing the contractors. It was not clear whether the statute would require legislative approval beforehand; however, part of the Department's mission was to do remedial actions on contaminate places which could affect human health and the environment. It would not be prudent, in their opinion, for the legislature to have to approve every action that exceeded $50,000. The proposal would exempt environmental remediation projects from Section 18-2-102 of the MCA.

Opponents' Testimony: None.

Questions From Committee Members and Responses:

CHAIRMAN LORENTS GROSFIELD asked **Ms. Mills** whether environmental remediation might in some circumstance be involved in a $2 million building where once the remediation was done, the state would be responsible for the future maintenance. **Ms. Mills** responded she had no clear answer; perhaps there would be another owner through an agreement, property transfer, or whatever. After the remedial action was complete, they would have to assess that as part of the reparative decision on the remedial action.

SEN. BEA MCCARTHY wondered why they weren't called temporary facilities, because once the remediation was completed and the facility cleaned up, she assumed they would definitely be removed. **Ms. Mills** answered in some cases the facilities would be removed; however, there were situations such as the Montana

Pole Facility where the county was interested in taking ownership of those buildings and they had another use for them in the future. In most circumstances the building would be decommissioned after the work was completed.

CHAIRMAN GROSFIELD suggested that could be addressed in the sponsor's close. **REP. GRADY** answered it never came up in the House, but felt the Senate could amend it a bit. He said he didn't have anybody to carry HB 118, but it could be a good bill for a freshman because it slid through rather easily.

Closing by Sponsor: None.

Executive Action on SB 97

Amendments: **Don McIntyre, DNRC Legal Counsel,** explained Amendments SB009701.alm **(EXHIBIT 1)**.

Motion: **CHAIRMAN LORENTS GROSFIELD MOVED DO PASS ON AMENDMENTS SB009701.alm.**

Discussion: **SEN. VIVIAN BROOKE** referred to Amendment #9 and asked how much of a moratorium there really would be. **Don McIntyre** answered as **SEN. CHARLES "CHUCK" SWYSGOOD'S** bill now stood, it took out the suspension through the year 2005; however, the way SB 97 was now structured, this moratorium would be in place until the year 2003. That would mean there would be a period of 1997 to 2003 which would require work on permitting and negotiations with the Tribes if they so choose.

SEN. BROOKE said since the administration agreements could be given, would there really be a moratorium. **Don McIntyre** answered the moratorium would exist, but the question was whether or not the agreements could be gotten within that period of time to realistically do anything with it. He said he understood there had been contact with at least the Flathead Tribe; in fact, they indicated to the State of Montana they had an interest in that -- the Assistant Attorney General involved was here to speak, if necessary. He basically told them if they had that interest, to get back to the Department and to document it. This language would facilitate that, but it really depended on the willingness of the parties.

CHAIRMAN GROSFIELD asked **Harley Harris, Department of Justice,** to comment on that contact from the Tribe about developing some kind of mutual administration in the meantime. **Mr. Harris** answered he spoke with John Carter, one of the attorneys for the Confederated Salish Kootenai Tribe, just a few days prior to the initial hearing of this bill. Mr. Carter asked if it wouldn't make some sense to have something like this, and **Mr. Harris** told him Attorney General Mazurek and Governor Racicot were willing to sit down and talk to anybody about anything. He explained it was their longstanding position regulatory issues on Indian reservations, particularly natural resource issues, were best

dealt with cooperatively. In that phone conversation, John indicated he was interested in it and agreed to go back to his principals, the Tribal Council, to see if there was a bona fide interest; however, he hadn't heard back from John Carter on that. **Harley Harris** said there were significant difficulties in a number of fronts in negotiating these types of agreements; they had gone to the brink before and not come away with anything. He explained as a general matter, although his office was not taking a position on the bill as a whole, the concept of agreements reflected in the amendment was a good one and one they had suggested earlier on.

