

MINUTES

MONTANA SENATE 55th LEGISLATURE - REGULAR SESSION

COMMITTEE ON FINANCE & CLAIMS

Call to Order: By **CHAIRMAN CHUCK SWYSGOOD**, on March 10, 1997, at
9:38 a.m., in Room 108

ROLL CALL

Members Present:

Sen. Charles "Chuck" Swysgood, Chairman (R)
Sen. Thomas F. Keating, Vice Chairman (R)
Sen. Larry Baer (R)
Sen. Thomas A. "Tom" Beck (R)
Sen. James H. "Jim" Burnett (R)
Sen. B.F. "Chris" Christiaens (D)
Sen. Eve Franklin (D)
Sen. Loren Jenkins (R)
Sen. Greg Jergeson (D)
Sen. John "J.D." Lynch (D)
Sen. Dale Mahlum (R)
Sen. Ken Miller (R)
Sen. Arnie A. Mohl (R)
Sen. Linda J. Nelson (D)
Sen. Mike Taylor (R)
Sen. Daryl Toews (R)
Sen. Mignon Waterman (D)

Members Excused: None

Members Absent: None

Staff Present: Taryn Purdy, Legislative Fiscal Division
Sharon Cummings, Committee Secretary

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

Committee Business Summary:

Hearing(s) & Date(s) Posted: HB 110, 3/4/97
Executive Action: HB 139, BCCAA; HB 21, Tabled

HEARING ON HB 110

Sponsor: REP. EMILY SWANSON, HD 2, BOZEMAN

Proponents: Joe Mazurek, Attorney General
Judy Browning, Governor's Office
Paul Sihler, Department of Fish, Wildlife and Parks

Geoffrey Smith, Clark Fork-Pend Oreille Coalition

Opponents: None

Opening Statement by Sponsor:

REP. EMILY SWANSON, HD 2, BOZEMAN HB 110 is to continue funding the Arco litigation on the clean-up of the Clark Fork drainage between Butte and the Milltown dam. This bill was introduced in House Appropriations with a funding source that was a continuation of the loan from the Coal Tax Trust Fund which had been used for the last two legislative sessions. House Appropriations amended the bill by changing the funding source from a loan to an appropriation from the Coal Tax Trust Fund. A small group met over a period of time looking for another funding source as some of us were unwilling to see it as an appropriation from the Coal Tax Trust Fund. A source of funding was found in two funds that were closed at the end of FY95 when SRS and DFS were united. These are funds used for administering their federal money. The Department of Health and Human Services (DPHHS) has been reconciling these accounts since the end of FY95. The reconciling has to do with how much money goes into administrative costs and how much the department needs to pay for the actual services. The accounts are closed and the funding authorities have been transferred to a different account through DPHHS. We have been given assurances from DPHHS and the Legislative Auditor that this money is available, will not be needed for another purpose and can be used for funding this litigation. These two accounts amount to \$2.5 million. The Department of Justice estimates this is adequate money to fund litigation through this fiscal year and the next biennium.

{Tape: 1; Side: A; Approx. Time Count: 9:44; Comments: None.}

Proponents' Testimony:

Joe Mazurek, Attorney General This litigation program started in 1990 in the Department of Health and Environmental Sciences and was transferred to the Attorney General's office by executive order of the Governor. The claim is under superfund legislation at the federal and state level. The State of Montana is making this claim against Arco for restoration damages to the Clark Fork from Butte to the Milltown dam. This appropriation will fund a supplemental appropriation of approximately \$675,000 to close out this biennium but also the next biennium. We are now in trial in phase one of five phases. We estimate each phase will take approximately 2-5 weeks. We have had structured settlement discussions involving the State of Montana, Arco and the Confederated Salish-Kootenai Tribes, which are making claims under the Hellgate Treaty of 1855. All discussions have been unsuccessful. We recently participated in another round of settlement discussions in which we brought in all the federal agencies involved and we hope to continue discussions as the trial progresses. When Arco and the Anaconda Mining Company

merged, Arco assumed the obligation for this clean-up. If it is proven that Arco is not responsible the taxpayers of the State of Montana will have to pay for this clean-up. We feel this is a very important case and urge your prompt consideration of HB 110.

