

MINUTES

MONTANA SENATE 55th LEGISLATURE - REGULAR SESSION

COMMITTEE ON NATURAL RESOURCES

Call to Order: By **CHAIRMAN LORENTS GROSFIELD**, on March 7, 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. 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: Sen. Vivian Brooke
Sen. Dale Mahlum

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 344,
HB 486,
HB 156,
Executive Action: None

HEARING ON HB 344

Sponsor: REP. RAY PECK, HOUSE DISTRICT 91, HAVRE

Proponents: Franklin Culver, Bozeman
Gerard Berens, Treasurer, Save the Fort
Carole Toppins
Joe Lamson, OPI
Steve Bullock, Legal Counsel to Mike Cooney

Opponents: Leroy Schramm, Chief Legal Counsel for Board of
Regents
Ross Best, Missoula

Opening Statement by Sponsor: REP. RAY PECK: HB 344 is a repeat of a similar bill we had in the 1995 session. Last session there was a Land Board bill introduced. I also introduced a bill and they were merged. In the merging that took place there were some things that we were somewhat negligent on and I think they need to be improved. We had an agreement on that bill last session and apparently the parties to the bill agreed to disagree so that pushed us a little further. This bill adds a requirement that the Montana Antiquities Act and the Montana Environmental Policy Act would be complied with by the University System. In the hearing in the House there was no objection to that. I believe the indication was that the University System has adopted policies in both these areas, so I don't think that would be a problem. It's been determined that the 1995 law does not actually require full market value and if you refer back to the Constitution of Montana, Article X, Section 11, both words are specific in the Constitution. It also indicates there must be a competitive bid process. The bill that was passed last session does not assure that. There's some language which allows them to do a RFP process, which of course does not do anything in terms of requiring full market value. In the bill itself on lines 16, 17 & 18 requirements are added as to when the regents may, sell, exchange or lease land. On page 1, lines 24, 25 & 26 there is clarification of the appraisal requirements. On page 2, line 4, it does indicate that there must be a public auction as the Constitution indicates. On page 2 it also deletes some broad language that was a problem I mentioned in the 1995 bill. On lines 16 through 30, there are some specifics as to what the regents must do prior to sale. It also includes language in terms of the refusal and concurrence by the Land Board and what basis they would use for that.

Proponents' Testimony Franklin Culver: I'm a resident of Gallatin County, I live near Bozeman, and am testifying in favor of HB 344. As REP. PECK said, the problem with existing law is, in my opinion, it does not provide for competitive bidding and public auction, as do most of the general laws for the selling of state lands in Montana. It does have what's referred to as a RFP process for selling lands. A serious problem with the RFP method in selling land is it does not assure that the sale of public lands are conducted openly, fairly, and without favoritism. Neither does the request for proposal method assure the people of the state of Montana of getting the constitutionally required full market value for the sale of those lands. I'd like to spend a little time just going through one sale that did happen under this statute and explain how the RFP system method does work and maybe instill in you enough information that you can see this bill is worthy of your consideration. There's only been one sale executed since 1995 under section 20-25-307. This was at Montana Tech and I think it shows the problems with the RFP procedure. What happened there was Montana Tech wanted to sell some undeveloped land in Butte to the private Montana Tech Foundation. See EXHIBIT 1, written testimony.

GERARD BERENS, Treasurer, Save the Fort: We were involved in the original Ft. Missoula matter which somewhat precipitated the original 1995 legislation. I rise in support of what might be considered really an amendment to that 1995 legislation. The University System has a practice of not following very rigorous procedures for the sale and disposition of public assets. This bill will help them along. What it really does is protect the University from it's own lack of policies and procedures and rigorousness in it's procedures which have exposed it to some serious criticism in most recent times. The open bidding process for the sale of land is a widely recognized standard for the sale of public assets. Counties and school districts follow this similar type of procedure. It would be helpful to have the University also dispose of assets in a similar manner. The question has to be raised, what harm will it cause the University System to follow a more rigorous policy than is followed by other public agencies? I might point out that this bill, and it's predecessor in 1995, is really the totality of statutes that govern, control, and guide the University System in the sale of land. By comparison, other lands in the state are sold under the aspects of Title 77, which represents 47 pages of statutes regarding how to properly sell state land. Coming from the private sector, I believe in less government. I think the prior legislation and prior practices and prior abuses in the sale of public assets, not only in the state but in other states, have precipitated statutes to go ahead and govern the sale of a very precious asset, public land. If we are going to dispose of it, it needs to be done in a way that assures the public that they're getting the full market value, which is what the Constitution says. In conclusion, I would recommend that you pass on this particular legislation.

Carole Toppins: I'm asking you to support this bill for these reasons: 1. It would help restore the public's faith in the regents if the regents had to follow the same laws as the rest of us. 2. If the regents are actually abiding by state laws, then this bill will have no impact on them. 3. It would safeguard the public's interest in public lands.

Joe Lamson representing Nancy Keenan at OPI: We strongly supported this legislation when it was over in the House. The basic reason is it gives further clarification to the issues that this ongoing controversy has been having. In that testimony it was brought out, the University now has policies to deal with most of the questions that are dealt with and we congratulate them for that. However, lots of people will want to have policies or want to do the right thing, and unfortunately the law is necessary sometime in that they create an even playing field so everybody participates on that playing field equally, and we believe this bill goes a long way towards doing that. Thank you.

Steve Bullock, Legal Counsel to Secretary of State Mike Cooney: I'm testifying in support of this bill on behalf of Secretary of State in his capacities as a member of the Land Board. It seems

eminently sensible that in disposing of, exchanging, or encumbering of university lands the Board of Regents comply with environmental and historical preservation requirements. They are mandated for virtually every other organ of government in Montana. The current requirements, that the sale or exchange achieve fair market value and be in the best interest of the state or the system, is an aspirational statement, it should be a strived for, but there's really not much meat on it, or any guidelines as to how that statement can be met. We believe this bill provides those guidelines, and for that reason we urge support for HB 344.