Vote: **Motion DO PASS ON AMENDMENTS SB009701.alm CARRIED UNANIMOUSLY 10-0.**

{Tape: 1; Side: A; Approx. Time Count: 1:25 p.m.}

Amendments: **SEN. MCCARTHY** said she was asked by **Holly Franz, Montana Power Company (MPC),** to draft Amendments SB009702.alm **(EXHIBIT 2)**; therefore, she consented but had no ownership of the amendment.

Holly Franz said she had talked with **Don McIntyre** about what could be done within the existing arrangement of the bills to address some of the concerns she had in the protection of senior water right holders. She said this amendment addressed one other concern she had which dealt with clarity of current law, i.e. when granting a permit, the entire period of use for that permit had to be looked at. She explained just because water was available, maybe for a day or two, the permit didn't necessarily have to be granted for the whole irrigation season. **Ms. Franz** said she and **Mr. McIntyre** agreed they thought it would be appropriate to include this amendment; however, it seemed (A) and (B) were somewhat of a repetition of what (C) said. The reason for the amendment was to clarify when the Department looked at whether or not water was legally available (and (C) would be the operative words) during the period in which the applicant sought to appropriate and in the amount requested. Therefore, the focus was the Department's inquiry to that, and it didn't seem the Department had a problem with it.

Don McIntyre agreed with **Holly Franz** and said the Department had reviewed this language and believed this amendment was further amended to simply insert after the words "the department", "during the period in which the applicant seeks to appropriate, in the amount requested". They felt it would meet the intent of the amendment and the Department believed it would work in terms of their studies and analysis of that legal availability.

CHAIRMAN GROSFIELD commented the Committee had just adopted an amendment which went to the same issue, i.e. amendment #2 in the Statement of Intent. He wondered if their amendment did anything not already done by that amendment #2. **Don McIntyre** said the intent of **Ms. Franz** and this amendment was to clarify that not

only in the physical but also in the legal availability test, the time frame and amount of the request in those analyses was being considered. He said this would be a clarifying amendment in the sense the Statement of Intent was much broader because it clearly stated the action of the agency negated the cases he talked about and tied them to a known set of factors they considered. He said he considered this to be in concert with it and he didn't think either one made the other one exclusive.

CHAIRMAN GROSFIELD asked if the amendment put a greater burden on an applicant. **Don McIntyre** said he didn't think so, but felt it was the same because they were doing the same analysis. He felt it created a comfort level for those with existing rights; this language would be in there to assure them their rights were being protected because they were looking specifically at the period they were looking for the water and the amount requested. He thought they would do that in any event; however, a bigger concern was if a person got into court. He suggested this created a comfort level for both the attorneys involved and for the court.

CHAIRMAN GROSFIELD commented a permit was different from an existing right in that it was not an ownership in the same way as an existing right; also, a permit had conditions which were put right on the face of the permit. He said there were some standard conditions and some were added as circumstances commanded. He asked if one of the standard ones went to this point. **Don McIntyre** said one of the standard points was the subject to existing rights. He explained in terms of an attorney looking at this and being faced with objections in a court, when the test there today was changed, one could argue without this language, the Department needed only to look at this in terms only of physical available. He said **Ms. Franz** was trying to make sure the court understood it was the whole gamut of both physical and legal availability; their review of the period of time of appropriation and the amount was considered as a totality.

CHAIRMAN GROSFIELD referred to a situation where the applicant decided to appropriate in the amount requested, but maybe in a wet year there was plenty and in a dry year there was not. He wondered if the situation precluded the Department from issuing the permit. **Don McIntyre** said he didn't think so, explaining it always went back to the historical notions of water law that you always try to get the maximum amount you can appropriate and put to a beneficial use, but that you may be able to actually use less than those maximums.

Motion: **SEN. BEA MCCARTHY MOVED DO PASS ON AMENDMENT SB009702.alm (EXHIBIT 2).**

Discussion: **SEN. MCCARTHY** said she was moving Sub (C).

Holly Franz said **Larry Mitchell** would have to fix the amendment because they didn't want sub (A). She suggested inserting that

language currently in (C) after the words "legally available" on line 21.

