MINUTES

MONTANA SENATE
55th LEGISLATURE - REGULAR SESSION

COMMITTEE ON NATURAL RESOURCES

Call to Order: By **CHAIRMAN LORENTS GROSFIELD**, on April 7, 1997, at 3:00 PM, 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: HB551, HB607; Posted 4/2/97
Executive Action: None

Hearing on HB551 and HB607

HB551

Sponsor: REP. LARRY GRINDE, HD94, Lewistown

Proponents: Bud Clinch, Director of (DNRC), Dept. of Natural Resources and Conservation
Mark O'Keefe, State Auditor
John Bloomquist, Mt. Stockgrowers Association
John Shontz, Mt. Association of Realtors
Stewart Doggett, Mt. Land Title Association
Lorna Frank-Karn, Mt. Farm Bureau

Opponents: None

Opening Statement by Sponsor:

REP. LARRY GRINDE, HD 94, Lewistown, asked to present both bills, HB551 and HB607, at the same time, because HB 551 brought about HB607 and said it was easier to explain the bills jointly since they were closely related. An amendment requested by **REP. GRINDE** for HB607, hb060701.alm., was distributed to the committee and attached as **(EXHIBIT 1).**
REP. GRINDE summarized HB551 as saying that one cannot disturb or degrade State Trust Lands. He said the reason this bill was developed was because of current problems in his district concerning landowners of adjacent subdivisions to State Trust Lands doing road construction on State Trust Lands without authorization. Thus, the bill stated there will be no structures, facilities, or construction on state lands. He said it was found that the majority of the adjacent property owners in this instance, did not have a right-of-way or easement across this school section, which in turn, brought about HB607. He said the reason he brought the bill forward was because of increasing problems with real estate transactions, such as refinancing, bank loans, and especially obtaining title insurance. Title companies will not insure these properties across state school lands unless you go through a present process, which is costly. **REP. GRINDE** went to the Commissioner of the Land Board, and suggested a new mechanism that would be easier and cheaper along with obtaining additional funds for the School Trust Fund. He compared the mechanism with the adjudication of water. There is a window of opportunity till 2001, to get an easement or access. For a filing fee of $50.00, applicants would then go through the procedure stated in the bill. **REP. GRINDE** summarized the bills by stating one bill is to protect our state land from being destroyed, and the other bill is to help landowners and the Land Board solve problems that are associated with easements.

Proponents Testimony:

Bud Clinch, Director of the Dept. of Natural Resources and Conservation. He first directed his comments to HB551, the bill intending to set a process for penalties for unauthorized structures or activities on state land. He gave some background information on the subject in question. The Dept. oversees approximately 5.2 million acres of school trust land. Those acres occur throughout the state. Substantial development has occurred across Montana, and recently, there is an increasing problem with the management of state land whereby unauthorized activities continue to crop up on tracts of land all over the state. He cited examples of development on state lands without authorization such as the building of garages, an extension of the garden, development of motorcycle raceways, blading and development of roads. **Director Clinch** stated that such instances can occur without the Dept. knowing about it, due to the fact no one from the Dept. is out there on a daily basis checking on

state land. The activities usually are not found until an inspection is done or complaints are filed from a lessee. He gave an example in Clyde Park, where adjacent property owner that bordered state land elected to build a two-car garage on state land where 50 percent of it was located across a known survey line onto state land. He said a permanent structure may have a potential impact for future uses. He told of another lease situation, where an adjacent landowner built an unauthorized motorcycle course on state land. Another instance he mentioned occurred south of Helena involving a subdivision. Historically, the road access had been a two track trail across state land, with only one or two individuals having legal access. The subdivision landowners banded together and elected to do a rather substantial road reconstruction without making sure what the stipulations of their easements had said. They disturbed about twice the area of the existing easement along with implementing an improper stream crossing, whereby they disturbed an archeological site. He said it resulted in damages where the Dept. ended up in litigation. The Dept. wanted to emphasize for all concerned, that state land is not a free-for-all situation where you can just go out and do as you please. HB551 sets up a process whereby when unauthorized uses occur, the Dept. can assess a penalty to those people. He brought the attention to the committee to the provision which stated that the bill did not pertain to the lessee of that state property due to the fact their lease already entailed restrictions or authorizations. Most of the problems occur with the adjacent land owners versus the lessees.

