MINUTES

MONTANA SENATE
55th LEGISLATURE - REGULAR SESSION

COMMITTEE ON NATURAL RESOURCES

Call to Order: By **CHAIRMAN LORENTS GROSFIELD**, on February 19, 1997, at 3:00 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: SB 356, SB 363; Posted 2/17/97
Executive Action: SB 322, SB 323, SB 332, SB 337, SB 342, SB 334, SB 253, SJR 7

HEARING ON SB 356

Sponsor: **SEN. STEVE DOHERTY, SD 24, Great Falls**

Proponents: **Peter Funk, Trout Unlimited**
Patrick Judge, Montana Environmental Information Center
Florence Orr, Northern Plains Resource Council
Debra Smith, Montana Chapter of the Sierra Club
Hope Stevens, Marysville
Pat Hettinger, Lewis and Clark Dept. of Health Missoula Dept. of Health Water Quality Protection District
Janet Ellis, Montana Audubon Society

Opponents: **Brett Brown, Montana Wildlife Federation**
Steve Pilcher, Western Environmental Trade Assn.
John Bloomquist, Montana Stockgrowers Association
Page Dringman, Pegasus Gold
Candace Torgerson, Woman Involved in Farm Economics
Frank Crowley, ASARCO
Larry Brown, Ag Preservation Assoc. and Northern Montana Oil and Gas

Opening Statement by Sponsor: **SEN. STEVE DOHERTY, SD 24, Great Falls.** Senate Bill 356 is a good, clean water bill which does several things. First, it redefines interested persons - because the 1995 Legislative Session defined "interested person" as someone who had property, water rights or an economic interest that may have been affected by a proposal changing a non-degradation permit. That definition, however, excludes people like me and other Montanans. The rationale for doing this is to prevent frivolous lawsuits and appeals from being filed. Unfortunately when that was done, "interested person", in non-degradation policy, also included hearings so Montanans were prevented from testifying at hearings on non-degradation policy. **SEN. DOHERTY** said he didn't think **Zenchiku Land & Livestock** should necessarily have more of an interest than he did just because they owned property in Montana.

Secondly, on Page 6, the nitrates standards the legislature instituted were stricken. This was a good idea because he opined it was the legislature's business to set standards for particular pollutants. Last session, however, they bumped standards up from 2.5 milligrams per liter to 5. In some instances where there was a double recovery circumstance, the standard was up to 7.5.

The amendment would strike that language and give the task to the Board of Environmental Review - those appointed by the Governor to sift out the volumes of scientific evidence presented during hearings. Current law said the Board must, to the extent practicable, establish objective and quantifiable criteria for various parameters. In other words, we are to trust the Board of Environmental Review to do its job.

Then, on Page 7, language says the Department may review or reveal results of nondegradation permits - a kind of special water quality permit. The Department should be mandated to review those, so "forever" may not be a really good thing. It seemed reasonable that the Department should review the giving of special nondegradation permits.

Further, at the bottom of Page 7, the language "in a location where they are likely to cause pollution", was changed because the bar was too high. "That will cause pollution" was a standard waste could be placed in, just outside the flood plain. Without rain, there may not be water passing through and the flood plain, by definition, may not get the water. At that point the public and the Department would be looking at a situation where they had

to prove there would be pollution. I think "is likely to cause pollution" is probably a better, more fair and accurate standard.

I suggest these proposals for amending Montana's Water Quality Laws are reasonable and prudent; and I urge the Committee's concurrence.

Proponents: Peter Funk, Montana Council of Trout Unlimited. Most of our members are intensely interested in water quality issues; however, the majority do not fit within the current definition of "interested person", as defined (a person with a real property interest, a water right, or economic interest in the stream).

Admittedly, some of our members are outfitters and would have the type of economic interest that "interested person" details. Most members, however, did not have an economic interest in water quality and felt they were presently cut out of the process. On page 7 of the bill, we propose to change the definition of "interested person" to the "real operative" language in Section 5, line 11, where it says, "an interested person wishing to challenge a final Department decision may request a hearing before the board within 30 days of the final Department decision".

There is a separate statute in the nondegradation code (75-5-307, MCA) which says, "At a hearing held under this section, the board shall give all interested persons reasonable opportunity to submit data, views or arguments orally or in writing." On Page 7 of the bill, however, it says "interested persons" may continue beyond the appeal stage. I want to emphasize that this statute was not included in the bill because it made public participation more restrictive.

According to Montana's Constitution, Third Section, Inalienable Rights, all Montanans have a right to a clean and healthful environment, pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking the health and happiness in all lawful ways. These phrases are from our Federal Constitution, and our State Constitution draws no distinction between the right to pursue life, liberty and pursuit of happiness and the right to a clean and healthful environment.

If citizens without an economic standing in a particular water body have no right to submit data, comments, or views in any part of the nondegradation process, this section of the Constitution has virtually no life in regard to this section. I don't think it will be too long before somebody takes a run at this provision.

There was a lot of House debate about what was labeled the 32-cent appeal, or what **SEN. DOHERTY** referred to as "opening up the flood gates of litigation for the litigators from out-of-state

who want to get in the way of our nondegradation decisions". I suggest the Committee ask the Department of Environmental Quality (DEQ) about their experience concerning appeals of nondegradation permits. There haven't been very many.

Further, economic interest is the main basis on which courts draw the line as to who was to participate in a judicial process. I am asking the Committee to keep in mind this is an administrative process, not a judicial process. While it could be appropriate for the courts to say that those without an economic interest should not be in the court system, I don't think it is appropriate for the legislature to say economic interest is the defining factor for the rights of the people of this state to participate in that process.

We support the bill in its entirety because it isn't right for our members who are more connected with Montana waterways than some other people to be cut out of an administrative process.

Patrick Judge, Montana Environmental Information Center, read his written testimony **(EXHIBIT #1)**, distributed **(EXHIBIT #2)** and read briefly from testimony of **Dr. Vicki Watson, University of Montana (EXHIBIT #3).**

Florence Orr, Pony, Northern Plains Resource Council Legislative Task Force, read her written testimony **(EXHIBIT #4).**

Debbie Smith, Montana Chapter of the Sierra Club. We support the statements made by the sponsor and those of prior proponents. Government and the legislature act as trustees on behalf of all people of Montana to safeguard and regulate Montana's waters. It is up to the legislature and the executive branch of government to pass and enact laws that the people of Montana wants.

Early this year Lee Newspapers conducted a poll, and found that 56% of Montanans support stronger water quality standards. In keeping with the Department's and the state's authority to safeguard waters, we want the Department to review nondegradation authorizations because we don't know whether the authorizations originally granted will continue to be abided by into the future. The Department must have a way, and some assurance, that nondegradation authorizations would continue to be non-harmful to the water.

Changes to the nitrate standards pose the most significant near-term impact on Montana's population, because the rate of development and subdivision growth are high. The immediate effects on families and children cannot be understated. I strongly urge your support of this bill.

Hope Stevens, private citizen, read her written testimony **(EXHIBIT #5).**

Patricia Hettinger, Lewis & Clark County Department of Health and the Water Quality Protection District, read her written testimony **(EXHIBIT #6),** as well as testimony on behalf of **Missoula County Department of Health (EXHIBIT #7).**

Janet Ellis, Montana Audubon Society. On page 7, when the Department does its review and is going to revoke a permit, there is a check so it is not just up to Department staff. An industry or a person with a permit could appeal that decision to the Board of Environmental Review.

Brett Brown, Montana Wildlife Federation. To favor SB 356, is to accurately represent the will of the people of Montana. This bill is not a radical agenda which would completely overhaul the water quality laws, but rather provides for common sense water quality changes, for needed protection of wildlife and public health, as well as democratic policies and the policy-making process.

Opponents: **Steve Pilcher, Western Environmental Trade Association,** read his written testimony **(EXHIBIT #8).**

John Bloomquist, Montana Stockgrowers Association. We oppose Section 4 of the bill, defining prohibited activity. Prohibited activity subjects the violator to the enforcement provisions of the Water Quality Act. On lines 26 and 27, prohibited activity would apply if somebody placed or caused waste to be placed where it would likely cause pollution.

As an example, the livestock industry is being asked more and more to change certain practices, particularly around streams in riparian areas. Many times fencing might be required, but the livestock still need water. Many times diversions are pulled off a particular source but water might return into the source. If livestock were pulled off the creek and the water were diverted, obviously the livestock are going to do what livestock do after they've ingested forage. If it was an area which would likely cause pollution, somebody could complain about that and a prohibited activity under this particular definition could be argued.