{Tape: 1; Side: A; Approx. Time Count: 3:40}

Opponents' Testimony: Leroy Schramm, Chief Legal Counsel for Board of Regents: There are some portions of this bill that we don't find objectionable, such as the requirements that we observe the Environmental Policy Act or the Antiquities Act which apparently was the basis for some peoples' support. The Regents have adopted a policy saying they will make sure every sale does comply with that. If they didn't, it's a matter of state law anyway. But the rest of the portions of the bill I think cause some problems, and they're more than just tinkering with the 1995 legislation, which came to you with the support of both the regents and the Land Board. The Land Board as a body has not taken any position on this bill. **See EXHIBIT 2, Written Testimony.**

Ross Best: I'm from Missoula and am one of the citizens who originally raised questions about the Fort Missoula transactions. I was the only person who complained about the Montana Tech land sale we heard discussion on here. I am generally supportive of **REP. PECK'S** bill. I hope he'll forgive me for speaking in opposition. I do have some reservations about some parts of it, and I thought it might be informative to hear Mr. Schramm speak before I got up. The part that I question is one that Mr. Schramm also questioned, and that is whether it's appropriate for the Land Board to be making a judgement whether land is going to be needed for educational purposes for the next 50 years. When you look into this question, you find that there are somewhat conflicting Constitutional provisions as far as authority over state lands and authority over the University System. I think the best way to resolve that is to recognize that there are some decisions that are distinctively educational, and those decisions need to be made by the Board of Regents. There are other decisions that are basically just land decisions, basically just business types of decisions, regarding how to get the full market value. I think it's legitimate for the legislature to authorize the Land Board to participate in the sale process, and to set the guidelines, but I don't think it's appropriate for the legislature to say that the Land Board should be taking into consideration whether the land is going to be used for university purposes within 50 years. That's an extremely speculative question and the people who should be making that kind of

judgement are the regents. It's speculative for the Land Board, it's much more speculative for the Land Board to be second guessing the regents, so I speak in opposition to that provision and I think you need to be aware that the provision Mr. Schramm just discussed, having to do with the best interests of the state or the best interest of the University System, is a provision that will very likely be found to be unconstitutional.

My interest is in helping you to understand what the best, fairest, most constitutional approach will be, and I think that the strongest bill here would actually strike out that language and take away some of the basis for the Board of Regents current litigation before the Supreme Court. In relation however, to these other objections Mr. Schramm raises, the question on whether a condition should be placed upon property, the questions of whether a request for proposal process should be used, I'd like to give you a little background on what I think is happening here.

I think that the University System doesn't like some of the restrictions that the legislature puts on them, and the University System doesn't like some of the restrictions the Constitution puts on them, and they try to bypass the legislature and the Constitution by having some of their work done for them by University Foundations. We saw that with Fort Missoula. U of M transferred property to the U of M Foundation. We've seen that in Bozeman, MSU transferred prime real estate in and around Bozeman to the MSU Foundation for the creation of a technology park, and that's the subject of the litigation that's being contemplated now between the Land Board and the regents. U of M has put out a plan to have the U of M Foundation build an office building on land that is either now owned by U of M or is going to be acquired by U of M. The MSU Foundation has built its building on land that was acquired from MSU through these exchanges, and we see here that the Montana Tech Foundation is the beneficiary of the deal with Montana Tech.

That was a deal in which you and I could not go in and bid on the land, because the deal was rigged, guaranteed that a University Foundation, that specific one, bought the land. They had an appraisal and the Foundation bid appraised value, but there was no competition the way a free market requires, so there's no way to say full market value, the fair market value of that land really is, because there was never the test of the market.

I agree there are certain kinds of conditions that may be appropriate. You obviously can't have a shooting range across the street from the University of Montana. But local zoning takes care of that in most cases, anyway. I think it's reasonable to have conditions that are there to protect the educational use of the adjoining land, but it is not appropriate to have conditions that are intended to guide the sale to a specific buyer, and it's not appropriate to have this request for proposals process, which cuts out competitive forces, cuts out

the free market mechanisms that tend to guarantee that you're getting full market value.

We all know that auctions are somewhat unusual processes. They can produce good results or less satisfying results, but the important thing, I think, is not that you have an auction, somebody standing with a gavel to signal the winning bid. The important thing is that you have competitive bidding, so maybe you don't have an auction that lasts one day, maybe you have a process that goes on for weeks or months, but the important thing is you are taking the highest bid and not taking a lower amount in consideration for what else you're doing for us on the side.

The Constitution doesn't say anything about deals on the side, the Constitution says you must get full market value. I think that's a clear imperative and I think that in that regard **REP. PECK'S** bill is moving in the right direction. As I said, I am concerned though about the unconstitutional aspects of the 50 year speculation and the potential for rejection of deals based on the Land Board's judgement about what's in the best interest of the state or the university system. I'd like to point out that I've raised issues of conflict of interest involving a member of this committee, whose wife works for the University of Montana, and I feel a duty as a citizen to object every step of the way to the participation of the legislator in a process like this, when that legislator has a conflict of interest. I thank you.

{Tape: 1; Side: B; Approx. Time Count: 4:20}

Questions From Committee Members and Responses: **SEN. MCCARTHY:** I would like to ask Mr. Best if he feels I have a conflict of interest also in this issue? **Ross Best:** I must confess that I don't know.

SEN. MCCARTHY: I'm a former member of the Board of Regents.

Ross Best: Since this doesn't deal with any past activities of the Board of Regents, and since you're not currently on the Board of Regents, I think it's probably reasonable for you to participate. That's my personal reading of the situation.