Director Clinch stated that HB607 is similar but contains somewhat different issues. There is an increased interest in people applying for perfected easements to their own private property. He said the current process requires surveys, archeological assessments and NEPA compliance. Problems developed with that process with increasing activities on the adjacent land to state land. Previously, the Dept. encouraged road development on state property and many people accessed their adjacent property for a long time through these roads. It had not been until the early 80's that the Dept. required a perfected easement in order to use those roads. The purpose of HB607 is to set in statute a process whereby those people can come forth in a specific period of time, and apply for an easement. **Director Clinch** said the easement process would be granted in a much more expedited manner and simplistic fashion. The bill referenced 1972 as a time line that the road must have existed by evidence. The date was selected on account of the fundamental differences that occurred in Montana in 1972 regarding the new Constitution, etc. Also in the bill, property values were referenced to 1972 because the Dept. felt many people would have applied for an easement back in 1972 if the policy had been in place. He stated that this bill was merely attempting to recognize the role that the Dept. played in allowing these uses to develop, and coming forth with a process whereby applicants can perfect their easement at prices comparable to what they would have been prior to 1972.

Mark O'Keefe, State Auditor and Member of the Land Board, rose in support of both of the bills and passed out his written testimony listed as **(EXHIBIT 2).**

{Tape: 1; Side: A; Approx. Time Count: 3:30; Comments: None.}

John Bloomquist, Mt. Stockgrowers Association, urged the passage of HB551 and HB607.

John Shontz, Mt. Association of Realtors, made two comments about the bills. He said what really brought this issue to the forefront, was when the Land Board initiated a policy in June of 1995, that said we are no longer going to grant easements in perpetuity, and that easements will be for no more than 30 years over State Lands. This triggered a crisis throughout the State of Montana in terms of marketability and good title to land. The title companies have less than enthusiasm for insuring the title to property that does not have permanent access.

Mr. Shontz directed the committee to Page 3 of the bill, line 17, where it spoke of a historic right-of-way, which he thought was the same as an easement. The bill would allow the current user who has historic use of access over state lands to gain a permanent easement, non-exclusive, but none the less an easement. He strongly encouraged the committee to support HB607.

Stuart Doggett, Mt. Land Title Association, wished to go on record in support of this bill, HB607. He said the bill initiated some good common sense mechanism for granting easements. The members he spoke with about this legislation felt that this would assist them in being able to define easements, clarifying that process, and ultimately providing title insurance to those people purchasing property. He received a letter from one of his members, **Loren Solberg,** who had some concerns with HB607. **Mr. Doggett** passed out copies of the letter, attached as **(EXHIBIT 3),** which contained some proposed amendments.

Lorna Frank-Karn, Mt. Farm Bureau, stated their support of the bills, HB551 and HB607.

{Tape: 1; Side: A; Approx. Time Count: 3:40; Comments: None.}

Questions From Committee Members and Responses:

SEN. MIKE TAYLOR asked **REP. GRINDE** if it was permissible to repair damages in the roads caused by natural causes, such as severe rainstorms?

REP. GRINDE replied that as long as the road stayed the same as it was originally, it can be repaired. If improvements were desired, then the project would have to go through the Land Board. He wanted **Director Clinch** to comment on this.

Director Clinch replied that the bill allowed routine maintenance. In instances, such as gully washers, where a culvert needed to be replaced, or other substantial road construction needed to be done, the Dept. requests that the party contact the area office so the Dept. has some oversight. The intention of that being, if there are streams involved, a number of statutes may be involved also. He stated that routine road maintenance in the magnitude that it was before would not be a problem. The main intention of the Dept. is to keep from any substantial road improvement or growth of that road from occurring.

SEN. TAYLOR wanted to clarify if a culvert was damaged or taken out, did he have to call the Dept. to put that culvert back in?

Director Clinch said every situation is somewhat different, and site specific, but if your just talking about replacement of a culvert within the confines of the normal road, the Dept. would not anticipate any big deal.

SEN. WILLIAM CRISMORE asked **REP. GRINDE** about the application deadline, 2001, and the termination date of 2003. He asked to explain the two year span.

REP. GRINDE replied that the two year time span existed so the Dept. between 2001 and 2003 can wrap up the process. The money obtained by these fees would be used during the two year period for processing the program.

SEN. FRED VAN VALKENBURG referred **Director Clinch** to page 3, line 17, of HB607, where it stated "the historic right-of-way deed is a grant of a non-exclusive easement," and asked if he could explain a "non-exclusive" easement.