I believe this really is a policy question of where the bar would be set. I would suggest the bar set by the last legislature put the burden on the enforcement agency to show that violations are occurring. It is our position that would be the proper level for that bar.

Page Dringman, Pegasus Gold. We are opposed to the definition of "interested person" which was changed in 1995, based on language from a court decision on the Stillwater Mine by Judge McCarter. The amended law on page 2 and says "interested person" is in regard to degradation of state water pursuant to 75-5-303, MCA. Page 7, line 11, is the only time "interested person" appears in this statute, and that is when someone wants to challenge a final

decision made by the Department. The Department is in the process of ensuring that up through the preliminary decision, the public can comment.

{Tape: 1; Side: B; Approx. Time Count: #00; Comments: None}

Contesting the case procedures was like a trial; evidence had to be presented, witnesses had to be cross-examined -- time, money and trouble had to be spent; therefore, she thought it rational to consider whether or not a party would have judicial standing to challenge a degradation labor at that point. Judicial notions or standing usually required some sort of concrete and particularized injury, rather than an assertion of the general grievances which were shared by some segment of the public. She said all paid taxes so there was a general right in good government to ensure that money was not wasted; however, there was not the ability to challenge how taxes were spent because it was not a specific direct impact on us, but a generalized grievance.

Ms. Dringman referred to **EXHIBIT 9** and said Judge McCarter was looking specifically at the contested case proceeding, and whether some of the plaintiffs in this case have standing under the contested case procedure under definition of a party under MAPA, who defined "party" as a person named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party. She said the central question to be answered was whether the rights and interests of the plaintiffs and interveners were direct and immediate enough for them to have standing as a party to the contested case proceeding. She suggested creating a threshold that people needed to meet when they did invoke a contested case procedure, there should be some higher threshold of interest that needed to be met.

We have another concern on page 7 of the bill, concerning the ability to revoke a nondegradation waiver. In order to finance industrial property, some assurance is necessary that the nondegradation waiver is not going to be revoked in five years. The Department has to comply with a number of criteria on page 6, including ensuring that existing and anticipated uses of state water would be fully protected. This provision concerning revocation is particularly tough in light of the fact it has absolutely no standards of criteria for such revocation, should revocation be deemed appropriate. What is appropriate? And what kind of criteria is the Department looking at? For these reasons, we hope the Committee will vote to table this bill.

Candace Torgerson, Women Involved in Farm Economics. We have adopted a specific policy supporting the contents adopted in SB 330 and SB 331 last session: "Whereas Montana's prior water quality standards were nearly impossible to comply with; whereas the problems stemmed from ever-changing interpretations, ambiguities and unenforceable standards; whereas many Montana waters naturally carry arsenic and nitrate levels that exceed

those standards; whereas the levels were set so low that they cannot be accurately measured; whereas as the new levels set by the 1995 legislature were realistic and well within the parameters set by the federal government;, therefore, be it resolved that W.I.F.E. supports SB 330 & 331 as passed in the 1995 Legislature."

I want to remind the Committee that, last fall, I-122 was turned down by the voters. We had some concerns with language in the bill as stated by Mr. Pilcher. Specifically, the "interested party" language left it open to anyone. Some Montana farmers and ranchers have been here for about 100 years, even though the sponsor of the bill referred to people who owned that property and those water rights for only six years. Longevity should give these people a little more standing.

We are also concerned with the language specifically directing the Department to review authorizations to degrade state water. This should left to the discretion of the Department. We object to the standard on Page 7, concerning "the location likely to cause pollution". We are of the opinion that this language is counter-productive, and ask that the Committee table this bill.

John Youngberg, Montana Farm Bureau. The 1996 poll, with a little broader sampling than the Lee Newspaper poll, showed roughly 57% of Montanans feel current Montana water law is sufficient to protect our water quality standards.

Frank Crowley, ASARCO. The reason nitrates are in statute is because legislation passed in 1993 was followed by an arduous rule-making proceeding where many comments were submitted regarding nitrates and other nondegradation parameters. In the end, the Department, despite all the rational testimony submitted, decided to adopt a standard of 2.5 milligrams per liter, which was 4 times more stringent that the federal standard. Thus, the 1995 Legislature decided to insert this in statute to ensure that the administrative process would have some direction.

I commend **SEN. DOHERTY** for his continuing concern for the environment. As contrary to what appeared in the media, Montana continues to have one of the most stringent water quality programs in the West. A person could be a strong advocate of the environment and not vote for this bill.

Larry Brown, Northern Montana Oil & Gas Association, and Agricultural Preservation Association. We oppose SB 356. I also wanted to go on record for **Les Graham, Montana Cattlewomen's Association**, who oppose this legislation.

<u>Questions from the Committee</u>: **SEN. KEN MILLER.** Would you have accepted the Department going with the EPA standards of nitrates of 10 mg. per liter? **SEN. DOHERTY.** I probably would have, though I wouldn't have liked it. If I didn't think there was

adequate information in the record, or that the Department had made an irrational decision not supported by the evidence, I would have been upset. But, at some point, people have to be allowed to do their job.

SEN. FRED VAN VALKENBURG. I am concerned about the provision in this bill that would permit a person who had submitted oral or written comments on the Department's preliminary decision to be treated as an interested person in this matter. What is the Department's experience with respect to such persons filing appeals to the Board of Environmental Review on previous issues before the law was changed in 1995? **John Arrigo.** It must be realized prior to the 1993 changes in the Water Quality Act. In order to obtain an authorization to degrade, a petition has to be submitted to the Board of Health and Environmental Sciences. Prior to that change, five petitions have been filed with the Board. Those petitions were granted and there were no appeals. Two other petitions were submitted by Stillwater PGM: one for their East Boulder project (appealed by the Northern Plains Resource Council and the Cottonwood Resource Council. This was the case Judge McCarter ruled on which was referred to by **Page Dringman, EXHIBIT #9.** The Judge ruled that Northern Plains and Cottonwood Resources did not have a standing, and voided the Board's authorization to degrade.

The second Stillwater petition was appealed to District Court by Cathedral Mountain Ranch on the basis that their adjacent property would be impacted. The Board was temporarily enjoined from further action by the Court on that case. I believe the Company, essentially, withdrew their petition.

SEN. VAN VALKENBURG. I'm not sure I heard the answer correctly. In one instance, what was an interested party under this proposed bill, but which is not now an interested party, filed an appeal? **John Arrigo.** That is correct. In one of the Stillwater cases, they were determined not to qualify as having standing so they would not be an interested person; in the other case they were.

SEN. VAN VALKENBURG. Because of action in either the 1995 Session or as a result of passage of SB 1, did the Department or the Board of Environmental Review poses a rule change with respect to the nitrate standards, so as to put into rule essentially what the legislature intended to do in 1995 and did accomplish in 1997? **John Arrigo.** When the nondegradation policy was revised in 1993, the Department went through a rule-making procedure. The Board promulgated those rules and established a nitrate nonsignificant level. In 1995, when the language specifying a nitrate standard was put into the Water Quality Act, the Department again initiated a rule-making process and the Board passed those rules, setting these nitrate standards. Since that time DEQ has not adjusted or requested the Board to adjust the nitrate standard.

SEN. VAN VALKENBURG. If the portion of the bill which took the nitrate standard out of the statute were adopted, the nitrate standard now in statute would still be in rule? **John Arrigo.** That is correct.

SEN. VIVIAN BROOKE. In your examination of this legislation, could you tell me whether I am correct in saying that if this passed, it would be effective October 1, 1997? **John Arrigo.** I assume it would be.

SEN. BROOKE. Mr. Pilcher said something to the extent that, if this bill were to pass, we'd have to go back into those subdivisions and re-review them or require them to be reviewed in a different way. Is that your reading of this? **John Arrigo.** In the Fiscal Note, the Board of Environmental Review promulgates the standards in rule form. I can't predict whether the existing rules would stay in place or whether someone would petition the board for new rules and different standards. Our assumption is that if the rules changes and the standard changes, and if it goes down from 5 and 7 to 2-1/2 and 5, there would be a tougher standard for subdivisions to meet.

The Fiscal Note goes through a logical discussion, and estimates how many subdivisions would have to apply for authorizations to degrade. It's our estimate that 126 subdivisions each year would have to do this. These are the new applications, not the retroactive ones. **SEN. BROOKE.** If something is already permitted, this bill doesn't take it back and have them go through a permit again? **John Arrigo.** That's how we read it.