Judy Browning, Governor's Office I believe there are two reasons you might object to funding this lawsuit: 1) dislike for the federal law; and 2) putting more money into the litigation. If we don't fund the trial stage of this lawsuit we'd be turning our backs on close to \$10 million that has been spent so far and the chance we have to correct the destroyed resources. I urge you, on behalf of Governor Racicot, to pass HB 110.

Paul Sihler, Department of Fish, Wildlife and Parks Testimony handed in. (EXHIBIT #1)

Geoffrey Smith, Clark Fork-Pend Oreille Coalition Testimony handed in. (EXHIBIT #2)

Opponents' Testimony:

{Tape: 1; Side: A; Approx. Time Count: 10:01; Comments: None.}

Questions From Committee Members and Responses:

SEN. J.D. LYNCH Who decides to make an offer and the amount of that offer? **Mr. Mazurek** The litigation is monitored by a policy committee. The policy committee considers the advice and recommendations of the legal staff and scientists and makes recommendations to the Governor. The Governor ultimately makes this decision. There is also a legislative oversight committee that has input in the process. (EXHIBIT #3 & 4) handed out.

SEN. LYNCH I understand the objection to the grant from the Coal Tax Trust Fund, why was there an objection to continue loaning the money from the Coal Tax Trust Fund? **REP. SWANSON** Some felt this wasn't an honest thing to do as claiming we are loaning money in a risk situation where we may not be repaid is false.

SEN. TOM KEATING It is my understanding that Arco is cleaning up now, how much money have they spent so far and what is the \$760 million in damages? **Chris Tweeten, Department of Justice** We are claiming damages for two different elements: 1) restoration costs which are the costs of restoring the resource; and 2) compensatory damages to compensate the people of Montana for the lost use of those damaged resources. Arco has been ordered to do clean up by the Environmental Protection Agency (EPA) and the State Department of Environmental Quality (DEQ) pursuant to portions of the superfund statute. Arco has brought a lawsuit to try to recoup expenses it is incurring from the State of Montana. Arco is working on specific remediation projects identified by the EPA and DEQ to eliminate eminent threats to public health. An example of a restoration project in the natural resource damage case is Mount Haggin, it has been denuded of vegetation

because of the flue dust from the Anaconda smelter. We don't know the amount Arco has spent because they have not allowed anyone to audit their expenditures.

SEN. MIKE TAYLOR Is this an ongoing process you are evaluating or were the figures established in 1983? **Mr. Tweeten** Federal law and regulations require the trustee go through an assessment process in which they have to conduct extensive scientific studies of the injured resources. After those studies are completed, alternatives are identified for restoration of the resource. The trustee makes a determination, based on those studies, as to which of the alternatives he will adopt for each unit in the superfund site. The Governor, with input from scientists and the policy committee, went through the process of authorizing the assessment study and then determined which alternative for restoration to adopt. The total of the selected alternatives were aggregated to come up with the restoration cost portion. The compensable damage portion was identified as a result of an economic study undertaken by the State of Montana to try to determine the value of the lost use of those resources. This was part of the same assessment process.

SEN. TAYLOR I understand the Hellgate Treaty, in what area of this lawsuit do the Salish-Kootenai lay claim and are they participating in the lawsuit monetarily or with legal help? **Mr. Mazurek** Within the past five years the Confederated Salish-Kootenai Tribes filed a motion asking to be allowed to intervene in the lawsuit. They asserted they had claims under the Hellgate Treaty because the area they traditionally lived in included parts of the Clark Fork which were affected by this damage. We resisted their intervention and argued that we could adequately represent whatever claim they had in the litigation. The court has never directly ruled on that motion but is allowing the tribe to participate. The tribe is represented by their own counsel.

SEN. TAYLOR Could the tribe lay claim to part of the settlement if one is made? **Mr. Mazurek** Yes, they could. The court would have to ultimately determine that.

SEN. DALE MAHLUM Do you contract for legal assistance outside your department? **Mr. Mazurek** Yes, we do. There is an accounting of what funds have been spent in **(EXHIBIT #4)**. Governor Stevens created the Natural Resource Damage Litigation program which is comprised of attorneys and scientists. We currently have a contract with a Colorado law firm.

