MINUTES

MONTANA SENATE
58th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN DUANE GRIMES**, on January 23, 2003 at 9:00 A.M., in Room 405 Capitol.

ROLL CALL

Members Present:
Sen. Duane Grimes, Chairman (R)
Sen. Dan McGee, Vice Chairman (R)
Sen. Brent R. Cromley (D)
Sen. Aubyn Curtiss (R)
Sen. Jeff Mangan (D)
Sen. Jerry O'Neil (R)
Sen. Gerald Pease (D)
Sen. Gary L. Perry (R)
Sen. Mike Wheat (D)

Members Excused: None.

Members Absent: None.

Staff Present: Judy Keintz, Committee Secretary
Valencia Lane, Legislative Branch
Cindy Peterson, Committee Secretary

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

Committee Business Summary:
Hearing & Date Posted: SB 99, 1/20/2003; SB 226, 1/20/2003
Executive Action: SB 164

HEARING ON SB 226

Sponsor: **SEN. BOB DEPRATU, SD 40, Whitefish.**

Proponents: **Chris Christiaens, Montana Landlord and Housing Providers**

Opponents: **Scott Crichton, Executive Director, American Civil Liberties Union of Montana**

Opening Statement by Sponsor:

SEN. DEPRATU opened the hearing on SB 226 by stating this bill is designed to protect landlords and tenants from drug- and gang-related activity by providing rules for termination of a rental agreement and repossession of the premises for violation of laws relating to drugs and gangs. **SEN. DEPRATU** testified if a peace officer were to seize drugs on the property, the landlord could then notify the tenant they have three days to vacate the property. Meth labs, in particular, are destroying properties and sometimes these properties must be torn down. The cost to rehabilitate a building that once contained a meth lab is astronomical and is not usually covered by insurance. These properties are major investments for landlords and can easily be destroyed through illegal activities.

Proponents' Testimony:

Chris Christiaens, representing the Montana Landlord and Housing Providers, testified this bill has come about because of the proliferation of drug activity over the last two years. Specifically, the activities which include clandestine labs in which there has been methamphetamine operations. This bill has been drafted in conjunction with people from public housing, who are very concerned about what happens to federal housing projects when there has been a methamphetamine lab. This bill will allow a landlord to terminate a rental agreement within three days' notice rather than within the standard 14 days. This is particularly important when the DEA comes in and places the property on a hazardous waste site list. Currently, there are notices placed on the property which indicate a hazardous lab was located on the premises and this notice stays indefinitely. Once that designation comes on the property, it never comes off. This results in the property's value dropping to zero., and the Department of Revenue then loses the tax revenue. If a landlord has a mortgage against that property, then the best thing for them to do is to let the property go back to the mortgage holder. In Havre, Montana, where there was a clandestine lab, the property had to be destroyed, the building removed, and the soil

had to be remediated. This particular property had just been remodeled three months prior to operation of the clandestine lab. This particular landlord ultimately filed for bankruptcy due to the complete loss of this property.

In Park Hill Housing, the public housing unit in Great Falls, there have been two clandestine labs that exploded. All the occupants of these four-unit dwellings are now displaced. There was over $100,000 in clean up costs and in Montana we do not have clean up standards. Who determines when the property is clean and who will assume the long-term liability has yet to be determined in Montana. The Department of Health feels it does not have the money or expertise to inspect these properties and certify them as clean. Currently, the landlord assumes the long-term liability. If a person is in public housing and is involved with the operation of a clandestine lab, they are expelled for life.

Opponents' Testimony:

Scott Crichton, Executive Director of the American Civil Liberties Union of Montana, feels this bill is more than an attack on drug users. **Mr. Crichton** is concerned about Section 1, subsection (b), on page 2 where it does not say the landlord "can" but rather that the landlord "shall." This is not a permissive measure; it is a mandatory measure. There is nothing that talks about the conditions under which the drugs were seized. The bill does not reference methamphetamine but refers to any illegal drug. This bill looks like we are being tough on crime, but we are not being smart on crime. Federal case law does not support this argument any more. The Supreme Court had decided last March that you can evict a whole family for the actions of one member of that family. In that case, the grandson was dealing drugs and the grandmother became homeless as a result. **Mr. Crichton** feels the Committee should consider the implications of this bill as it relates to families. **Mr. Crichton** warned you could find people with limited funding and resources homeless. **Mr. Crichton** feels the war on drugs has been a failure. Looking at the money put into this war on drugs, the largest casualty is the fact that everyone has become a suspect. Our Fourth Amendment Rights of search and seizure are being whittled away, and there still has been no reduction in drug use. **Mr. Crichton** feels that a drug user and dealer will not be deterred by this law. The only result from this law will be a lot of innocent people being caught up in this law and displaced from their homes.