SEN. BROOKE. There were some comments made about section 4 and the waste that was caused to be placed (page 7, line 27). There was quite a bit of criticism about that particular language. Would you comment? Does that go back to some original language that we did have or is that something that was less stringent than the old language? **SEN. DOHERTY.** I believe it goes back to the old language before 1995 which, as I recall, did not bring civilization to a halt. I would also point out that the concern brought by Mr. Bloomquist, that grazing cows can somehow be subject to nondegradation permits, is not the way it is. We do not have to worry about grazing cows and their waste being a potential threat to Montana's water sources in this bill; it does not apply to non-point sources, and your grazing cow is a nonpoint source. If there were a 5000-head feed lot, that would be a point source, and they might have to get a nondegradation waiver.

SEN. TAYLOR. If I've got 3-4,000 acres, and I put nitrogen and nitrites on my field and all of a sudden I'm a mile away from a stream, and we have a 'gully washer' and if these things get into the stream, am I liable under this bill now? **SEN. DOHERTY.** No. Nondegradation permits are not required for putting fertilizer on fields.

SEN. MILLER. Would you give the sponsor an idea where you were coming from on the grazing? **John Bloomquist.** This bill takes in more than the nondegradation policy. The prohibited activity in 75-5-605, MCA implies, basically, the entire act and not just nondegradation policy. So, if a prohibited activity violates this particular section, it subjects you, potentially, to an enforcement action. Therefore, we need to keep the nondegradation policy and other portions of the Water Policy Act separate. I would offer that this particular change would pull in the scenarios that I provided earlier.

CHAIRMAN GROSFIELD. Prospectively, after Oct. 1, if this bill passes in its current form, what's a likely scenario for subdividers - whether it's 1200 subdivisions or 4000 lots? Are they going to be looking at nondegradation waivers in each case? **John Arrigo.** We estimate that we process approximately 1300 subdivision applications a year. A subdivision may have two septic systems or it may have 50 septic systems. On each of those, the Department evaluates what will happen to the sewage that comes out of that septic system, and tries to calculate what will be the resulting concentration of nitrate in the groundwater as a result of that discharge.

I should preface that when I say nitrate, I mean nitrate as nitrogen. We compare that predicted concentration to the threshold in the regulations, and in the law or what they consider the nonsignificance level.

There are a couple scenarios. If the Board does not change the rules and the current nonsignificant levels remain, we see no fiscal impact and will continue to operate as are now. The other scenario we put forth is that the Board promulgates new rules and drops the nitrate level down to 2-1/2 and 5. Under that scenario, we predict that out of those 1200 subdivision applications, 126 would have to apply for an authorization to degrade because the prediction of the nitrate concentration in the ground water would exceed the nonsignificant level. They would have to begin the arduous process of monitoring the groundwater, developing a data base, looking at technological, economical, and socially feasible alternatives, etc., that are required by the nondegradation authorization process.

CHAIRMAN GROSFIELD asked for an estimate of how long a process that might be. **John Arrigo.** In both the sanitation and subdivision law and in the nondegradation regulations, the Department is under a 60-day time-frame to process. But, for each application for authorization to degrade, we must go through a 30-day public review and comment period. That's where your interested persons come in. So, we're looking at a minimum of 90 days.

CHAIRMAN GROSFIELD. Section 4 of the bill says, "place any wastes in a location where they are likely to". How would you propose to deal with defining "are likely to"? **John Arrigo.** To

the best of my recollection, this is language that existed in the act prior to the changes of 1995. The Department uses its expertise to make this decision. Obviously, if there is a pollutant that enters a stream, it is "likely to" and has caused pollution. Where we get into the gray area is when a waste is dumped upon the land surface and we have to make a decision as to whether or not that waste will leach into the ground water. It's a case by case decision.

Often, we tell the violator that if there's a question of whether or not it's going to leach into the groundwater, he can either clean it up and eliminate that decision, or monitor it for 'x' amount of years and try to verify whether or not it will leach into the groundwater. Typically, long-term monitoring is a commitment that people don't want to deal with, so they clean up the spills.

CHAIRMAN GROSFIELD. Would you have an estimate of costs for subdivisions going through the 90 day process? **Steve Pilcher.** I don't think it would be fair to just throw out a number. Someone would need to figure it out. It would obviously be significantly higher than the normal review fee under the Sanitation and Subdivision Act. The actual level of cost depends on a wide variety of factors.

CHAIRMAN GROSFIELD. I would like you to address the language "are likely to" in your closing, as it's pretty imprecise.

Closing by Sponsor: SEN. DOHERTY. John Arrigo talked about beginning the arduous 60- to 90-day process to get a nondegradation permit and alternatives available to applicants such as upgrading their sewage removal system so they don't have to get a nondegradation waiver. Otherwise, they can clean up their act so they're not dumping fecal coliform into groundwater.

There are a couple of things you need to know to be a plumber, and one of them is sewage always rolls downhill; thus, sewage is going to get into groundwater. The question is, how much sewage do we want to let get into ground water? It is very interesting that we had somebody here from the Lewis & Clark County Health Department and the Missoula County Health Department where we have valley aquifers. These counties are concerned about the increasing level of nitrates in our groundwater. **Ms. Hettinger's** testimony is something that we really ought to pay some attention to.

You can also do the arduous process of actually cleaning up the sewage before it goes into the ground water, and avert permitting. **Mr. Bloomquist** and I have talked about water policy and water law for a long time. If the Committee thinks we need an amendment to make sure that we will not be making criminals of grazing cows, I am more than amenable to that amendment. The case **Ms. Dringman** cited raising the threshold of interest for interested persons, was interesting as an association of

individuals was not granted standing. That decision was not appealed, so it's a District Court decision.

A group of people could get together and say they're a rod and gun club, and tell stories about their hunting and fishing, and say they're concerned about a particular stretch of water. Whether that rod and gun club has standing is an issue that we may want to look at, but I submit that the individual members of that club are an entirely different matter. What **Ms. Dringman** didn't tell you about the other part of the decision, was that there were individuals who were granted standing; albeit in this instance they owned land downstream from the proposed nondegradation waiver. Maybe the people who don't own land but who use the resource and can demonstrate that they have a particularized interest, should not be locked out of the process.

These may be hypothetical problems but, that's what we do around here - we try to prevent problems from occurring. That's sometimes a difficult thing to do, but it's incumbent upon us to recognize where there are holes in legislation and try to deal with them.

I think you received the right answer from **John Arrigo,** Mr. Chairman. That language that was in the statute before, but it did not stop development, jobs, society, septic tanks, and it did not subject the owners of the grazing cow to any onerous government interference with their ability to let the cows wander cows are wont to wander.

The question is, will "cause or likely to cause" have to be made on a case by case basis? If there is a placement of waste, a tailings pond on a particular soil, those particular tailings are susceptible to leaching into groundwater and the soil type is such that it might happen, then it's the Department's call to make.

I believe the Fiscal Note, is one of the "more amazing flights of fantasy" that I have ever seen from the Department. To suggest, with a straight face, that passage of this bill would cost $1.3 million is probably, with all due deference to the Department, the most awful example of trying to torpedo a bill that I've ever seen.

Why should you pass this bill and not table it? First of all, **SEN. MILLER**, sometimes we have to admit that we don't know it all. It isn't the best process to sift scientific evidence out. After the Board of Environmental Review was appointed by both Governor Stephens and Governor Racicot, it adopted a standard based on the evidence the members thought was appropriate. If they bump it up to ten, I'll have to live with that, because I don't think that call is uniquely suited to the legislative process.

The issue of periodic review of nondegradation waivers is one that we need to instill. Nondegradation waiver is saying we have a general policy that you don't get to pollute, but because you have shown special circumstances, we're going to let you.

I think special preferential treatment demands periodic review - nothing more, nothing less. We ought to pay attention to the testimony of the two county health departments who have those shallow valley aquifers. Last session the Missoula County Health Department was very much against the new nitrate standards. They sent a letter to the Governor and said if you are drinking water at 7.5 milligrams per liter, the standard that's currently in statute, and there are no other significant sources of nitrate, roughly 15% of the water in your glass may have originated in your neighbor's septic system.

I believe we need to trust the Department and the Board of Environmental Review. I don't think they want Montanans drinking their neighbor's sewage.

One other point - the specifics of I-122 were not contained in this bill. This is a bill that tries to provide some balance to those situations, and I believe these are reasonable proposals. To answer your question, Mr. Chairman, about the ability of Montanans to participate in the process, the definition that was mentioned as applying only in 75-5-303, MCA, also appears in 75-5-307, MCA, and that definition is "interested persons". It deals with the ability to comment at hearings - a winnowing process that won't take everybody in.