SEN. MCCARTHY: That was not his reading of the situation in regards to **REP. COCCHIARELLA** who was an employee of the University System, but is no longer an employee **Ross Best:** And that was because she was employed during the time of the challenged transactions. This legislation proposed by **REP. PECK** deals entirely with what happens in the future, it doesn't deal with anything that happened in the past. If you were being asked to pass judgement or influence any decisions involving past transactions, then my answer would have been different.

CHAIRMAN GROSFIELD: I'm a little troubled by the language in here on lines 24 through 26 talking about no use restrictions and so on, and I didn't hear my concern raised. It says the

appraisal must include an analysis and determination, must include a determination that no use restrictions and so on have been placed upon the land proposed for sale. It doesn't say "have been placed upon the land by the University System", or by the Board of Regents, or anything, it says have been placed upon the land, period. I would presume that somebody might leave some land to the University System with some kind of conditions on it. These are not put on by the University System, they're conditions on the land when you get it, and this says that the appraisal must determine that there's no use restrictions on the land. Wouldn't that apply to use restrictions that were put on the land before you ever even got it? The way it's worded there?

Leroy Schramm: I guess I had not thought of that. I think it would. I think there is an additional problem with the wording, because when you put a restriction on some land, or an encumbrance or condition, what you're doing is affecting the fair market value, it seems to me. When you sell a piece of land with a condition on it, without condition it might go for \$40,000 and with condition it might go for, some conditions actually increase value, restrictive covenants in subdivisions often increase value, but it could lower it or increase it, so in that sense a condition doesn't prevent you from getting fair market value, it changes the fair market value. If you read it that way, this sentence is nonsense. It wasn't intended that way, and I addressed it as if it were meant that you can't place a condition on it that would lower it, but I discussed that in the footnote, my footnote, my objection that the wording really doesn't do what they seem to be intending it to do. The question you raise, I guess I have not thought about and I think on reading I would concur.

REP. PECK: I think you hit on something that is an oversight on part of the drafting, and I certainly haven't thought of it either, Mr. Chairman. I think that what's intended, the University System has had a practice in the past of manipulating things in the foundation, in and out, and in some cases ignoring specific instructions of things that have been deeded to them. We certainly wouldn't presume that they would have any control over that in terms of the legalization, and I think we do intend that the University System should not be able to put those on so that they could manipulate a sale and reduce the number of people that might have an interest in that property.

SEN. GROSFIELD: It would seem to me that in the best interests of a University someplace, they might want to be concerned about who their neighbor is. Mr. Best talked about getting the conditions so restrictive that you're only dealing with one potential buyer and I understand that concern, but it would seem to me that even uses that are consistent with the zoning laws may not be consistent with regent policy or educational atmosphere or something. Maybe if it's a commercial zoned area there may be some commercial things you'd rather not have in the neighborhood, and as a university they have some ability to have some influence

on who the buyer is. Here you're saying that absolutely no encumbrances regardless of whether they would increase or decrease the value as Mr. Schramm points out. In some cases they can increase the value, how is that consistent? I have trouble with that whole section.

REP. PECK: I think you raise a good point, and the problem that's created is the history that we're operating on. If you go back and read the Attorney General's reports on the land transactions, it's not a very happy story in terms of the kinds of things that the University System has done in manipulating lands in and out of the Foundations, sales and trades and all this kind of stuff. It's an effort to do this. I think Mr. Best makes a good point, that as far as I can think of, all of the units are within the city limits. I don't know, we have a lawyer sitting there and counsel there, and a couple of them back here, what if you got into a conflict between zoning laws and restrictions or whatever that the University System would want put on properties that they're going to sell? What prevails, I don't know, but the intent of this is to restrict the University System's manipulation of the kinds of things they have a history of, and that's a very complete report by the Attorney General on these kinds of things. Gentleman back here, Mr. Culver, has done a very thorough review of transactions by Montana State University in Bozeman that raise all kinds of questions in the minds of anyone who would look at that. It's not been a history that's been very positive for the University System.

SEN. GROSFIELD: I understand that, the history, I was on this committee last session when we dealt with the other bill, and that was kind of a long, protracted messy sort of deal. On line 18, where we're talking about the 50 year, and we're not necessarily just talking about selling or exchanging, we're talking leasing, so a University System cannot even lease land. Maybe they didn't need it for 10 years or maybe they needed the dollars more than they needed the use of the land because the legislature cut their budget or something, I don't know, but they can't even lease it here if it looks like they may need it within 50 years. It just seems to me that the 50 year thing is a pretty tough test.

REP. PECK: It seems to me like somebody was trying to make an interpretation up here that the Land Board is going to be doing that. That isn't the way I understand it. It's all under the heading of what the regents will do.

{Tape: 1; Side: b; Approx. Time Count: 4:20}

SEN. MC CARTHY: A number of years ago, and I get fuzzy on the proper terminology, but Eastern Montana College at that time was purchasing a number of homes in back of the campus. You're familiar with what I'm talking about. They were leasing them back to the owners, on a situation, until they needed them. If I read this clause correctly, they would not be permitted to do

that. **REP. PECK:** Not permitted to purchase them or not to lease? **Answer:** Not permitted to lease them back, under what you're saying, because they were not leased back for educational purposes, they were leased back to the owners for rental purposes, and you are precluding them from doing that under that clause. **REP. PECK:** I'm pretty sure a good lawyer could figure a way around that. I'm saying I don't like the way they have been operating.

SEN. MCCARTHY: I understand that, you and I have been over that many times. I'm just using that for an example of where we're at.

REP. PECK: There's no perfect answer to this problem. If good intentions are not there, you can always manipulate the law in some way, or you can choose to ignore the law, or whatever. There are people in the University System, a former dean of the College of Agriculture, Max Amberson, has written letters to me about the concerns of the land transactions that have taken place at MSU, and he's very familiar with them and they've been bad news.