CHAIRMAN GROSFIELD explained the amendment on Page 12, line 22, would read, following "available", strike the sentences of (A) and (B) and just the (C), so it would say following "available", "insert during the period in which the applicant seeks to appropriate, in the amount requested."

Vote: **Motion DO PASS ON AMENDMENT SB009702.alm CARRIED UNANIMOUSLY 10-0.**

SEN. MIKE TAYLOR referred to the amendments in **(EXHIBIT 3)** and asked **Jon Metropoulos, Flathead Board of Control,** to explain them.

Jon Metropoulos said **SENATOR TAYLOR** had mentioned to him part of their role ought to be either they didn't end up back in court or if they did get there, the state could preserve its authority to decide issues such as whether it actually had authority to manage water on reservations within its own system, that being the Montana Indian Water Court.

SEN. VIVIAN BROOKE asked for **Susan Cottingham's (RWRCC)** comments.

Susan Cottingham said she had received these a little while ago and was a little unclear about what was intended. She said if it was simply a restatement of existing law this system was set up to adjudicate and it is the intent to continue to do that, she didn't have a problem; however, she didn't understand why it needed to be restated. She stated any federal water rights claimants right now had the option to petition the water court to adjudicate their water rights and they could terminate negotiations and go to water court; she said she understood the amendment just restated what they could already do. However, if the intent was to force the Tribe to either not object or go to Water Court, it seemed it was forcing the Tribes out of negotiation and into court. She reiterated she wasn't clear what was intended to be done by these amendments, because it did say they had the option. She contended the Tribes already had the options to petition the Water Court to adjudicate their right; they could terminate negotiations.

Jon Metropoulos contended it did a bit more than restate the law because amendment #1, 3rd line from the bottom, said "if an objection is made on grounds other than those in 308.1B and 2"; that indicated a Tribe or federal entity could enter an objection on the same grounds as any other objector in the State of Montana. That would not require them to go to the Water Court to litigate their objection; however, if they wanted to make an objection on a different ground from those specified by the legislature, particularly if they wanted to object the state had no authority to administer that program, they would have the option of going to the Water Court to litigate that. That action

would eliminate the suspension provision of the compact commission negotiations under 217. Or they could say they'd rather compact and negotiate the issue of jurisdiction. He didn't think it restated the law because it made it clear if they wanted to raise that particular objection concerning jurisdiction, it would be decided in the Montana Water Court. **Mr. Metropoulos** said the state's jurisdiction to administer permits and changes was frankly imperiled in the Pope case; it first went to the state District Court, then the State Supreme Court and now it was still pending Federal District Court. He interpreted the codes as they now stood, were intended by the legislature to mean that those issues went to the Montana Water Court; the intent was to ensure if those issues were to be litigated prior to an adjudication, they were litigated in Water Court.

CHAIRMAN GROSFIELD said SB 97 was very important and asked **Susan Cottingham** and **Harley Harris** if they felt prepared to look at this or if they needed more time. Both people said they'd like a little time for more work, proper form, etc. **Don McIntyre** said they affected not so much the agency's permitting authority as it did a policy decision being made by this Committee as to how water right permits objections were raised outside the context of the statutory criteria. For example, jurisdiction kicked this kind of a bill in, and it had a definite effect on the option made by the Tribe to either pursue that through the Water Court and end negotiations, or to negotiate without carrying forth with those objections and proceeding. Therefore, it was one that needed input from others besides the DNRC, because it had a greater effect than our permitting process.

CHAIRMAN GROSFIELD requested the staff to put the amendments in **(EXHIBIT 3)** into proper format so they could be before them on Monday.

Motion: **SEN. MIKE TAYLOR MOVED DO PASS ON THE AMENDMENT IN (EXHIBIT 4).**

Discussion: **SENATOR TAYLOR** said it shortened the time period but in the negotiations area, it didn't change anything other than it set a quicker time table to get to some resolution. It didn't set any precedents on it; however, it set the clock ticking a little faster.