I am wondering how the Department can take the definition that is clearly set out in statute, and make up their own definition and say it doesn't apply to hearings, but it does apply to appeals. I think this is a clear example of a bureaucracy attempting to bend and mold rules to it's own advantage. We ought to be concerned about that. What we did last time was to block Montanans out of hearings and not just appeals, and that was wrong.

I came across a bill to increase public involvement in the issuance of gambling licenses. It referenced the Montana Administrative Procedure Act, and talked about public convenience and necessity, and about getting folks involved in those decisions. That bill, of course, didn't make it out of Business & Industry; however it wanted to give Montana citizens the right to comment on gambling license issuances if they lived in the neighborhood. I think that's a very reasonable thing.

Under the Montana Administrative Procedures Act, if we're going to give folks the right to comment on those kinds of things, we cannot do less to a nondegradation hearing and waiver. Why is there a different standard for water quality laws and another standard entirely for the rest of the Administrative Procedures Act?

My family's been here for four generations. We don't own property on the Blackfoot River, but I can remember fishing on that river with my father and grandfather. Now, if they want to issue a nondegradation waiver on the Blackfoot River, I think that I, and my nieces and nephews, deserve an opportunity to say something about it. We are blocked out of the process and that's wrong, and that's why you ought to pass the bill. Thank you.

{Tape: 2; Side A; Approx. Time Count: #00; Comments: None}

HEARING ON SB 363

Sponsor: **SENATOR LORENTS GROSFIELD, SD 13, Big Timber**

Proponents: **John Bloomquist, Montana Stockgrowers Association**
Larry Brown, Agricultural Preservation Association
Pat Graham, Director, Department of Fish, Wildlife, & Parks
Peter Funk, Trout Unlimited
Jim Richard, Montana Wildlife Association

Opponents: **None**

Opening Statement by Sponsor: **SEN. GROSFIELD.** Senate Bill 363 was killed on the Senate Floor in the 1995 Legislative Session. The bill has been changed and, although it appears lengthy, it's a fairly simple bill. It does several things in an attempt to resolve the issues of instream flow for fisheries, which I've been working on since before I ever came to the Montana Legislature.

This does amend the water leasing statute, and it does allow for emergency ground water use to benefit the fishery resource. It also does a bit more in granting abandonment protection for voluntary non-use of water to benefit the fishery.

There are several temporary sections in the statute that have to be addressed. On page 1, "appropriate" means to use ground water to benefit the fishery resource. The best example is the Big Hole River, where arctic grayling are surviving, but are also of concern because of the possibility of the Endangered Species Act in the Big Hole Basin with respect to them.

About four years ago, there were a couple of tours of the Big Hole River when there was a drought, and the river was very low. The temperature in the water was rising dramatically - at about 72 degrees it becomes a danger for arctic grayling. There's a lot of irrigation out of this river, and with less water it warms up faster. So, what are we to do? We could perhaps talk somebody into not using their irrigation water for awhile under the abandonment protection.

If the river is so low that irrigation is not really having that much of an effect, yet the fish are still in danger, there is the concept of emergency ground water use to either directly infuse the river - assuming it was of proper water quality - or to indirectly to provide an alternate supply for some irrigator along the river.

My experience has told me that, many years of dealing with instream flow issues, there's no single tool to address the issue, but rather bunch of little tools. That's what this bill does. If, for example, you drill a shallow well every half-mile on the Big Hole and it comes out of the ground at 45 degrees, and you put that water into the river to cool the river, you might save a fishery.

On page 25 is the abandonment language and page 27 amends the water leasing statute. When water leasing first passed in 1989, it was authorized on only five streams in the state. In the 1991 session that was raised to ten, and in the 1993 session it was raised to twenty. The language in this bill seeks to eliminate a ceiling on the number of streams, so the Department could designate stream reaches eligible for leasing any place they thought it might work. I believe they are involved in 12 stream reaches now. This kind of program has been picking up steam, and I don't want to inhibit them with an arbitrary maximum of 20 stream reaches.

I believe people across the state in both agriculture and some of these fishery organizations have become more and more comfortable with water leasing. It's a tool that, in some cases, has really worked. Mill Creek is a real success story.

Proponents' Testimony: John Bloomquist, Montana Stockgrowers Association. SEN. GROSFIELD is getting closer with this bill. The scenario on the Big Hole is one example where this provision could have limited, beneficial use, i.e., where we've been drilling ground water wells to forego some diversionary stock water uses. A few things need to be tightened up, however.

Section 1 is fine, but on page 7, section 3, the language would allow the drilling of a well, perhaps without the permission of the surface owner or ownership of that particular property. That is probably unintended, but the surface owner needs to have a say in this situation. We'd like to see that language eliminated. This language carries through on page 9, line 29. Possessory interest or permission actually carries through a variety of sections of the bill.

Then on page 25, where irrigators get together and forego some of their diversionary uses to try to keep the fish going, does that raise an argument in the future that someone could say, 'I've abandoned a part of my water or a portion of the water right'. The language is pretty broad, in terms that non-use during periods of low flow. We believe it needs a few more sideboards

to prevent folks from using this particular provision to get around a legitimate abandonment of a water right.

We're getting closer, as far as pulling off the limitation on the Department's leasing program. It sounds like agriculture is much more comfortable with it. Last session, we expanded leasing of water rights for instream flow to individuals and others who might be interested in that process, and it was supported by agriculture; so we support section 8 as well. Hopefully this session, if not next session, we'll get the bill right.

Larry Brown, Agricultural Preservation Association. Our association is similar to the Stockgrowers, and we're supporting the bill for the same reasons. Last session I was involved a bit in regard to placement of these wells and the hydrology of the stream. What's really important here is that during drought conditions you're going to have situations where the ground water will be close to the surface, and it may or may not be augmented by ground water being brought to the surface to create instream flows.

We believe the government, as well as **SEN. GROSFIELD** and everyone involved in it - the Department, DNRC, and DEQ - understand that very concept. You can spend a lot of money drilling a well and pumping the ground water up, and it's just going to go right back in the ground in a short distance.

As those streams are identified, I'm sure the Department has looked at them very carefully. We believe they need to be extra careful about not throwing a lot of money away to augment the fisheries when, in fact, the water's just going to go right back into the ground. An example of this is the North Fork of the Smith in the upper Smith River Basin. Without the reservoirs up there, some areas below White Sulphur would get very low.

We believe **SEN. GROSFIELD** is on the right track here, and support the bill.

Patrick Graham, Director, Department of Fish, Wildlife & Parks, (EXHIBIT #10), written testimony.

Peter Funk, Montana Council of Trout Unlimited. We urge the Committee to support this bill, and to work out the problems the agricultural community has identified. This is an effective way in those rare situations where streams dry up to, perhaps, keep a little water for the fish in the streams.

Jim Richard, Montana Wildlife Federation. We strongly support this bill. Several years ago, John Bloomquist, Trout Unlimited, and our Federation, along with several agricultural groups, undertook a consensus process to try to determine if there was a way to provide for instream flows. We believe that consensus effort was very successful and resulted in the legislation of last session which John Bloomquist mentioned earlier, which

allows individuals and organizations to lease water from willing water rights holders. We see several provisions in this bill that would accommodate water right holders to provide the instream flow that is really advancing that particular part of this process.

Opponents: None.

Questions from Committee Members: **SEN. COLE.** There are 12 streams now available which you can work on? **Pat Graham.** We currently have 9 streams with leases in place, and 12 streams are designated for study. Between now and next session we plan to have adopted a list of 20, and to have added 8 additional streams to that list. The question is whether we really even need a list like that.

SEN. COLE asked if this had worked out quite well, and if the Department were the one who put in the wells. **Pat Graham.** The wells are a small portion of the leasing program. The leases themselves are for a variety of things. You've got a report that's just been passed out. On the last page there is an overview of all the leases that are in place and who's involved in them, as well as the terms for the lease, quantity of water, periods of use, and cost. **(EXHIBIT #11)** - Annual Progress Report Water Leasing Study.

At this point, we have found a variety of situations. In some it's too complicated to get involved in raising the water rights issues. In others, the priority date is not early enough that we could be assured of having water during the low water years. Typically, where it has been most useful is in small tributary streams, and usually at the lower ends of those tributary streams. These also tend to be the areas that are most vulnerable to drying up. Spawning goes on in the spring, but before the fish can migrate out down into the main river, the lower end of the stream might dry up.