SEN. GROSFIELD: We're talking about public auction here. I go to a lot of auctions, and there's a lot of factors that go on there, and we're talking about full market value for a state asset here. The best day for me to go to a bull sale is on a day when there's a blizzard, cause I know there's not going to be a lot of competition. That's not to say that full market value might be paid in comparison to a nice sunny afternoon. That makes me a little nervous as well. Could you comment on that?

REP. PECK: I'm not sure what the definition of public auction is, I think public units that comply with that particular language may take sealed bids.

Ross Best. Under Title 77 the way the State Lands sell land, you have not only the auction but you have a minimum bid established, so you have an appraisal, at least 1 appraisal, and the purpose of that is to establish the minimum bid, so if you have an auction at which no minimum bid is received, then that is considered prima facia evidence that you would not receive full market value. At the very least you go back to the drawing board. It may be that you have to have a re-evaluation of the land, but you do not, on that day, consider that you have received full market value.

Closing by Sponsor: **REP. PECK:** Let me say first of all that **Mr. Best** getting up here as an opponent was a total surprise to me. I was not a party to that, and I have no concern about any member of this committee voting on this bill or any other reservation about the treatment that it will receive. Members of the committee, this is basically to implement what the Montana Constitution says. I think it's very clear language, obviously Leroy doesn't agree with me but I think he has spent so much time

in that section on the Board of Regents and their powers that he loses sight of some other sections.

Let me just read the section to you, Article X, Section 11. Public Land Trust Disposition is the title of it. It states "all lands of the state that have been or may be granted by Congress or acquired by gift or grant or devise from any person or corporation shall be public lands of the state. They shall be held in trust for the people, to be disposed of as hereafter provided, whether respective purposes for which they have been or may be granted, donated or devised. Item 2. No such land or any estate or interest therein shall ever be disposed of except in pursuance of general laws, providing for such disposition." Now Mr. Schramm, I think, is saying we have that authority. I don't think they have that authority. I hope the action goes to the Supreme Court.

We're talking about some constitutional accommodations, I don't think that's going to settle it because we thought we had a settlement and agreement in the bill last time and first thing we knew, we had a lawsuit filed over it and Mr. Schramm has indicated there's a part of the bill from last session that's a part of that lawsuit. I think Mr. Schramm has raised the question, why is the bill so tight? I think **SEN. MCCARTHY** and I in our little exchange here have indicated that we understand why it is, and I think you people understand why it is, because it's been in the press a lot. The language that he is taking exception to is an effort to close off the kind of mechanics that the Board of Regents have gone through to shift land around and back and forth that has been granted to units of the University System. They've basically used their Foundations to do that. You don't need to take my word for it, as I've said, you can get the Attorney General's opinions on these, and he has raised questions on a number of those.

The 50 year requirement, I don't know where that came from. The attorney, the drafter put it in there. I don't have any particular concern about the 50 years. Mr. Best says that's a constitutional issue because the Land Board makes that determination. The Land Board, in this bill, doesn't make that determination. I think Mr. Best is incorrect. Mr. Schramm is reporting differently to you than what I hear happened in the committee hearing yesterday, there was no progress is what I was told. And he says that we put a straight jacket on them. That may be fairly accurate, and that may be pretty much the intention.

I don't think there were any votes against this bill over in the House. They are very unhappy with what's been happening with land transactions, they don't think the state has received full market value, they don't think a RFP process does that and that's why we're changing that. I think, once again, refer to the Attorney General and see what his report says, it's a pretty bad report in terms of how they have complied. I think the sections

that I read to you on the Constitution very clearly says you dispose of public lands only in pursuance of statute, laws passed by the legislature.

{Tape: 1; Side: B; Approx. Time Count: 4:35}

HEARING ON HB 486

Sponsor: CARLEY TUSS, HOUSE DISTRICT 46, BLACK EAGLE:

Proponents: Dexter Busby, Montana Refining Co.
Gail Abercrombie, Montana Petroleum Association

Opponents: None

Opening Statement by Sponsor: REP. CARLEY TUSS, HD 46, Butte: Today I bring you HB 486. This is a bill that would exempt the one remaining refinery, it would exempt one refinery from the overview of the underground storage tanks. It only affects one refinery because the other three refineries have their pipes above ground. The one remaining refinery is Montana Refining. Does this decrease regulation? Is the environment subject to some catastrophic event as a result of this? I would point out to you that state law, in many ways, is compounded by the federal laws this refinery faces. This would include things like RCRA. I maintain that because of the monitoring practice at this refinery that the environment would not suffer. Those kinds of monitoring practices include daily pressure tests, it includes material balances from in lines and out lines, and it involves an end of the month and from month to month report that must also balance. Additionally, there are underground monitoring wells in two different places on that premise that are subject to strict overview. From those points of view, I think this a bill that you can question about an awful lot of things, but one thing that should be understood is this does not increase the vulnerability of the Missouri River or the soil to spills.

Proponents' Testimony: Dexter Busby, Montana Refining, Great Falls: The big thing I want to bring out about this is it doesn't remove total regulation from the dirt around the pipes that we're talking about. This dirt is still subject to regulation under RCRA. As the bill states, we have to be under RCRA corrective action permit for this bill to take effect. If we shut down, if the RCRA corrective action is not completed when we shut down and go away, we still come under the CECRA program, so the piece of dirt is multi-regulated beyond this. We feel that the amount of paper work does not provide additional protection for the environment. Carley said that other refineries do not have underground lines. When we put this in we didn't know that. It would affect them if they did have some that were not registered. Ours happen to be all registered, it would affect about 21 or 22 lines that we have, mostly going under roads and through tank ducts.