Mr. Crichton suggested the Legislature adopt a Meth Lab Rental Recovery Act of 2003 instead of SB 226. He feels this bill is

too broad. **Mr. Crichton** feels the reference to "gang-related activities" is caveat since "gangs" usually refer to people of color and low-economic status. **Mr. Crichton** stated this bill only affects those individuals who cannot afford to own property. Therefore, the bill is unfair in its application. The war on drugs has increased sentences, increase prison populations, and increased the burden on the taxpayers for chemical addictive problems. **Mr. Crichton** hopes that what will come out of the Legislature will be a new prospective on the war on drugs and some sane assertions about reasonable investment and looking at drug use as a health problem. **Mr. Crichton** feels we need to start discriminating in the way we go about attacking the war on drugs and drug use in our society.

Questions from Committee Members and Responses:

SEN. JEFF MANGAN asked **Mr. Christiaens** whether this bill was permissive, or not.

Mr. Christiaens stated it is not because of the language "the landlord shall." **Mr. Christiaens** feels if the illegal drug was marijuana or the drug was being used by a guest in the house, the landlord would probably not give the three-day notice. However, if it were a schedule 2 drug, it would behoove the landlord to give the three-day notice.

SEN. MANGAN then asked, if the language stays the same and reads "landlord shall," how it would be enforced.

Mr. Christiaens replied that the individual would be served notice, either in person or by certified letter. Currently, you can evict with a three-day notice and it would be the same now.

SEN. MANGAN replied he was interested in knowing what would happen if the landlord did not follow the law and chose not to evict. How would the law be enforced against the landlord?

Mr. Christiaens stated there is a great deal of education which would have to go with this law. As soon as law enforcement notifies the landlord there has been a drug seizure, then the landlord would be required to issue the three-day notice of eviction. It comes down to the detail and how it is finally put in place by rule. There are other types of things that are dealt with in the same way.

SEN. MANGAN is concerned because he believes that some landlords are just as culpable as the tenants. He wonders if some language was changed the landlords could be held accountable for not

taking action if they know drug activity is occurring on their property.

Mr. Christiaens believes the landlords would be supportive because they are trying to protect their property. **Mr. Christiaens** knows there are some bad landlords out there who support drug activity. He believes the Landlord Association would be supportive of such a change.

SEN. MANGAN then asked if precursors were found on the property, whether this bill was intended to cover some of those issues.

Mr. Christiaens said he was unclear about what **SEN. MANGAN** was referring to as precursors. If **SEN. MANGAN** was referring to the chemicals used in the production of methamphetamine, those chemicals can be found in any household kitchen. **Mr. Christiaens** stated he believes there would need to be an arrest for the active drug.

(Tape : 1; Side : B)

SEN. JERRY O'NEIL asked about changing the reference to illegal drugs on page 2 to methamphetamine. **SEN. O'NEIL** also suggested providing that at the time the police seize the methamphetamine, they can evict the tenant and then the bill can provide for a show cause hearing.

Mr. Christiaens stated that would just transfer the responsibility for evictions to law enforcement and may possibly be unconstitutional.

SEN. BRENT CROMLEY inquired if this would apply if there were one marijuana cigarette.

Mr. Christiaens stated he believed with marijuana it would have to be of a certain amount to end up with an arrest.

SEN. CROMLEY is puzzled over the mandatory duty of the landlord to terminate because it does not give any discretion on the landlord's part. **SEN. CROMLEY** wondered what would happen if a landlord refused to act.

Mr. Christiaens replied there are civil remedies available which would provide for a tenant to come back to the landlord if they feel they were illegally handled in their eviction. **Mr. Christiaens** replied maybe inserting the word "may" would be a more appropriate way to go.

SEN. CROMLEY stated he believes the landlord could be held responsible if he did not evict a tenant and there is additional activity in the household which causes damage to the family next door. Then the family next door could have a cause of action against the landlord for failure to terminate the lease.

Mr. Christiaens replied that is provided for in civil law right now under the public nuisances laws.