Director Clinch said that term, "non-exclusive," refers to the fact that it is not exclusive to one individual. For example, a segment of road that crosses state land to private land may service multiple parties. Then the easement requested would be non-exclusive, that is, it is not one that the Dept. would grant to just one landowner, thereby giving him the ability to exclude the others.

SEN. VAN VALKENBURG commented on the fiscal note where there is an assumption that the average right-of-way will be 3.63 acres which is made up of a 30 foot wide easement, one mile long. The average cost would be $453.00. For example, the Dept. may grant ten of those easements, and thereby collect $4530.00 for essentially the same historic easement that has always been there.

Director Clinch said that was correct, and the Dept. does charge multiple times for the same easement. He added that situation was quite common in private practices as well.

SEN. VAN VALKENBURG asked **Director Clinch** about a hypothetical situation where the general public, historically, had been using a historic right-of-way to get across state land to maybe some federal land for recreational purposes. Then the Dept. comes in and grants an entity an easement to get to some private property on the other side of this too. Does that individual then have the ability to stop the public from using that historic right-of-way to get to the federal land because they're the sole holder of the right-of-way easement?

Director Clinch responded firstly by saying the various roads that exist on state land that are open for the public are open through a process of designation through Area Offices, in which they are declared open for the purposes of the public and recreational use. He said there was nothing in this bill that proposes to change the way that the Dept. designates roads being open for the public. If there is a road that currently is open for public use, and an applicant wishes to secure an easement because that also accesses their private property, there is no intent to transfer the authority to that individual to close out the public. He added that there might be instances where the Dept. grants historic right-of-way easements across state land on a road that has not been open to the public and the Dept. has no intention of opening it up to the public.

SEN. VAN VALKENBURG asked **Director Clinch** in reference to HB551, on page 2, line 17-19, how could pipelines or utility lines be inadvertently installed within 20 feet of easement boundaries? Does that mean outside of the easement boundaries?

Director Clinch said there was a direct concern by utility companies about this legislation. He explained when a utility is applied for, there are two methods of utility easement for pipelines and utility lines. They can apply through the normal process whereby they go out and perform a survey of the effected property. That survey then goes before the Land Board for approval and then the utility company installs the facility. It is possible that when they go back out and install that facility, an error or failure somewhere in the survey may occur. He said it is conceivable that a phone pole could be installed where it may not be within the exact survey boundaries, possibly avoiding geographic features or other obstacles. **Director Clinch** stated that the language just intended to clarify, that when those instances occurred, this bill was not intended to be used as a retribution for that. He added that there is a process whereby the Dept. can amend easements to make the survey comply with where the line actually is located.

CHAIRMAN LORENTS GROSFIELD asked **Director Clinch** why was references only made to utility and pipelines, what about boundary fences?

Director Clinch answered that one does not need to acquire an easement for installation of a boundary fence. The easement that is being referred to, is an actual deeded right for that strip of land. The boundary fences that are installed on state lands would be found as part of a lease.

CHAIRMAN GROSFIELD was concerned about possible future problems installing boundary fences where minor disturbances of the ground may occur from putting in posts, or some deviation off the boundary line due to a geographic barrier, may occur. He wanted to make sure that additional licenses or easements would not be needed for future installation of boundary fences.

Director Clinch responded that the intent of this bill was to rectify those extraordinary circumstances that occur out on the land. To his knowledge, nothing in this bill emerged as a result of fence problems. Frankly, he said, the amended language in the bill originated from a request of the utility companies. They were concerned about protecting themselves, and obviously were not concerned about fences, so they did not include the word, "fences."

CHAIRMAN GROSFIELD commented that **Director Clinch** referred to the 1972 Constitution. Prior to 1972, didn't the constitution have the full market value language in it?

Director Clinch said he believed the language relative to full market value is unchanged there.

CHAIRMAN GROSFIELD said he did not understand why the bill is tied to that date.

Director Clinch replied that the reason that the Dept. is tieing it to 1972 was due to the substantial philosophy change both within the Dept. and among the realty interests that occurred after that. Prior to that time, the Dept. encouraged people to build roads across state land for development of Montana. He said, if the legal interpretation had been available then, that we needed to require an easement for all of those activities, we would have done it and would have done it at the associated land values at that time. So what were really trying to do is recognizing the fault of the State in allowing these things to occur over the last several decades. There is not really anything magical with 1972, but we needed to pick a date.