Gail Abercrombie, Montana Petroleum Assn: When this particular piece of legislation was devised, we were very cognizant of those folks who do have underground lines that connected to above ground storage tanks that do want to stay within this definition of underground storage tank, so that they can be compensated from the underground storage tank remediation fund. In devising this language, it was to make sure that those other folks who wanted to stay in, have above storage types of things, they wanted to stay in the underground storage tank definition. If you'd look on page 3, line 6, it actually starts on line 4, it says underground storage tank. On line 6 it says any one or a combination of tanks used to contain a regulated substance, the volume of which is 10% or more beneath the surface of the ground, that's the federal definition. Montana added that following paragraph, (ii), and that's what caught in these refinery facilities and some other facilities that did want to get in this definition, this piping underground storage tank definition. If they do have a leak they can get compensation from the Underground Storage Tank Compensation Fund. The refineries, statutorily, are not allowed to get funds from that particular funding device. This is an opportunity to remove a double regulation that happened by adding in the other paragraphs, so it would be those folks that get compensation, because now they would be defined as an underground storage tank.

Rex Manuel, Cenex Petroleum Division: We also would be helped by this bill. We just want to go on the record as favoring passage of the bill. Thank you.

Opponents' Testimony: None

{Tape: 1; Side: B; Approx. Time Count: 4:40}

Questions From Committee Members and Responses: **SEN. FRED VAN VALKENBURG:** **REP. TUSS,** I understood you to say that this only affected one refinery but then Mr. Manuel says it apparently affects the Cenex refinery also.

REP. TUSS: It was my understanding in the beginning that the Montana Refinery is the one refinery that has pipes that are under dirt, but I believe, I could be wrong and you could check with Mr. Manuel. I believe that underground also refers to a pipe that runs through a fire wall, and so around these huge tanks are dikes of fire walls. I also believe that may be the tank he's referring to, because they go through that fire wall they still may be subject to this interpretation and that's what we're talking about.

SEN. VAN VALKENBURG: One of the things that I was concerned about here as I looked at the fiscal note and listened to your testimony, was that the affect that the passage of this legislation may be to give the Montana Refinery that you're particularly interested in a competitive advantage over the other refineries because it is, in essence, not going to be required to

bring these lines above ground as the other refineries have already done.

REP. TUSS: I'd like to address that and how this differs, how these refineries differ. The other refineries, to the best of my information and knowledge, have those lines above ground. What you all might not be fully aware of is the location of Montana Refinery. Let's pretend this is the highway, this is the bridge over the Missouri River, this is the highway going up to Havre, and the refinery sits here. Some of those storage tanks are located on the other side of that highway, so those pipes will forever have to be underground. The protection that you have, and I refer to this, the protection is in those daily pressure tests and that pressure is monitored regularly. The other protection is in the pipe itself. The pipe is wrapped and where those pipes go under the road, those pipes are in sealed containers. There's a sealing around that, so those are some of the inner connecting projections that I was speaking to. Now, pipes rust with time and need to be replaced. Parts that are due to come out that are amenable to being brought above ground will indeed be brought above ground. But those pipes underneath the road are going to have to stay under the road, and our protection is in their monitoring program and in the projections on that pipe itself. I don't believe that this gives a competitive advantage, which was the other point of your question.

SEN. VAN VALKENBURG: Is there a representative of the Department of Environmental Quality here that regulates this arena. Ms. Mills, I assume the department doesn't have a position on the bill one way or the other here, but I would like to hear what the department has to say about the policy choices the legislature has to make in terms of exempting what, in essence, is one particular facility from a law that otherwise has statewide application.

Denise Mills, DEQ Administrator: I'll try to respond to that for you. The department made a pretty thorough evaluation of this bill. To give you a bit of background on it, and hopefully the committee will recollect, the department has a bill to recodify the underground storage tank law and separate it from the hazardous waste law. The intent of that bill was very clear, to retain it only as a recodification and early in the session we talked with Mr. Busby. He was interested in whether or not he could introduce this definition change into that bill. The intent of the bill wasn't to open up the law and change it. We advised Mr. Busby that perhaps some other bill should be introduced to provide change to address the concerns that he had at that time on behalf of other refineries in the state. With that, the department did work with Mr. Busby to make this definition change and see that protection was in there and only addressed petroleum refineries in the state. Through our analysis, we did find that there was indeed only one refinery that would be affected by this. We currently do require Montana Refinery to register 12 lines under the Underground Storage Tank

Act. If you actually looked at some of the facts and requirements that come under that registration, and the dual facts that come under requirements that refinery has to comply with, under the Resource Conservation and Recovery Act, another aspect of the Montana Hazardous Waste and Underground Storage Tank Act, there is some dual regulation of those lines. If there was ever a release from those lines it would stem perhaps from the pressure testing that was described by **REP. TUSS**. That release would be addressed by another law, not the underground storage tank law. That would be addressed, perhaps, under the Water Quality Act or possibly a corrective measure under the Resource Conservation and Recovery Act. Therefore, through the department's assessment and looking at some of the realities of what this definition change does, whether it's one refinery or four refineries in the state, and recognizing the impracticalities for Montana Refining to move some of its lines above ground, we did make some policy evaluations here and decided we wouldn't take a position on the bill. The bill doesn't really affect the department. There are other regulations that cover these facilities. We don't necessarily view it as a preferential bill for one facility, which I think is the concern that I'm hearing. I hope that responds to your questions.

SEN. VAN VALKENBURG: It does. Thank you very much.

Closing by Sponsor: **REP. TUSS:** It's always interesting to me to hear from the House to the Senate, the areas of concerns, all are legitimate and all deserve our attention. I would hope that you realize that by maintaining this industry in the underground storage tanks that there are conflicting laws. By passage of this bill, some of those conflicting factors would be removed, and the safety of the environment would still be maintained.

SEN. GROSFIELD: The fiscal note addresses stopping the pressure leak detection test, or whatever, that could end up being a problem. Is that a problem now?