SEN. MIKE WHEAT stated he has some concern about the breadth of the bill. **SEN. WHEAT** presented the scenario where a single mother's child invites a friend over. Maybe the police know the friend is selling drugs and they come over and arrest the friend for possession of marijuana. Under this scenario, the landlord would be able to give an immediate three-day notice to terminate. The bill speaks to illegal drugs seized from the premises and does not address individuals who are participating.

Mr. Christiaens stated that this statute would apply to the scenario presented. This scenario is exactly what happened in the Park Hill Housing in Great Falls. It was a guest who came over and had a perc upstairs in the apartment. The woman was not aware her son was doing this with his friend, and she has been evicted under federal laws for life for any type of subsidized housing. There are lists available to landlords of people who have been evicted for drug activity. It is through the application process and screening that a landlord makes a choice as to who is going to rent their property.

SEN. WHEAT stated there is the concept of presumption of innocence, which says a person is not guilty until they are proven to be guilty, and this bill makes you guilty by association.

Mr. Christiaens agreed a person would be guilty by association under this bill.

SEN. GARY PERRY asked **Mr. Crichton** if his objection to the bill is based on the use of the word "shall" on page 2, or is it to the three-day time period, or because granny may live in the house. Or, is his objection based on all three of these reasons?

Mr. Crichton stated it is the first and third reason, and the time limit really does not concern him. **Mr. Crichton** is concerned because the bill makes no distinction as to guilt or innocence, and making no distinction about association, knowledge, or intent. The bill evicts everyone in the domicile, regardless of their culpability. **Mr. Crichton** has knowledge of the way the war on drugs functions and he has heard of, and seen,

instance where people have been busted and the DEA says we will work with you. These people are working to keep themselves out of jail, and there are situations where people are encouraged to do things they would not normally do. This bill does not account for any of these circumstances.

SEN. PERRY asked **Mr. Crichton** regarding page one, Section 1(a)(2) would he object to the termination of a rental agreement if granny has a cat.

Mr. Crichton answered he is not objecting to existing law.

SEN. PERRY expanded saying **Mr. Crichton** would object to the termination of the rental agreement if illegal drugs are found in the house, because granny may live in the house. However, if granny has a cat, the rental agreement can be terminated. **SEN. PERRY** sees a conflict in logic.

Mr. Crichton stated if granny has a cat, the landlord will know she has a cat. **Mr. Crichton** feels if someone is holding two full-time jobs, they cannot be held accountable for, or aware of, everything that is going on in their house.

SEN. DAN McGEE then asked **Mr. Christiaens** if there is anything in the bill which prohibits the landlord from re-entering a rental agreement with granny if he determines she had no knowledge of the illegal drug activity.

Mr. Christiaens replied there was nothing to prohibit the landlord from entering into another rental agreement with granny.

CHAIRMAN GRIMES then said we are using meth as an example because it is an epidemic right now, and asked **Mr. Christiaens** to describe the other things the Landlord Associations face with regard to drug use.

Mr. Christiaens replied that the primary drug is cocaine. The drug of choice used to be alcohol, went to marijuana during the 60s, and now the primary hard drug is cocaine. In addition, LSD is on the rise. The drugs of choice tend to change depending on what is deemed to be the party drug. Currently, ecstacy is the party drug among young people. Anytime a landlord is aware there is drug use going on, they need to be concerned as to what is happening on that property. Long-term drug use leads to a number of other things. People who are manufacturing methamphetamine will cover the windows to keep out the light. This is a large issue right now facing the Department of Health and Human Services because this type of behavior directly affects other members of the family.

CHAIRMAN GRIMES then asked **Mr. Christiaens** to explain how quickly a meth lab can be set up and how destructive the explosions are.

Mr. Christiaens replied it takes no time at all to set up a meth lab and it can be done in the back of a van or under a public road bridge. Everything you need to produce methamphetamine can be bought at a grocery store.

CHAIRMAN GRIMES followed up by asking what length of time it would take for a landlord to re-rent the property if there is a one-time contamination from a meth lab.

Mr. Christiaens responded, if the property can be cleaned, it can take up to one year. In a multiple dwelling this would affect every tenant. It comes back to what is the liability of the landlord if he has a multi-dwelling unit and all his tenants are displaced? Do these tenants have a right to come back under civil procedure?

SEN. CROMLEY then asked if the landlord had in the rental agreement that dangerous drugs would not be permitted on the premises, then (d) of existing law would allow them to terminate the lease with 14 days' notice.