CHAIRMAN GROSFIELD asked about the conflicting dates in HB551 where it stated that is effective July 1, 1997 but applies to after September 30, 1997. Why is that?

Director Clinch said that he had to refer that question to the drafters.

{Tape: 1; Side: B; Approx. Time Count: 3:55; Comments: Turned Tape, began Side B..}

CHAIRMAN GROSFIELD asked **Director Clinch** about the word "facilities," and if that was referring to permanent or temporary?

Director Clinch replied that if he looked on top of Page 2, there were provisions that went into that. From a practical standpoint, the assessment of the fine would probably only occur on facilities where they are permanent and where the party is unwilling to work with the Dept.

CHAIRMAN GROSFIELD said that Page 2, lines 20-23, did not make any sense to him.

Director Clinch answered that both of those amendments were offered from the Montana Power Company. They were concerned about if the Dept. were involved in an land exchange where the Dept. acquired new property that was not previously state owned. If a utility structure was on that property, such as a power line, that the Dept. did not have the ability to assess them a fine for not having an easement for that facility.

CHAIRMAN GROSFIELD asked if the Dept. acquired land through an exchange like that, is it still State Trust Land?

Director Clinch said it certainly could be. An example of that is the **Ted Turner** land exchange, where the Dept. exchanged away trust land and acquired other private land. That other private land will become Trust Land in the name of the same beneficiaries that the traded property was. Therefore, that provision was intended to protect those people from falling under the provisions of the bill.

CHAIRMAN GROSFIELD had questions about HB607, on Page 2, line 19, where it was amended and asked if **Director Clinch** supported these amendments.

Director Clinch said that was correct, the amendment strikes the word "another person," and inserts the "applicant's successor in interest," and it goes on to say with the approval of the Dept. **CHAIRMAN GROSFIELD** asked why it was necessary to have that in there? Under what circumstances would the Dept. not approve it?

Director Clinch responded that the only circumstances where the Dept. may not approve it was if there had been some violation of the stipulations associated with the road or its intended use. He said the reason that the language was inserted was to keep it tied to that parcel of land and not allow it to be transferred to some other third party that does not have any interest.

CHAIRMAN GROSFIELD responded that he understood that and thought the amendments fit but it made him a little nervous about having to obtain the approval of the Dept. and the possibility of stipulations being added on at the last minute.

Director Clinch said **REP. GRINDE** had the same concern and his original thought was to attach this to the land. He directed his attention to the next sentence after that on line 19, where it said, the Dept. may not require a fee for the approval of an assignment and may not withhold approval for any reason other than that the use of the historic right-of-way is contrary to subsection 5. He said the only reason for denial would be something contrary to subsection 5.

CHAIRMAN GROSFIELD asked **Director Clinch** about tieing the value of the easement to 1972, where he assumed that the $37.50/acre was 1972 values, but the Dept. is granting an easement based on 1997 conditions. Is that consistent?

Director Clinch answered that one has to remember the application is going to have to be proven by providing an aerial photograph exhibit of the condition of the road in 1972.
So that is the basis upon which the road is granted under those conditions that will be evident in that photograph.

CHAIRMAN GROSFIELD interjected that it says that the physical conditions of the road existing on the date the deed is issued, say 1998. In 1972, it may have been a two-tracked dirt road, and in 1998 it might be a paved road.

Jeff Hagener, Trust Land Administrator, DNRC, said the value was established, based on looking at the historic right. The Dept. looks at the existence of the road as it is now, because of the fact that we cannot go back. There may be some minor changes in that road, but the Dept. cannot go back and say the road was only so wide in that year. So we are looking at the situation as it existed today

SEN. TAYLOR wanted to clarify possible fencing that may be off the boundary line, is that a problem?

Director Clinch responded that fencing was not a problem in the past for the normal negotiations with the lessees and landowners. Now, if it was an establishment of a 12 foot high game farm fence that took out 120 acres, or other blatant attempts, that would be a different situation.

SEN. THOMAS KEATING asked **Director Clinch** if state lands are immune from prescriptive easements?

Director Clinch answered that was correct, prescriptive easements are prohibited by statute.

REP. GRINDE closed in saying he hoped the committee saw the need for these two bills and urged a do pass.

CHAIRMAN GROSFIELD closed the hearings on HB551 and HB607 at 4:08 PM.

ADJOURNMENT

Adjournment: 4:08 PM

SEN. LORENTS GROSFIELD, Chairman

GAYLE HAYLEY, Secretary

LG/GH