Denise Mills: It's not really a problem, and the fiscal note does have an error which **REP. TUSS** has pointed out previously, but since that was an oversight that leak detection devices are not available in the lines used by these refineries since they don't exist right now. So what's required is the type of testing or pressure testing that the refinery currently does daily. That type of testing does detect release if it happens. I think the note in the fiscal note is meant to say that if there is a release, the refinery still retains responsibility for taking care of that release, regardless of what law it comes under. They do continue responsibility for doing some detection. Our Underground Storage Tank Law and registration of these lines under that law requires some means of leak detection. Except for business decisions or other management practices that a facility has, there is no requirement for doing this detection on those

lines. It's a prudent practice to do some sort of detection or testing on those lines to see that they won't become a problem.

HEARING ON HB 156

{Tape: 1; Side: B; Approx. Time Count: 4:50}

Sponsor: REP. EDWARD GRADY, HOUSE DISTRICT 55, CANYON CREEK

Proponents: Bud Clinch, Director, Department of Natural Resources and Conservation

Opponents: None

Opening Statement by Sponsor: REP. GRADY: I am bringing you this afternoon HB 156, which I am carrying for the Department of Natural Resources. The Resource Development Account was established by the Legislature in 1967 for the purpose of investing in the improvement and development of state lands acquired by grant or foreclosure in order to increase the revenue derived from them. House Bill 156 proposes to amend the allowable percentage of income into the account from 2.5 to 3%. The amendment will increase the funds in the Resource Development Account by approximately \$80,000 per year. Current annual funds distributed into the account is 2.5% or an average of \$404,000 per year and projected funds at 3% will be \$484,000 per year. The increased income into the Resource Development Account is necessary to fund new special use program objectives, like paying for the filing of late water right claims, to perform the environmental inventory of state lands for hazardous materials, and to fund the conversion of the Swan River Boot Camp from an institutional facility to a special lease. This approach in funding these items was recommended by the OBPP. The special use program is showing the greatest promise for substantial increases in rental income. In order to take advantage of current opportunities for special use development on these state lands, funding is necessary to place tracts into marketable condition. Mr. Chairman, the department is here to explain the bill further.

Proponents' Testimony: Bud Clinch, Director of Department of Natural Resources and Conservation: REP. GRADY has done a good job of giving an overview of the purpose of this statute. Quite frankly, it was spawned out of a response from OBPP when we presented to them several new proposals that REP. GRADY mentioned to you that are necessary activities that have expenditures associated with them for the continued management of state lands.

It was the recommendation of OBPP that rather than seek a general fund allocation for them, that an increase in this Resource Development percentage was perhaps the appropriate way to go. Consequently, this legislation emerged from that.

In the packet I just passed out are a couple of things I'd like to address your attention to help you understand just a little

bit. **EXHIBIT 3.** I believe if you open up to probably the second page in the packet, you'll see a diagram that is a little bit of a flow chart, and that will help you understand how the income flows in the trust plan division to the various trust beneficiaries. Basically, within our trust plan management we have two types of revenue that we generate distributable receipts and non-distributable receipts. The distributable receipts are monies that we earn through management of generally renewable resources, like grazing, crop shares, and the timber sale program. You'll see coming out of distributable receipts that there currently are two accounts that tap into those receipts that fund portions of the departments ongoing programs. To the left, the first box, you see there's the Resource Development Account and that is the account this legislation is proposing to amend, to increase that from 2.5% to 3%, yielding an additional \$80,000 per year into that account to fund some reneeded activities on school trust lands.

REP. GRADY touched on those briefly and I'd like to mention those to you. Basically there are four new proposals that will be funded out of this money.

(1) Additional revenues for the special uses program. This is one of the fastest growing areas and offers the greatest amount of promise for increased income off the school trust lands for various things, like commercial developments. We're seeing properties where there's an incredible potential to look at new uses. It's an area that has never been provided for in general funding. It's an area that we have identified that we need to bolster and improve the marketing in order to generate increased revenues.

(2) This is to pay the bill we have incurred as a result of filing 474 late water rights claims. I suspect that makes you perk up just a little bit, but if you remember back several sessions ago, this legislative branch passed a law that allowed for the late filing of water claims. Because of some previous confusion on the filing of water rights on state lands, there was quite a mix-up as to whether the lessee was the appropriate person to be filing for the water right or the state was the appropriate person to be filing for water rights, particularly in those cases where the diversion of that water was not on school trust land. Consequently, the deadline expired and a great amount of potential water right claims were not filed. Following the extension of that deadline, we then re-evaluated that and had a better interpretation as to the authorities and we have now proceeded with filing 474 late claims for that, bringing with each one of those a \$150.00 filing fee, so we are looking at a bill of \$71,000 and ironic as it may sound, it's a bill that the Trust Land Management Division will pay to the Water Resources Division within the Department of Natural Resources. That's the structure we operate under. That's an extremely important activity that must go forward. I guess I don't need to emphasize to this committee the importance of maintaining water rights on

those agricultural lands and the increased value they bring or they would lose if the department was to not be able to go forth with those claims.

(3) The potential use of this increased funding is to do an inventory of potential hazardous waste that's around the state. I'm sure this committee has and will continue to hear talk this session about hazardous waste. Recognizing that we have tens of thousands of tracts around the state of Montana, comprising 5.2 million acres, we're becoming increasingly suspicious that we have various tracts out there that have hazardous waste on them, whether it be dumping of motor oil from a lessee or it might be some other sort of deposit. We think it's prudent to move forward now and do an inventory of those things, and begin to develop a plan to progressively rectify those situations. So that's a new activity. A new proposal is to inventory those potential sites and analyze what we have and develop a plan of response to those.