Mr. Christiaens confirmed that was the case, but Justices of the Peace interpret this law differently, and even on a 14-day notice, there have been times where it has taken a landlord up to six months to evict a tenant. **Mr. Christiaens** stated he has a bad actor in one of his rentals, and it is now going on three months since he began the eviction process. Especially in multi-dwelling units, the lengthy process can create a huge liability for the landlord.

SEN. O'NEIL questioned whether there were other illegal drugs which were as destructive to housing as methamphetamine.

Mr. Christiaens responded that most drugs were not because they do not blow up. It is the ingredients that go into meth that cause the contamination. **Mr. Christiaens** stated that now meth labs are appearing in hotel rooms. He reported there is a 250 until hotel in Washington that had a meth lab that exploded. The entire motel is now condemned property.

SEN. O'NEIL then stated that once an arrest is made and the tenants get out of jail, they then have three days to go home and manufacture more meth before they have to move out.

Mr. Christiaens stated yes if they want to they could. **Mr. Christiaens** then reminded **SEN. O'NEIL** that under current law,

they have 14 days within which to manufacture meth before being evicted.

SEN. O'NEIL believes it would make more sense to have the tenants evicted at the time of the arrest.

(Tape : 2; Side : A)

Mr. Christiaens responded he did not believe we would want to give that kind of discretion to law enforcement.

SEN. O'NEIL asked whether we are currently giving that discretionary power to law enforcement when we say the landlord "shall" terminate the rental agreement.

Mr. Christiaens said he did not believe that was the case since it referred to the landlord giving notice not law enforcement.

SEN. O'NEIL disagreed since that determination of illegal drug activity is predicated upon the actions of law enforcement.

Mr. Christiaens stated that was not his interpretation and he disagreed with **SEN. O'NEIL's** analysis.

CHAIRMAN GRIMES followed up with **Mr. Crichton** stating people were complaining that law enforcement was not moving quickly enough, while they were having to live in close proximity with meth labs. **CHAIRMAN GRIMES** stated in concept **Mr. Crichton** would have to agree meth labs are a problem in public housing and rental housing, and the Legislature should try to find a way to expedite the eviction for the sake of the public.

Mr. Crichton agreed with the statements made by **CHAIRMAN GRIMES.**

Closing by Sponsor:

SEN. DEPRATU closed by stating the use of "shall" and "may" was an excellent point and thinks "may" is more appropriate. While **SEN. DEPRATU** would support an amendment to use "may," he cannot support an amendment which would limit the bill to methamphetamine. If law enforcement feels an arrest and seizure of the drugs necessary, that should be enough to trigger eviction. Drugs other than meth can create problems for other tenants and devalue property. **SEN. DEPRATU** believes it is important to understand that all tenants have civil rights, as well as civil remedies. Therefore, if a person feels he was wrongfully evicted, he can pursue civil remedies. In addition, **SEN. DEPRATU** believes the ACLU is being very narrow-sighted. Investors in property also need protection. Allowing these

properties to become so devalued, investors will steer away. Some people already are only investing in commercial properties because they do not want to take the chance of losing the value of a duplex or four-plex. Financial institutions are not going to want to loan money to investors to buy rental property because they know they are at risk. A good number of people who utilize rental housing are being harmed.

EXECUTIVE ACTION ON SB 164

Motion: **SEN. MANGAN** moved **SB 164 DO PASS.**

Discussion:

SEN. McGEE reviewed the history and final status of HB540 introduced by Representative Mulnar in 1995. The language in the original code read, "A shelter care facility must be physically unrestricting and may be used to provide shelter care for youth alleged or adjudicated delinquent in need of supervision or in need of care." That language was amended in 1995 to read, "A shelter care facility may be used to provide an appropriately physically restricting setting for youth alleged or adjudicated . . ." **SEN. McGEE** is wondering why the Committee would want to go back to the language which was in Code prior to 1995. There was a lot of discussion, and this language was highly scrutinized at that time and found to be appropriate. **SEN. McGEE** stated there was logic behind the language in current law and he does not want to take the language back to how it was before 1995.

CHAIRMAN GRIMES then asked how long Montana has been out of compliance with federal law.

SEN. MANGAN replied it was just recently discovered that we were out of compliance.

CHAIRMAN GRIMES stated when the changes were made in 1995, either the law changed or we were out of compliance and did not realize it at the time. **CHAIRMAN GRIMES** feels a lot of things can change in five or six years.