SEN. LARRY BAER On page 5 of **(EXHIBIT #4)** you mention that the court has been presented with motions for summary judgement and the court has chosen to reserve ruling until after the trial is completed. Can you give us a scenario either way depending on how the judge rules? **Mr. Mazurek** As early as two years ago Arco and the State of Montana had made a number of pretrial motions. The judge chose not to rule on those motions, we assume because he wants to get all the evidence in so he can rule at the end of

the trial. It may be in our long term interest to have the case as broadly structured as it is now. It will take longer to try but it reduces the risk that we would have to go back and retry parts of the case again.

SEN. TOM BECK Do you expect this litigation to reach a conclusion during this biennium? **Mr. Mazurek** We expect the trial to be finished by mid-fall, the decision will probably be made in 6 months and the appeals to the 9th circuit may take from 6 months to 1 year.

SEN. ARNIE MOHL Are the Salish-Kootenai attorney's being reimbursed for their costs? **Mr. Mazurek** Not by the state.

SEN. LOREN JENKINS What is the compensatory loss? **Mr. Mazurek** The total claim is divided equally between restoration and compensatory damages. The compensatory claim is to compensate for the loss of the use of those resources from 1981 forward. Restoration is the money necessary to restore those damages. Any recovery has to be used to repair the damage to the resources. If we are successful in our recovery, the State of Montana will recover that money in addition to the assessment costs which are loans and attorney fees.

SEN. JENKINS Is the wildlife management area around Mt. Haggin part of this litigation? **Mr. Sihler** I don't know.

SEN. JENKINS Isn't FWP going to benefit from the clean-up of the Clark Fork? Why isn't there FWP money asked for in this? **Mr. Sihler** FWP resources will benefit from the clean-up. I don't know whether we've contributed in the past and why we are not contributing now. **REP. SWANSON** The lawsuit is on behalf of the entire State of Montana and is coming out of the general funding base rather than having any particular agency participate. **Mr. Mazurek** When the lawsuit was initially started it brought in funds from FWP, DHES and DNRC; then the decision was made to fund this from the General Fund. A loan from the Coal Tax Trust Fund was used for the next two bienniums.

SEN. MIGNON WATERMAN I am concerned with the language on page 3, section 5. The last sentence says if the Legislative Auditor is wrong and there is a shortfall the Department of Public Health and Human Services (DPHHS) will have to come up with the additional funds. Would you agree to an amendment stating if there isn't adequate funding from these two funds we would appropriate the difference between that amount and the \$2.5 million from the General Fund rather than taking it from DPHHS? **REP. SWANSON** We discussed that in the House and asked hard questions of the people managing these funds. We wanted to know what risks are being taken, the possibility that there might not be enough money to reconcile the accounts and that additional funds would be needed. We were told that the risk is nominal, the greatest likelihood is that this money is available and we will have adequate funding to reconcile the accounts. If that

money is needed, the second sentence addresses it, DPHHS can come in for a supplemental.

CHAIRMAN SWYSGOOD As I understand it, there is this amount of money for reconciliation. We've been told that everything has been reconciled but the question remains, will we have to reimburse the feds later? If the answer is yes, DPHHS will have to pay that out of their current budget. Am I right? **REP.**

SWANSON Yes, I encourage you to talk with Mike Billings about this issue.

{Tape: 1; Side: B; Approx. Time Count: 10:35; Comments: None.}

Closing by Sponsor:

REP. SWANSON In conclusion, I direct you to section 6 in the bill which is an amendment we put on in the House as reassurance to the Clark Fork Basin that this money will go to the restoration and compensation in that basin. It's important the State of Montana make a strong statement to Arco that we are here for the duration and will not back out on this lawsuit. Arco has an incentive to delay this as long as possible with the hopes that the legislature will fail in their commitment to see this lawsuit through. I urge you to pass HB 110 as speedily as possible.

{Tape: 1; Side: B; Approx. Time Count: 10:37; Comments: None.}

EXECUTIVE ACTION ON HB 139

CHAIRMAN SWYSGOOD (EXHIBIT #5) is a copy of the microcomputer contract process that needs to be put in record.

Amendments: (EXHIBIT #6)

Motion: SEN. LYNCH MOVES TO AMEND HB 139 WITH EXHIBIT #6

Discussion: **CHAIRMAN SWYSGOOD** This amendment strikes subsections 4 & 5 which deals with direct negotiation.

Vote: THE MOTION TO AMEND HB 139 CARRIED WITH SEN. KEATING, MILLER, WATERMAN AND TAYLOR VOTING NO.