(4) This pertains to the boot camp that we've all heard, the Swan Boot Camp that's run by the Department of Corrections, that's planned to be eliminated here in the real near future. Whether that will or will not occur, I don't know, but currently the Dept. of Corrections has informed us that sometime this coming fall they will cease to operate the boot camp. The interesting thing about that is the Swan Boot Camp was located on school trust land in the Swan Valley, and when the initial agreement was established years back, it wasn't a rental agreement, it was issued through an easement. The Dept. of State Lands issued an easement to the Dept. of Corrections to build that facility and operate it, and no money or rental was associated with it. A condition of that easement was that if it ever ceases to be operated as a corrections facility, the facility would revert to the school trust. They would acquire all of the associated improvements. That's exactly what's about to occur when the Dept. of Corrections ceases to use that facility. We've had this conversation with them, and they continue to tell us that is their plan. They're going to walk away from that facility and it will revert to the school trust beneficiaries. The interesting or ironic part of that is we don't have a definitive date when or how that's going to occur and what degree of those improvements they will remove or take with them. It's a substantial capital investment. Trying to be a prudent manager, we know that if this plan does proceed, next fall we are going to take over a rather elaborate facility there just before winter sets in, obviously without enough time to recruit some potential lessee of that, so we're going to be stuck with some maintenance costs and ongoing activities for at least 6 months until we can evaluate the situation and get an innovative lease installed.

Those are four things that are new proposals on the horizon that this money is targeted to be spent for. One other thing I would mention to you is please note that in section 2 of this bill, it gives mention to the fact that if another bill is passed, that

this bill becomes null and void. There is another bill that's just emerging from the legislative council that proposes to fund all of the trust land management activities within the division out of revenues. If that occurs, there will be no need for this piecemeal attempt to fund the resource development.

Occasionally when we talk about funding activities of the department out of revenues, we hear rumblings from some legal opinions that it is unconstitutional, and in your packet I have several things there to help bolster the opinion the department has historically had through our historic legal counsel, John North and now through the legal counsel of Tommy Butler and Don McIntyre. We continue to maintain that it is in fact constitutional to pay the expenses associated with managing property out of the revenue. I see **SEN. CRISMORE** looking at me and he's vividly familiar with this because that's exactly what this legislature did last session with HB 201, the timber sale bill as well as the Resource Development Account that's been in place since 1967.

From a practical standpoint and a business perspective, I think it quite frankly makes no sense to do business any other way. You pay your expenses out of your revenues and what's left over is the profit that you put in the bank, or in this case give to the school trusts.

In your packet are a couple of references to a number of statutes for clarification. On the third page, highlighted in orange is 72.33.631. This is out of the law for general estates and trusts and it says a trustee is entitled to the repayment out of the trust property from the following: (1) Expenditures that were properly incurred in the administration of the trust. (2) To the extent that they benefited the trust, expenditures that were not properly incurred. In addition to that, general trust law basically says it's okay to pay for the management of your activities out of the trust. We have an opinion of the Attorney General from 1967 and I have the pertinent parts of that highlighted in the several following pages.

The last couple of pages of this packet are a couple of excerpts out of the recently published book called "State Trust Lands History and Management" by Drs. Sauder and Perifax, two leading authorities on school trust lands. They recently compiled a book of the trust land management of the 22 western states. I have attached their analysis which talks about the way the other various states fund their state land management programs. If you'll look at the chart, you'll see of the 15 states, all but 4 of them fund all or a portion of their land management activities out of receipts. The chart further breaks down whether they do it from disburseable income, royalties or land sales or other various methods. There is substantial evidence that certainly leads the DNRC legal staff to the conclusion that this is an allowable practice and I personally believe it is a prudent way to be operating the school trust management functions.

Opponents' Testimony: None

{Tape: 2; Side: A; Approx. Time Count: 5:00}

Questions From Committee Members and Responses: SEN. KEATING:

This bill is coordinated with LC 175. Could you tell me what the correlation is between those two bills?

Bud Clinch: Today SEN. BECK has agreed to be the sponsor for LC 175, and is currently in the process of getting that bill brought forth. We were informed by Legislative Council that it will have to be resurrected as a committee bill, but I don't anticipate that will be problematic. That particular bill will tend to fund the remaining portion of the trust land management out of revenues similar to the way the timber program and others work. If that occurs, the instructions will say that this is unnecessary.

SEN. KEATING: These flow charts are really helpful. LC 175 is \$6 million dollars?

Bud Clinch: It's \$3.2 million dollars per year, \$6.4 for the biennium. That is the remaining amount of general fund appropriated monies that fund the trust land management division.

SEN. KEATING: So the distributable receipts would be another box in here besides timber sale account and resource development.

Bud Clinch: That's correct, there would be another box that would tap into the income going into the nondistributable receipts.

SEN. KEATING: Would it come out of the distributable receipts?

Bud Clinch: No, it would not. The revenues screen that LC 175 is proposing to tap into is the revenue screen that's generated from the royalties from oil & gas, coal - the other nondistributable receipts. It's the money that would currently go into the permanent trust, and so we're going to tap into that before it goes into the permanent trust. The ultimate result of that is the permanent trust would grow at a slower rate.

SEN. KEATING: It would be on the right hand side of this flow chart.

Bud Clinch: That's correct. Not the department, the division. It would fund only the activities that generate revenue on school trust lands. I say that because the department, in general, is a lot of things. It's water resources. It's a compact commission. We're focusing here on trust land management of the 5.2 million acres.

SEN. KEATING: Is that about 30 to 95 million dollars that goes into the nondistributable receipts?

Bud Clinch: About \$12 million dollars annually goes into the nondistributable receipts.

SEN. KEATING: Half of it would?

Bud Clinch: No, about a quarter of it. That's annual.

SEN. KEATING: Three million dollars annually would be intercepted before it gets into nondistributable receipts. So the distributable receipts are not impacted by LC 175. Why is it coordinated then?

Bud Clinch: If the other bill passes, 3.2 million dollars will fund all of those department activities, including those that are currently being funded by the Resource Development Account.

{Tape: 2; Side: a; Approx. Time Count: 5:00}

SEN. COLE: You'll keep doing some water right filings now on state land?