SEN. VAN VALKENBURG asked **SEN. GROSFIELD** to respond to comments by **John Bloomquist** to the effect that this bill needs sideboards. **SEN. GROSFIELD.** With regard to the abandonment issue - that does need some sideboards on it. This was last minute, and I knew it needed a little more work. Regarding the other issue on ownership - it is certainly not my intention to allow emergency groundwater use without permission of the property owner. I am unclear at the moment if that's what the language actually says, as it's a little awkward reading. I will check into it, however.

This wasn't in the question, but I believe Director Graham pointed out another issue that could use an amendment. I think what he was saying on page 27 - along 6 through 9 - that we eliminate those, and that is fine with me.

SEN. MILLER asked if term limits are going to get **SEN. GROSFIELD** before this bill gets through.

Closing by Sponsor: SEN. GROSFIELD. This is probably the third time I've tried to up the number on the last page. The first it went down in the Agriculture Committee (5-10); the next time I had this same amendment in they said no, but they let it go this morning. However, I think, as Mr. Bloomquist and others have said, that people are comfortable enough with this now, and that it's time to eliminate that. There's no need now to have that kind of a block in the process. I'm going to let the issue be raised, and will defer to the Committee on it.

EXECUTIVE ACTION SB 322

Amendments: (EXHIBIT #12), sb032201.alm

Discussion: CHAIRMAN GROSFIELD. The Department had an amendment at the hearing to clarify the funding process, more along the lines we had intended, and because original draft was not correct. The amendment does two things to the bill. First, it changes $700,000, to $500,000. I don't have strong feelings about that. There has not been a dedicated money source for mining reclamation in the past, so maybe we should start off with $700,000. On the other hand, more tax is paid by oil & gas than by mining, so if oil & gas get $600,000, maybe mining shouldn't get quite that much. I'm satisfied with the amendment as it is before us. The other reason for the amendment is that it still takes the money out of RIT, but just comes out in a little different fashion which does affect the budget of DEQ.

Motion: SEN. MILLER MOVED the amendment sb032201.alm be adopted.

SEN. KEATING. Is this coming in as a statutory appropriation, from the RIT interest income account? **CHAIRMAN GROSFIELD.** I wish I had one of those charts to show you. **SEN. KEATING.** I can visualize it. It's the contingency first, then the oil & gas mitigation, then renewable resource, reclamation and development, then water storage and you're adding another one to the statutory appropriation of $700,000 of the interest income after $5.725 million of the interest income has been appropriated? **CHAIRMAN GROSFIELD.** I believe that's the way the bill was in it's introduced version. With the amendment it comes out of the $3 million that is in the grants program - the same place where the $600,000 oil & gas mitigation money comes from. Oil & gas gets the top $600,000 out of that account.

SEN. KEATING. Oil & gas mitigation gets $50,000 now but in HB 7, it's the first amount of funding by application from the Board to the Department, that they be awarded $600,000 for oil & gas mitigation. **CHAIRMAN GROSFIELD.** It's that place the money is coming out of - the same place the $600,000 comes from. It's not coming out of the revenue stream where the $50,000 comes from, it's coming from where the $600,000 comes from.

SEN. KEATING. What you're doing is prioritizing it in the grants reclamation & development account? The $3 million

account? **CHAIRMAN GROSFIELD.** Yes. Basically, this bill has been stricken, as you see it, and the amendment becomes a substitute bill for how this used to be appear.

Amendment number 2 strikes everything through page 3, line 11, which is essentially to end of the bill. A different source of funding, as has been explained, is now being utilized. Section 90-2-1113, amendment #2, (reclamation and development grants program of the DNRC), now says that in prioritizing grants coming to the Department which are to be sent to the Legislature for approval, that it will get a priority to #2 which it always has, and $700,000 for oil & gas. New section 3 says another $500,000 shall be prioritized for abandoned mine reclamation, as opposed to subsection 1, which spells out the criteria for all the other grants that come to the Department for funding. All other grants under the $3 million grant program must meet all that criteria and be approved on the priority list, except for subsection 2 - $600,000 oil & gas and new subsection 3 - $500,000 for mining.

SEN. KEATING. Does this then jump in priority ahead of refining reclamation? There are two application grants for the clean up of the abandoned refinery in Kalispell? In HB 7? **CHAIRMAN GROSFIELD.** I'm not clear on what those grants are, but are they part of the $600,000? **SEN. KEATING.** No. The $600,000 is for plugging orphaned oil & gas wells, and next to that are old abandoned refineries.

There were two grants, and then the fourth grant started getting into the mining area. Finally, a couple things were going on in Butte. What would happen is that there are probably two or three applications on there that would get cut out. **CHAIRMAN GROSFIELD.** That's true for the future, but notice that the effective date of this act is July 1, 1997. So, it would not affect those grants in this biennium, but would put mining reclamation above that type of grant to the extent of $500,000, in the future.

SEN. KEATING. This doesn't take effect until after this budget is done? HB 7 is effective July 1, 1997, too. I don't have a problem with that. I'm just saying the $3 million that is statutorily appropriated to that account is fully applied and granted in HB 7, and so this would then supersede some of the appropriations already approved by the Long Range Planning Committee. That's just a point of information, it's not a basis for argument. **CHAIRMAN GROSFIELD.** You've made a good point. I'm not sure that I'd want to do that. I don't want to frustrate what has already been done in regard to HB 7.

SEN. KEATING. This won't frustrate me at all. What you're doing here would really not have the kind of impact on HB 7 that would be adverse anything other than a few little mining projects, and this just prioritizing the abandoned mine reclamation over a couple of other things that may not have priority.

SEN. BROOKE. This bill comes out of the Revenue Oversight Committee? **CHAIRMAN GROSFIELD** said this is a bill that comes as a result of some people in the mining industry coming to me and asking if I would be interested in carrying it for abandoned mine reclamation, and I said I would.

SEN. VAN VALKENBURG. I don't think anyone is here from DNRC who could tell us what effect this would have on the grants that are already proposed to be funded in HB 7. **SEN. KEATING.** I can obtain a copy within a few minutes.

SEN. VAN VALKENBURG. I don't think it's that important. Essentially, this biennium, and certainly in future bienniums, the effect of this is going to be a reduction in the amount of money available for agricultural projects. I just want to commend **CHAIRMAN GROSFIELD** for his broadminded approach to these issues.

SEN. KEATING. The reclamation development account is a statutory appropriation of $3 million out of the interest income. In addition to that, it receives about 36 percent of the residue of the interest after the Renewable Resource Grant - which is $2 million - and then the interest. Forty percent of that residual balance goes into the other water program uses.

Again, with regard to the Renewal Resource Grant, the only thing that your proposal will affect is a number of those applications in HB 7 which are reclamation activities anyhow. They're ground disturbance activities of some sort. This will not impact any water or agricultural programs per se or directly. The thing that's going to affect all of this is that, because of statutorial appropriations and the approval of grant applications and the other multiple uses of the RIT, we find ourselves in about a $2 million shortfall because of the overuse of the RIT for whatever purpose.

Vote: CHAIRMAN GROSFIELD'S MOTION TO ADOPT THE AMENDMENT CARRIED UNANIMOUSLY.

Motion: CHAIRMAN GROSFIELD MOVED THAT SB 322 DO PASS AS AMENDED.

Discussion: CHAIRMAN GROSFIELD. You'll note I did not sign the fiscal note, because I knew this amendment was in the works and that it would negate the fiscal note.

Vote: CHAIRMAN GROSFIELD'S MOTION THAT SB 322 DO PASS CARRIED UNANIMOUSLY.

EXECUTIVE ACTION ON SB 323

Discussion: SENATOR HERTEL said they realize there's a lot of problems with this bill which they don't have time to work out this session, so he is amenable to having this bill tabled.

MOTION/VOTE: _____? MOVED TO TABLE SB 323. THE MOTION CARRIED UNANIMOUSLY.

EXECUTIVE ACTION ON SB 332

Motion/Vote: SENATOR MILLER MOVED THAT SB 332 DO PASS. THE MOTION CARRIED UNANIMOUSLY.

EXECUTIVE ACTION ON SB 334

Motion: SENATOR COLE MOVED THAT SB 334 DO PASS.

Discussion: I'm not ready to offer an amendment because it doesn't really change much. I like the bill the way it is, at least at this point.

SEN. VAN VALKENBURG. I missed the hearing on this bill, so some of my comments may not be germane, but we've managed to make it for 25 years without this bill and with the Constitutional provision we have.

If we start coming up with something like this to implement every provision that's in the Constitution, there could be an endless number of bills. I can't really imagine why this is necessary or what it says to a court, other than what is already in law. Basically, this says the legislature has passed some laws, and that's what we've done to implement the constitutional amendment. I don't think it's necessary.