SEN. MANGAN stated there has been a conflict in the statute since 1995. Currently, there is no shelter care that is secure. The purpose of shelter care is not to provide a secure facility. Since 1995, this statute was used in Great Falls, and it was the wrong thing to do. It is not the purpose of shelter care to be a secure facility for those youth. There is not one shelter care facility in Montana that provides a secure setting for these youth. In addition, this statute could jeopardize federal funding. Of those federal funds, 96 percent go back to the

communities to develop programs so youth, particularly status offenders and non-offenders, do not have to be held in a secure facility. If Montana does not address this situation, these funds will be jeopardized.

Upon question from **CHAIRMAN GRIMES, SEN. MANGAN** stated this bill came at the request of the Montana Youth Justice Council because of the results of a federal audit. In this case, the Board of Crime Control discovered Montana was in conflict with federal statute.

SEN. WHEAT agrees with **SEN. MANGAN** in that the Legislature's job is to remedy conflicts in law. **SEN. WHEAT** places a lot of stock in the fact this change was requested by the Montana Youth Justice Council. If this bill will clear up conflict and bring us into compliance with the federal statute, and it is not federal blackmail, we should support this issue.

SEN. McGEE stated he has not seen the federal statutes which suggest this language needs to be changed. The language in the bill says "provide an appropriately physically restricting setting," which could be interpreted to mean no restriction whatsoever, and this language is discretionary. **SEN. McGEE** remembers the 1995 law being hugely debated and time consuming. **SEN. McGEE** does not mind changing the law when it is necessary to do so, but he has not seen any justification for the contemplated change.

Motion: **SEN. MANGAN** withdrew his motion to **DO PASS** and stated he would get the documentation for **SEN. McGEE.**

HEARING ON SB 99

Sponsor: **SEN. RICK LAIBLE, SD 30, Victor.**

Proponents: **Tom Schultz, Administrator, Trust Land Management Division, Department of Natural Resources and Conservation**
Ellen Engstedt, Montana Wood Products Association

Opponents: **Leo Berry, Attorney at Law**
Susan Good, Surgical Specialities, Anaesthesiologists, Neurosurgeons, and Orthopedic Surgeons
Robin Cunningham, Self
Ronda Carpenter, Montana Coin Machine Operators Association
Anne Hedges, Montana Environmental Information Center
Don Judge, Teamsters Local 190

Opening Statement by Sponsor:

SEN. LAIBLE explained this bill was presented to the Senate Natural Resources Committee, and it was decided the bill would be better served if it were brought to Judiciary. This bill has been substantially changed from its original version.

SEN. LAIBLE submitted written testimony on SB 99. **EXHIBIT(jus14a01)**. **SEN. LAIBLE** stated at the original hearing before Natural Resources Committee there were many concerns about how the average person would gain access to rulemaking or comment on rulemaking. Amendment SB009902.avl, **EXHIBIT(jus14a02)**, came about to ensure the public has access to the agencies and to reaffirm there is a process in statute to verify that this procedure is in place. There also was a suggestion that the bill be drafted just to address the Department of Natural Resources and Conservation (DNRC) internal rules. The courts found no concern with the Montana Environmental Protection Act (MEPA) and dismissed that portion of the claim. The court accepted the Montana Administrative Procedure Act (MAPA) claim. If amendments are not made, all agencies will be subject to MAPA litigation.

(Tape : 2; Side : B)

SEN. LAIBLE feels that in the original presentation of SB 99, it was rightly opposed. With the proposed amendments, it reverses and reaffirms what the agencies can and cannot do, and also reaffirms the right of the public, within 2-4-315, of a procedure as to how they appeal certain rules.

Proponents' Testimony:

Tom Schultz, Administrator for the Trust Land Management Division of the Department of Natural Resources and Conservation, stated the intent of the bill is to address a court ruling. **Mr. Schultz** directed the Committee to the summary of that court ruling contained in his handout, **EXHIBIT(jus14a03)**. The DNRC was sued

over its internal agency guidelines, and the court ruled that since the term guideline met the definition of rule in MAPA, the Department should have gone through the rulemaking process.

The concern they have is in the real world situation they see the MAPA bullet potentially being used in the future as a compliment to some other laws to force agencies to comply with certain statutes. The proposed amendments refer to 2-4-315 which requires that before going to court to sue an agency over the lack of rulemaking or their decision not to conduct rulemaking, they must first petition the agency. There must be an agency ruling and the court must review that administrative record and determine whether the agency appropriately decided whether to conduct rulemaking. Although they feel they have not addressed all of the issues before it, they feel they are taking a step in the right direction by at least outlining the process by which an agency is defined. This will also give guidance to the court as to what they should be looking at in the administrative record. This bill, as amended, does not impose any limitations to anyone's ability to go to court.