Bud Clinch: We've already filed those, we met the deadline for the late claims. The provisions of that bill allowed a period of time before we had to pay for that. That date is coming up. This proposed legislation increases the amount of money in that resource development account, which can be used in the next biennium to pay the late water rights filing charges.

SEN. COLE: These filings are in the name of the state, and not in the name of the lessee, is that correct?

Bud Clinch: That is correct. The discussion about who is the appropriate one is what put us into the late filing position.

SEN. COLE: Are these the only filings or are there any filings which lessees have filed on state lands in the name of the state?

Bud Clinch: Jeff informs me that all of them have been filed in the name of the state. We did file a number of them before the late claims date. It was this issue about whether the lessee or others should file, particularly when the point of diversion and source was off state land, that forced us into the late filings position.

SEN. TAYLOR: Do the people of the State of Montana own the state lands?

Bud Clinch: That's correct.

SEN. TAYLOR: And the water on the state lands are owned by the people of the State of Montana. Is that right?

Bud Clinch: Well, I guess I don't know the right answer to that.

SEN. TAYLOR: I'm just trying to get to assessment. So we're charging \$150 to ourselves? To pay our own fee? To file a water claim?

Bud Clinch: That's correct. I suspect those people that are private property holders out there would object to the fact that the state did not have to go through the same process and pay the same fee as private property holders did. When you look at school trust land and the purpose of that, I typically get into a song and dance where I try to convince people that it is very much like private property.

SEN. TAYLOR: What is the total budget for the division to manage these trust lands?

Bud Clinch: \$5.7 million annually.

SEN. TAYLOR: I don't know about the House side when it comes to the Boot Camp. I want to address the Boot Camp. I happen to sit on the Corrections Subcommittee. Unless the House puts a lot of money into Corrections, the Boot Camp will probably still be in use as a correctional facility. If that happens, what'll we do with the money here, the \$110,000 that's requested.

Bud Clinch: The Department of Corrections has told us this will happen. We're just trying to be prudent managers and plan for it rather than having a heating bill for the winter for that facility. That's the reason we're pursuing this. Your question is, what if that doesn't happen, what happens to the money? I guess we will make some prioritizations inside if you add up those various projects that I talked to you about. They far exceed the \$80,000 that we're requesting. In other words, that's \$80,000 for each of the next two years of the biennium, because the House put a sunset provision on this that it will only be for this biennium. The bill for the water rights and the maintenance projections for the Boot Camp eat up almost \$80,000 each year, not leaving anything left over for the other two proposals. I guess we would just rank those activities and allocate the money accordingly.

SEN. KEATING: Back to the water rights applications of \$150.00 apiece, doesn't the State Lands Division qualify under the Renewable Resource Account for a grant from the water division for paying for those things?

Bud Clinch: I guess I'm not familiar with the criteria for that. They possibly could. I don't think that would rank very high. I think it would be more humbling for me to present that proposal to Long Range Building then it would be to this committee.

SEN. VAN VALKENBURG: You talked about the potential of a lawsuit being brought against the department for using income off of state lands to enhance the value of the lands and how you had basically determined that likelihood of such a lawsuit would not

be successful. It doesn't seem to me it is as likely that there'll be such a lawsuit if HB 156 passes, which basically takes \$80,000 a year and sets it aside for that purpose. If you're talking about LC 175, and the 3.2 million dollars, then the likelihood of such a lawsuit greatly increases. Would you agree?

Bud Clinch: Usually this is pretty philosophical. I'm not sure it makes much difference, at least to the people who have expressed an interest so far. Practically, I guess I would agree with you. The sum of 3.2 million dollars raises more eyebrows that the sum of \$80,000. When you look at things collectively, and you look at the fact that we currently are diverting \$420,000 dollars under this as well as substantially more money than that under the state timber sale program, the precedent and the opportunity for someone to make that allegation right now is already for over several million dollars of diversions.

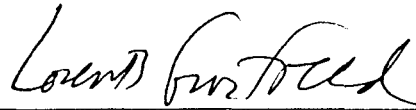
SEN. VAN VALKENBURG: My concern is that if a lawsuit is pursued, there will be substantial costs that the department and/or division will incur in terms of defense of that lawsuit, and that may again eat into what you have here in terms of the ability to finance. Do you have any objection to leaving your tie here as part of the record.....

Bud Clinch: You are very astute. I thought today's tie (showing hundred dollar bills) was most appropriate. In answer to your question about the litigation, I guess that doesn't concern me because the department has analyzed this in depth, not only this year but over the last several years, in terms of trying to advance this proposal. We have substantial records and documentation of the existing Supreme Court cases in other states with like enabling acts, and so I don't anticipate there needing to be a great deal of research to defend the actions should it ever get to that. My final statement is that the potential threat of litigation out there does not intimidate me to say this is not a good idea. I guess I stand strong on that concept and would continue to pursue that.

Closing by Sponsor: REP. GRADY: In regards to the Boot Camp, my understanding is that the decision was made in the last session and the Boot Camp is being built down at Deer Lodge. We hope we can find another use for it, though, because it is a good facility. The water rights, I guess, is pretty well determined. The state should be no different than any other private land owner in protecting their water rights and filing them, so I think that's a verified use of this money. With that, I think the Director pretty well covered it.

ADJOURNMENT

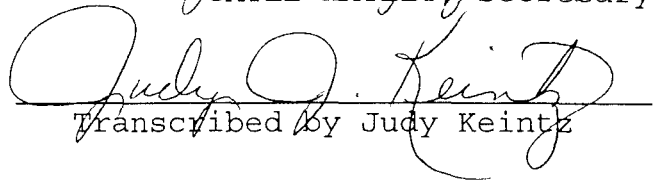
Adjournment: Adjourned at 5:20



SEN. LORENTS GROSFIELD, Chairman



GAYLE HAYLEY, Secretary



Transcribed by Judy Keintz

LG/GH