SEN. LYNCH I believe they should have been given some flexibility in the bidding process without saying the public has no recourse. It seems these small things being talked about could be addressed by giving yourselves more flexibility.

SEN. BAER We legislators represent the public and are being asked to protect the government from the public with this bill. The approach bothers me, they say trust us but exclude remedies to a complainant. The state better know what they need, exactly what it will cost and where the best pricing and source is or we are being incompetent. I don't believe the government can cover

that incompetence by indemnifying ourselves of liability by way of this bill. I'm concerned with the liability factor.

SEN. TAYLOR Government procurement costs taxpayers 25-35% more than private industry with their bid procedure. Consequently, taxpayers end up paying top dollar because of the system and the way we, as legislators, have laid it out. If you don't mind paying top dollar then we don't need this kind of legislation. If you believe we should save money then we need to come up with a solution that allows that.

SEN. LYNCH Who sets up bid specifications, isn't that done by rule? Couldn't they make the rules flexible, have a legitimate bidding process and save money? As I understand the testimony the suits are over minor things that could have been taken care of when setting up specifications. **Marvin Eicholtz, Department of Administration** It is pretty easy to design the specifications on ordinary procurements. The system works very well in those situations. It gets difficult when we are working on large procurements in something like information technology systems. It is very difficult to know exactly what the specifications should be because we don't know what is going on in the industry as it changes so rapidly. We often rely on the experts within state government and vendors to help us write specifications. We may require something absolutely in a bid and then find it isn't as important as we thought, this is when we round the "square corners". If we don't do that we end up cancelling the whole bid because most of the vendors didn't meet all the specifications and that isn't fair to the vendors.

SEN. LYNCH Wouldn't it be possible to give bidders an additional week to get in something small they may have missed?

CHAIRMAN SWYSGOOD I'm somewhat familiar with the bid process because my business receives bid notices from the state. The bid will state a date for submittal and when it will be opened.

SEN. MOHL About 90% of my work is done by bid and we like the bidding process. We feel when a bid is done you get a fair price.

{Tape: 1; Side: B; Approx. Time Count: 10:57; Comments: None.}

Motion: SEN. WATERMAN MOVES HB 139 BE CONCURRED IN AS AMENDED.

SEN. WATERMAN I believe we took out the part of this bill that was most significant. We are spending hundreds of millions of dollars on technology in the state. By the time we get the specs written the technology has changed and we are buying obsolete items. Other states have been able to save significant amounts with different procurement procedures. We are paying top dollar and not getting what the state deserves.

SEN. GREG JERGESON As I understand the testimony, the successful bidder will get the contract and unsuccessful bidders will sue with settlement being payment for profits they would have had if they had gotten the contract. That seems to be an invitation to frivolous lawsuits. I believe we need to pass what is left of this bill.

Vote: THE MOTION THAT HB 139 BE CONCURRED IN AS AMENDED CARRIED 11-5 ON ROLL CALL VOTE. SEN. JERGESON will carry HB 139.

{Tape: 1; Side: B; Approx. Time Count: 11:02; Comments: None.}

EXECUTIVE ACTION ON HB 21

Discussion: Taryn Purdy, LFD This bill allows "A" accruals to take place but would not allow them to appear in the base budget used for budgeting considerations.

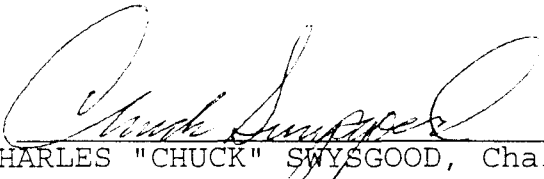
SEN. BECK I believe there was concern during testimony that agencies would spend the money before accruing it into the next year.

Motion/Vote: SEN. MOHL MOVES HB 21 BE TABLED. THE MOTION CARRIED WITH SEN. KEATING AND JENKINS VOTING NO.

SEN. EVE FRANKLIN Concern on "A" accruals getting lost was another part of this discussion. We were told the LFD could be directed to speak to those "A" accruals in the narrative. **Ms. Purdy** One other option is to amend SB 19 to require agencies to make that report as part of their budgeting procedure.

ADJOURNMENT

Adjournment: 11:10 a.m.


SEN. CHARLES "CHUCK" SWYSGOOD, Chairman


SHARON CUMMINGS, Secretary

CS/SC