CHAIRMAN GROSFIELD. SEN. VAN VALKENBURG correctly identified at least part of the purpose of the bill. Section 1 talks about where we've been since the new Constitution has been enacted. A number of pretty significant statutes deal with environmental law. This bill tries to give at least a legislative interpretation of what we think the Constitution means and how we are passing these laws. Obviously, if the court disagrees, they will let us know.

Section 2 in its present form it requires that a balancing act be done. Mr. Pogue was here earlier on the other bill, and I thought he made a great proponent for my bill, when he spoke about Article 2 of the Constitution, and how we need balance among those inalienable rights Article 2. Section 2 of the bill applies in cases where you cannot adequately mitigate under the statutes. That's the balancing test the agencies would use.

In my opening for the hearing of this bill, I talked about trying to set down on paper the legislative interpretation of what that Article means. Obviously, if the court doesn't agree then we'll go with these, and we've done that in a number of other bills. In fact, most bills that we've passed, in some manner or another, implement the Constitution. For example, in the ethics bill we passed last time, specific mention is made of an Article of the Constitution that bill was implementing or attempting to

implement. That's what this bill was for, i.e., attempting to implement the Article.

{Tape: 2; Side: B; Approx. Time Count: #00; Comments: None.}

SEN. BROOKE. We're talking about an environmental issue here. Obviously, with interpretation of the constitutional frame, that you are trying to refine and define in statute. I'm very concerned about some of the other constitutional protections that I really value. I think a lot of times the majority can trample the rights of the minority, but that's why we have a Constitution - to protect the rights of the minority.

This bill is so broad to try to define and explain a particular Article of the Constitution. It really opens the door, and to one that would give me pause to say that the right to privacy includes everything except a woman's right to choose. As far as she can see, if we pass this bill, it opens the door for that kind of bill. That is not unlike a lot of the political mood of this particular legislature and probably a lot of other legislatures to come will consider that type of legislation. I think this is very dangerous. The constitutional protections are there for a purpose and for the courts to interpret and not for us to interpret. I think it's setting a pretty dangerous precedent.

Vote: SENATOR COLE's MOTION THAT SB 334 DO PASS CARRIED 6-4.

EXECUTIVE ACTION ON SB 337

Amendments: sb033701.amc **(EXHIBIT #13)**

Motion: SENATOR COLE moved that SB 337 DO PASS.

Motion: SEN. MCCARTHY moved the amendments.

Discussion: CHAIRMAN GROSFIELD. Amendments were provided out when this bill was heard. The Department made two editing corrections. Please mark them because they have the identical number as the previous amendments do, although this one is dated February 19. The differences between the two are in amendment 16, following "groundwater", we inserted a ",", and "to" is stricken and "the" is inserted. These were typographical errors. On #22 of the February 14 amendments it said "following: bypass", but should have said "strike: bypass" as it shows now.

CHAIRMAN GROSFIELD asked **Barb Cosens** from the Reserve Water Rights Compact Commission to indicate whether the February 19 amendments were correct, and whether it had been agreed to by all parties. **Barb Cosens.** This is the correct set of amendments, and all the parties have agreed.

Vote: SEN. MCCARTHY's MOTION TO ADOPT THE AMENDMENTS CARRIED UNANIMOUSLY.

Motion: SEN. COLE MOVED THAT SB 337 DO PASS AS AMENDED.

Discussion: SEN. COLE. I reviewed the compact and asked a number of questions at the hearing. Although it's a good compact, it's not completely done, and I don't think it will be done for many years to come. There are a couple other compacts that the federal government still hasn't approved; however, I wholeheartedly recommend approval of the compact.

SEN. MCCARTHY. This is the first time I've been through this process, and I find it interesting. I thought the group that worked on it ought to be complimented of the complexity of the issues. Anyone who has been to the Rocky Boys Reservation realizes how poor it is. The fact that they're bringing good drinking water to people needs to be noted. That part of it alone makes the bill worth passing.

SEN. CRISMORE. I thinks this is the process we need to be using. I feel strong about it.

SEN. VAN VALKENBURG. I wanted to join those in commending the Chippewa Cree Tribe and the water users in the area of the Rocky Boys Reservation, in particular. Certainly we appreciate the efforts of our staff with the Reserved Water Rights Commission and the Department of Natural Resources, but they're paid to do that and that's part of their job. The water users and the Tribe have cone a long way from the description the Chairman and others provided at the outset here.

I am, however, disturbed by the attitude of the federal government at this point. The Chairman of the Commission, Mr. Tweeten, indicated in his response to the letter which the Chairman of the Committee received, under the signature of James Pipken, the Counselor to the Secretary of Interior, that he's not sure these people are dealing fully in good faith when they say they weren't given the opportunity to participate in the process. In actuality, they basically walked away from the process in the winter of 1995 until sometime in November of 1996.

I can't imagine how this compact could ever be approved by Congress if representatives of the State of Montana and the Chippewa Cree Tribe did not appear in front of the Congressional Committee that was considering a compact, and that's basically what the federal government did here. They stiffed us. They sent us a letter and said those are our objections. Nobody was here to answer a single Committee member's questions, if we had any, of the federal government.

Congress would not tolerate it if the State of Montana and the Tribe didn't bother to show up to answer their questions. I hope Congress will, as was indicated to us by the staff here and by Mr. Tweeten, do as they have done, for instance, in the Northern Cheyenne agreement. They, essentially, told the Department of Interior that its interest in protecting the trust relationship

with the Chippewa Cree Tribe is a good deal broader than the Department of Interior seems to think that it is, and would quickly appropriate funds to resolve this matter so there can be a compact here.

SEN. KEATING. I believe there is a requirement within the compact for a feasibility study concerning the transfer of water from the Tiber to the Milk River Basin, and that there is a $330,000 general fund appropriation for that feasibility study. So, if you're supporting this compact, remember that when you see the appropriation for $330,000 - it is a part of this agreement.

CHAIRMAN GROSFIELD. I appreciate **SEN. VAN VALKENBURG's** comments on the record. I think that once the minutes are done, they will be forwarded to the appropriate people. To some extent it becomes a question of the chicken and the egg and which comes first. Obviously, the state has to come first.

Montana would not fare well if we went to Congress and asked them to approve all this stuff, and then went home to see if we could pass a compact. That just would not happen, here or with the Northern Cheyenne or with the National Park Service, where we were dealing with money for controlled groundwater area.

We must act first, but in that process it would be helpful if the feds showed a bit more appreciation of our process. At the initial hearing I attended in Havre, at the beginning of this compacting process there was a lot of tension between tribal and non-tribal people. I commend the Tribal Water Resources Chairman and the local water users on the amazing working relationship they have developed through this process and you could all see it and feel it in the room here during the hearing. That's part of what negotiations will get you and what litigation probably doesn't get you. This is a good compact and I hope we can pass it unanimously.

Vote: SEN. COLE'S MOTION THAT SB 337 DO PASS AS AMENDED CARRIED UNANIMOUSLY.

EXECUTIVE ACTION ON SB 342

Amendments: sb034202.alm, sb034203.alm **(EXHIBITS #14 and #15)**

Discussion: CHAIRMAN GROSFIELD. We have two sets of amendments requested by **SEN. BROOKE.**

Motion: SEN. BROOKE moved sb034201.alm.

Discussion: SEN. BROOKE. Section 1 of the bill was a better section of law to amend or to add language to with regard to the augmentation plan, rather than just include it in the Basin closure. The amendment only applies to the Upper Clark Fork Basin closure. This ground water permit application is much

broader, and allows for augmentation of plans to exist within the permitting process.

Vote: SEN. BROOKE'S MOTION TO ADOPT AMENDMENT sb034203.alm CARRIED UNANIMOUSLY.

Motion: SEN. BROOKE MOVED THAT AMENDMENT sb034202.alm BE ADOPTED.

Discussion: SEN. BROOKE. This goes to the discussion we had at the hearing regarding how the members will be chosen. We're expanding the membership so the county commissioners and conservation districts will be involved in recruiting and appointing members. If it's a problem and people don't want to appoint a member to this committee, then it transfers back to the Department Director to fill those slots. As a point of clarification, the Department Director wouldn't appoint a county commissioner, but rather someone appropriate from that particular county. As you know these appointments take a while. In the past year, Director Clinch took great care to ensure there was a good cross section of people represented, and I know that will continue. We felt there was a need to involve the local people more.

CHAIRMAN GROSFIELD. SEN. BROOKE's intention is that these additional members not necessarily be either county commissioners or conservation district supervisors.