CHAIRMAN GROSFIELD said when this moratorium was first proposed at a meeting last month there was no date on it at all and it was at his suggestion they put a date on; however, he didn't recall there was a very specific reason why 2001 was the right number.

Jon Metropoulos said he wasn't sure 2001 was the right number either, but the Compact Commission, the Tribes and U.S. would determine whether reaching a compact was feasible; however, they probably wouldn't reach a compact during either four or six years. He said they would just like them to put the effort in to

make the determination if a compact was feasible in their situation, or would they have to litigate. The reason for a shorter time was they wanted to see the ball rolling; they weren't overly anxious to have it all resolved in four years, but they sure would like to see some progress.

{Tape: 1; Side: B; Approx. Time Count: 1:47 p.m.}

Susan Cottingham said people understood there was quite a bit of work left to do and there were a lot of complex issues ahead of them. She said this would most likely, in the middle of negotiations with the Flathead Tribes, pop the moratorium off and put everything in limbo while they tried to figure out where they were. She suggested the only thing that could possibly get them to work any further was to give them more staff, but they didn't intend to ask for that. She stated the 2001 moratorium wasn't going to simplify the issues up on the Flathead or get them to an agreement any sooner. She said if it was the Committee's intent to have them come and report their progress, they'd be glad to do so because they did that twice a year to Water Court anyway and the reports were available to the public. She said she wasn't clear what would happen if the moratorium went off while they were in negotiations; perhaps nothing.

CHAIRMAN GROSFIELD said he interpreted **Mr. Metropoulos'** comment to mean they weren't expecting the compact be done, but the question was when was it going to be started; the thinking was this would urge it to get started a little more quickly.

Susan Cottingham said she didn't think it would happen because they were trying to find lines and memorandum of understanding of procedures on how to do that. The legislature had prioritized Milk River so the first order of business for them after this session was Fort Belknap and they also were further along with the Crow. She stated it was hard to predict how long these were going to take, but she wasn't convinced that having the moratorium come off was going to get their work done on the Flathead any sooner.

SEN. MCCARTHY asked if it would make matters more compatible if this date was 2005. **Susan Cottingham** said initially the bill didn't have a date and the assumption was the moratorium would go off and commission work terminated, which was fine with them. She said if the Committee felt either 2003 or 2001 was important, it wouldn't make them work any harder than they did already. **SEN. TOM KEATING** asked if it would make the other side work a little faster. **Susan Cottingham** said it had been agitating for them to work harder. She stated both the Crow Tribe and the Flathead Tribe had been anxious to move things along; Fort Belknap and they had been focusing on Rocky Boys this year. She said she knew there was the opinion that somehow the Tribes were dragging their feet, but quite frankly the Tribes thought DNRC was.

SEN. MACK COLE said he would not be voting for this amendment because he thought it would put some artificial deadlines on people here. If anything, he would rather see no year; however, if not that, at least 2005 because he thought they might end up with a staff jumping around to do a day's work at Belknap, then two days' work at Crow and then half a day over on the Flathead. They may not be as efficient as they would be if they didn't have this amendment on it.

SENATOR MIKE TAYLOR said he wanted to talk from a more practical standpoint. Members were continuously involved in water litigation as they were on the Flathead now because of some decisions, and they'd certainly like to see this come to some conclusion, or at least adjudicate it. It seemed a bunch of people were paying for attorneys fees, and like anywhere else, some resolution would like to be seen. **SEN. COLE** said he wanted 2005, and he hoped they would seriously consider this motion.

SEN. BROOKE added within the moratorium there were ways to obtain water permits now. It wasn't an absolute moratorium but she thought it shaded it a bit more and alleviated the pressure 2001 would put on.

Vote: **Motion DO PASS AMENDMENT (EXHIBIT 4) FAILED.**

ADJOURNMENT

Adjournment: The meeting adjourned at 2:00 p.m.

SEN. LORENTS GROSFIELD, Chairman

GAYLE HAYLEY, Secretary

Transcribed by: JANICE SOFT

LG/GH