Motion/Vote: SEN. BROOKE MOVED TO ADOPT THE AMENDMENTS sb034203.alm. THE MOTION CARRIED UNANIMOUSLY.

Motion: SEN. BROOKE MOVED THAT SB 342 DO PASS AS AMENDED. THE MOTION CARRIED UNANIMOUSLY.

Discussion: SEN. MCCARTHY. Four of the six counties involved are part of my Senate District, so I strongly support the bill.

Vote: SEN. BROOKE'S MOTION THAT SB 342 DO PASS AS AMENDED CARRIED UNANIMOUSLY.

EXECUTIVE ACTION ON SJR 7

Amendments: sjr00702.alm **(EXHIBIT #16)**

Discussion: CHAIRMAN GROSFIELD. Since the hearing on SJR 7, we have received quite a bit of correspondence which the secretary will pass out for your review. I believe they're mostly opposed to the resolution.

Motion: SEN. VAN VALKENBURG MOVED TO TABLE SJR 7, and then withdrew his motion.

Discussion: SEN. KEATING. On page 2 of the bill, the amendment should change "require" to "urge the Forest Service to redraft".

Following "1996 board to select alternative trees" it would delete the remainder of that line. Language in the amendment says that the legislature is asking Congress to exercise some oversight over the decision, and ensures that Congress itself is mandated multiple use principles for the forest. The alternative would provide reasonable access for exploration of oil and gas as strategic minerals necessary for all of the United States.

I understand the outfitters who think that oil and gas is going to be every foot of the way and that we're going to take up all of the million acres, but that's not the case. Those geological features only occur in very minor parts of the area, and the fields themselves might be two, three, or possibly four square miles in size. With growing technology and reclamation technology they would be very unobtrusive in the area.

The outfitters for the most part would never even see any of this activity. They will still have three million acres in the Bob Marshall Wilderness. There's all kinds of high county area around there that is not accessible for oil & gas exploration.

I think the Committee ought to remember that oil & gas can do nothing in that area until a lease is issued. The Department of the Interior, in issuing the lease, will have done an environmental review of the area and they will have put certain stipulations on those leases which we must comply with.

The only objection we have to the suggested leasing in the area is that they would issue leases with no occupancy stipulation, and that's useless. Why have a lease if you can't go on it to develop it? While we're happy to comply with all the environmental requirements and the stipulations that are imposed from the Environmental Review by the Department, I believe the Committee ought to think seriously about the economic trade-off in this.

I can assure the Committee that those outfitters and backpackers are in areas right now that are subject to mining and to oil & gas leasing, and that they're operating in areas that where even private lands are available for oil & gas leasing. This area has such a high potential for huge reserves and tremendous economic benefit to the United States and to Montana.

I am a bit disappointed in the environmental movement on this particular project. It seems that they're being awfully greedy trying to tie up another million acres for recreation and back-packing or outfitting for part of the year and shutting out anybody else when the criteria for public domain is multiple use.

Whenever I've had the idea of asking Congress to patent public domain to Montana as they should have in the time of statehood, everybody says no, that belongs to all the people and the people own that land, so we can't patent it to the State. If that land

belongs to all the people, then let the representatives of the people make a judgement in this decision, as to whether or not there should be multiple use in this area of the public forest. So I ask you to accept the amendment, and for your support on the resolution.

SEN. VAN VALKENBURG. I believe **SEN. KEATING** has improved this resolution substantially by the proposed amendment, although my experience with bills of this nature is that once they're introduced you can never, ever take back what was there in the first instance.

People begin to treat this whole issue as what you introduced it as, and think that one thing. If this moves on, it could potentially be amended back to where it was to begin with. I think you create great suspicion of that with the public.

The amendment doesn't strike a number of the whereases that seem really inappropriate in the resolution. When you declare in a whereas that the draft environmental impact statement overestimated the environmental and aesthetic impacts of oil & gas exploration, and that it fails to analyze the effect to sections of the forest land to surface occupancy restrictions, and you include in the whereases that only three alternatives offer access to the forest which could remotely be expected to lead to leasing for oil & gas, you defeat the changes that you make in the amendment.

I haven't had a chance to take in any testimony at all, and we don't have any public comment on what is in the amendment. I'm not even sure as to what extent even the people in the room are familiar with what you're now proposing in this amendment.

I don't think **SEN. KEATING** knows whether this committee or the Senate as a whole is prepared to reopen the hearing process and solicit that kind of comment a week prior to transmittal and with at best, only one more committee meeting to have in this regard. I believe the amendment should be rejected, and that we ought to go back to the motion to table the bill.

CHAIRMAN GROSFIELD. I agree with some of what was said, but not your last statements. There's hardly ever a chance for a rehearing on a bill in a committee. That's not the way the process works. The chance for a rehearing is when it gets to the next House. The amendment appears to help the bill and we should probably be passing things that help bills. I agree that some of the whereases and some of the rest of the language in the bill is troubling, but I believe the amendment helps these problems, so I'm going to support it.

Motion: SEN. KEATING MOVED THAT THE AMENDMENTS sjr00702.alm BE ADOPTED.

Discussion: **SEN. BROOKE.** With all due respect, I don't think that in this committee this session we've amended bills that created so much opposition as this, even though I haven't seen it yet. I don't feel comfortable without having another hearing, and discerning if this decreases opposition or makes people a little more comfortable. We need to know that. This has an incredible amount of opposition.

SEN. MCCARTHY. I'm pleased the word "require" would be replaced by "urge", and that the proposed language clarifies the intent. What concerns me is the message implied by stating that Congress needs to apply some oversight to assure we are following a multiple use mandate. This seems to say to me that we are not following a multiple use mandate.

It appears to me that the definition of multiple use refers to development, but multiple use includes every use from wilderness to maximum development. So, if you look also across the scope of the forest, we have approximately 1.8 million acres on Lewis & Clark National Forest, the decision at hand, and the preferred alternative we are providing for some lease opportunities on 50 percent of those acres. I believe that's a rather generous step forward. I recognize that the Rocky Mountain Front is an area of concern and that, therefore, some people would prefer to see all those acres available for lease shifted to the Rocky Mountain Front. I appreciate the intent to ask Congress to oversee whether agencies are doing their job correctly in following all the laws they've promulgated, but I believe we are or we would not be able to proceed.

SEN. KEATING. The one thing there is a provision for - some oil & gas leasing in the area - is misleading in the sense that the area, under alternative 7 that is allowed for leasing, is just a one-mile strip along the outer edge, and has no relationship to potential geological structures. We don't know where the structures are going to be exactly, but they are there. If there is a field, one square mile is the spacing for a single well. It wouldn't be economically feasible to drill one well and not be able to develop whatever might be found there.

It's really an either/or situation: either there is exploration allowed through the area; or there is not. The resolution is merely asking Congress to consider what has been done through the process, and to see if they think that there might be another alternative. That is all that we're asking for - just a letter to Congress and for them to take a look.

Vote: SEN. KEATING'S MOTION TO ADOPT HIS AMENDMENTS CARRIED 7-3 IN A ROLL CALL VOTE.

Motion: SEN. KEATING MADE A MOTION THAT SJR 7 DO PASS AS AMENDED.

SEN. TAYLOR. I'd like to support this bill, certainly from a business interest and the economic structure, as **SEN. KEATING** has indicated it can help Montana at a time we're stretching our tax dollars and property taxes. Since we're looking at a sales tax, maybe this is an alternative source of income. The wilderness provides a certain mystique people honor and talk about from all over the world that come here to visit. The people in my district have mandated that I not support this bill, so I must follow their wishes.

{Tape: 3; Side: 3; Approx. Time Count: #00; Comments: None.}

CHAIRMAN GROSFIELD. This is a big issue, and we suspect it might be pretty significant. It is an issue this legislature certainly needs to be aware of, if we are talking anywhere near the kinds of dollars that discussed in the hearing. The resolution mentions $10 billion over, but I'm not sure how long a time that might mean.

But I'm not going to be able to vote for this. In fact, I'm going to make a substitute motion to table the bill. If this really has to do with the merits of oil & gas exploration on the Rocky Mountain Front, I agree with a lot of what was said in the hearing - that if it's done right it can be done in a fairly benign fashion.

I happen to live in the mountains. About 15 years ago, an oil & gas well was drilled on an adjacent property at a pretty high elevation -at about 7,000' in the Crazy Mountains. There was a great big rig, all kinds of lights and noise, and drilling on a steep slope. They came in and they took a huge chunk of dirt out of there in order to set up a level pad big enough to run the operation which went down 10-12,000' looking for oil. They were there for three months and didn't find anything, so they came back in and closed it up. Within a year or two, I'm not sure that even a range scientist could drive up that road and tell where that site was. There is just no trace of it. It was incredible, so I know it can be done. I know that in this sensitive world we live in today, with regard to environmental impacts and so on, that this sort of thing is possible. I believe it's possible on the Rocky Mountain Front or anywhere else. But, what this bill asks us to do is something I cannot support. It asks us to get in the middle of an EIS (Environmental Impact Statement) process that's ongoing and to try and steer that process.

I appreciate **SEN. KEATING** bringing this in the form of a resolution to a legislature that is a public forum where people have the ability to come and speak as proponents or opponents for this concept. That is not what happened with respect to the New World Mine EIS, which was a joint EIS between the Forest Service and the State of Montana. That EIS too was far along in the process. An awful lot of money had been spent on it, and all of a sudden we were not dealing with a public forum there, but

rather rank political pressure from envitronmental interests. That EIS process was stopped right in the middle.

I've spoken with a number of high level people in the Forest Service who are very frustrated with what happened. Of course, a number of people in the private sector, a number of state officials, and the Governor of Montana have expressed frustration over it. I believe we should all be frustrated over it. We had a very good EIS process that was ongoing, and the rug was jerked out from under that process via political pressure. That was totally inappropriate, especially the behind-the-scenes political maneuvering.

At least here we are talking about trying to do this is an up-front public process, and I truly appreciate that. Nevertheless, the issue is the same. We are being asked to frustrate an EIS process that's ongoing. The whereases say the draft EIS does not fully represent the economic benefits. We heard about the draft EIS which receives public comment, and then is reviewed by the Forest Service, who comes out with a final EIS that with 100 percent likelihood will not come out identical to the draft EIS.

In the last whereas addressing Alternative 3, it talks about the situation that may or may not happen, as the EIS isn't done yet. I don't think it's appropriate for this legislature to get in the middle of that. If the EIS produces an alternative, in the final form, that the oil & gas industry does not find satisfactory, there are remedies of appeal. Then, if they still find it's not satisfactory, we don't know what the third alternative is going to be. It may be one that the outfitters don't like, or that the wilderness people don't like. They all have avenues of appeal. If all of those avenues fail them, we may hear it in the next legislative session with a resolution like this or we may go to Congress. The oil & gas industry may go to Congress, or the Wilderness Association. That's the way the system should work. I am not comfortable passing a resolution like this that jumps right in the middle of the process.

Motion: CHAIRMAN GROSFIELD MADE A SUBSTITUTE MOTION TO TABLE SJR 7.

Discussion:

SEN. KEATING. If the Committee will pass consideration, I would not mention SJR 7 again, and it would just not meet transmittal and would die.

CHAIRMAN GROSFIELD. You have made a interesting request, but I'm not sure what to do with it. Resolutions have the same transmittal date as the other bills, so if it were withdrawn and didn't make transmittal, it would sit on the table.

SEN. MILLER. I would like to see **CHAIRMAN GROSFIELD** withdraw his substitute motion, and allow **SEN. KEATING** to do as he wishes. It's probably the best way. I think it received good discussion, and that's what we needed. A no vote will send a message to Congress that we support it, and a yes vote does the opposite. This gives a mutual way of handling it.

SEN. CRISMORE. I support **SEN. KEATING**'s request.

SEN. VAN VALKENBURG. I, too, am requesting that the motion be withdrawn. If **SEN. KEATING** is good on his word that he will not bring this motion up, I will support his wishes.

CHAIRMAN GROSFIELD. The concern here is not about whether the bill is going to pass or whether **SEN. KEATING** is going to keep his word. Obviously, if anyone else wants to try and blast it out on the Senate Floor, they could do that anyway - with a table motion or without it.

My concern as committee chairman is what this might imply as to the integrity of this committee. It may not imply anything, but I'm hesitant and am trying to quickly think that through. It's a way to dispose of the bill. But it's a question of whether we formalize it or informalize it. Upon further consideration, as long as we're doing it up front in a public manner in an open session of this committee. I believe there's no impinging of the Committee's integrity by withdrawing my motion and allowing **SEN. KEATING** his request, so I withdraw my motion to table SJR 7.

Motion/Vote: SEN. KEATING MOVED TO PASS CONSIDERATION ON SJR 7. THE MOTION CARRIED WITH ALL MEMBERS VOTING AYE EXCEPT SENATOR BROOKE WHO VOTED NO.

EXECUTIVE ACTION ON SB 253

Discussion: CHAIRMAN GROSFIELD. When we heard **SEN. LYNCH's** bill, SB 253, we noted that John was going to meet with people about the rule-making issues in the bill, and that he would provide us with a report.

John Dilliard, Department of Environmental Quality, Community Services Bureau. Last week the Solid Waste Program distributed a draft of the construction or demolition waste regulations to the members of the committee for their review and consideration. Yesterday, that committee met in Helena to discuss the draft rules. The draft rules, as prepared by the Department, are designed to be applicable to a broad range of different non-municipal-type wastes, and were purposely left flexible so the waste disposal facility operator could select the specific type of waste which he is willing to accept. It would also give the Department wide discretion to determine the appropriate siting and operational needs for that particular waste.

With the proposed rules, the Department believed it would open the door to finding and allowing alternative disposal options for all types of non-municipal waste, rather than limiting them to specific construction and demolition waste alternatives. As proposed, the rules were similar to existing federal regulations. After considerable discussion, the committee felt that portions of the proposed draft rules were too broad and too flexible, and could possibly result in the need to conduct extensive site studies for each individual site in order to determine what the appropriate design criteria would be.

The committee decided it was better to narrow the scope of the rules to construction and demolition waste only, and to establish specific siting criteria for that type of waste disposal site. The committee agreed to the following schedule for the revision of the draft rules: 1) Within one week of the meeting, the Department would rewrite the proposed rules, narrowing the scope to include specific signed criteria, and then send the revision to members for their review; 2) Within one week of receiving the rules from the Department committee members would respond to the Department with their comments; 3) Within one week of receiving committee comments, the Department would incorporate them into the proposed rules; 4) Then the full committee would meet again on March 12, 1997 to be finalize the proposed rules; 5) Barring major objections to the proposed rules, the Department will immediately format the rules for public notice and proceed for comments and rule adoption process.

I'D LIKE TO ADD THAT, AT THE CLOSE OF THE MEETING, THE BUTTE/ Silver Bow members of the committee agreed that the process was moving in the right direction.

SEN. MCCARTHY. It's my understanding in discussing this with **SEN. LYNCH** that there will have to be a new site constructed for this. Is that correct? **John Dilliard.** In order to dispose of this waste and to meet siting criteria for this type of waste class, a new site can be developed. If a class 2 or municipal landfill would wish to accept this waste, they can accept this waste without any changes.

SEN. MCCARTHY. Does this go into class 4? **John Dilliard.** Currently in Montana we have what we call two groups of waste which are basically the municipal solid waste category. Then there is class 3 waste. We have corresponding facilities for class 2 and 3 waste disposal. Class 3 is the inert material. We're proposing that this be identified as a group 4 waste which would go into a class 4-type facility.

SEN. MCCARTHY. How long does it take to notice the public? **John Dilliard.** Assuming that the Committee approves the rules at the March 12 meeting, the earliest date we can file with the Secretary of State is March 24. Then they would be publicized on April 7, at which time the 30-day public comment period would begin. The Department would have to address comments received

during the public comment period and submit the final rules to the Secretary of State, which could happen by May 19 at the earliest. Following that process the rules could be published and become effective June 2, 1997.

SEN. MCCARTHY. Then when can we open the dump? **John Dilliard.** It can be opened on June 2.

Motion: **SEN. MCCARTHY MOVED TO TABLE SB 253.**

Discussion: **CHAIRMAN GROSFIELD.** I received a note from **SEN. LYNCH** saying he was satisfied with the meeting that took place and that he would be satisfied with tabling the bill. We appreciate **Mr. Dilliard** coming forth and the Department's attempt to expedite rule-making. Hopefully, the situation will be resolved.

Vote: **SEN. MCCARTHY'S MOTION TO TABLE SB 253 CARRIED UNANIMOUSLY.**

ADJOURNMENT

Adjournment:

Lorents Grosfield

SEN. LORENTS GROSFIELD, Chairman

Gayle Hayley (SH)

GAYLE HAYLEY, Secretary

Joann Bird (SH)

JOANN BIRD, Transcriber

LG/gh