Ellen Engstedt, representing the Montana Wood Products Association, stated this bill is in direct response to Judge Sherlock's ruling, and his perception that DNRC's internal biodiversity guidance somehow met the definition of a rule. "Rule" is defined in Code and in Administrative Rules in an incredibly broad manner, and this is what has caused the problem. This ruling enjoined a number of timber sales which were set to be harvested. The delay put many loggers and mills in financial jeopardy. It is the obligation of the Legislature, not the courts, to decide when an agency should adopt rules and on what statute. **Ms. Engstedt** further testified that they like the new version of the bill better than the original version. The authority is the sole responsibility of the Legislative Branch.

Opponents' Testimony:

Leo Berry, Attorney at Law, told the Committee he feels this is a bill with an unintended consequence. **Mr. Berry** informed the Committee that he worked for Governor Ted Schwinden to help draft the Administrative Rules for the Department of State Lands, and later became the Director of the Department of Natural Resources. **Mr. Berry** has been involved in the administrative rulemaking process for most of his legal career. **Mr. Berry** explained that the rulemaking process is governed by the Montana Administrative Procedure Act (MAPA)enacted in 1971 and was precipitated by the fact that state government was going through major changes. Agencies had their own ways of operating. Some agencies had published rules which were available to the public. Others had

rules printed, but not published. Others just had policies and procedures, some written down, and some were not. The purpose of MAPA was to require the agencies to let the public know the rules of the game. The fact that this bill was originally heard by the Natural Resources Committee and then re-referred to Judiciary, underscores **Mr. Berry's** testimony that this is a very broad piece of legislation. This bill affects every single program in state government and how the people in Montana are able to interact with those programs. **Mr. Berry** cautioned the Committee about amending MAPA to solve one particular problem based on one court decision. **Mr. Berry** pointed out that the subject decision was never appealed to the Montana Supreme Court. In addition, MAPA has been on the books since 1971 and has actually functioned quite well. **Mr. Berry** felt it was significant that representatives from the other agencies were not at the hearing supporting this bill. **Mr. Berry** suggested to **SEN. LAIBLE** that perhaps the Board of Land Commissioners, which has broad discretion, needs a process to allow them to adopt guidelines and use them in their management decisions. **Mr. Berry** does not feel we should amend every agency's rulemaking process. **Mr. Berry** testified that in his private practice he had to determine when the last day was that a person could appeal an agency determination. After reviewing the rules, **Mr. Berry** called the Chief Counsel of the agency to verify the date, where he was told his calculation was correct, unless that staff extends the date. **Mr. Berry** relayed his concern that he did not see the provision for extension in rules and was told it could be found in the agency's internal procedure manual. When **Mr. Berry** obtained a copy of the internal procedure manual, he found in the back of the manual under "miscellaneous" where it said the staff can extend the time for appeals for ten days. **Mr. Berry** stated if the purpose of this bill is to allow the agencies to use those types of guidelines in their management decisions, **Mr. Berry** is adamantly opposed to the bill. There is a big difference between statutes that require agencies to draft bills, and a discretionary authority to draft bills. This bill, both before and in its current state, is too broad, and **Mr. Berry** is not sure what the long-terms consequences of this bill will be.

Susan Good, representing Surgical Specialities, Anaesthesiologists, Neurosurgeons, and Orthopedic Surgeons. Ms. Good testified that she is not a lawyer, but her understanding is that the boards under the Department of Labor would still be affected because they are adjunct to the agencies. **Ms. Good** feels this bill would have a chilling effect on thousands of people who make a living and are regulated by licensing boards. **Ms. Good** knows that rules are written in response to a statute, but she testified some of the licensing boards are way past that,

and make rules and conduct hearings at their leisure. **Ms. Good** feels this new bill will drive people to file lawsuits.

Robin Cunningham, representing himself, is a fishing outfitter. **Mr. Cunningham** is the recipient of rules and was Chairman of the Board of Outfitters for six years. Therefore, he found himself having to pay attention to both aspects of MAPA. If you want to consider a rule, that consideration must go through MAPA. Anytime his board tried to do anything, they were advised by the staff attorney that they had to go through MAPA. This was made very clear to his board. **Mr. Cunningham** believes MAPA needs to be applied in all circumstances.

Ronda Carpenter, representing the Montana Coin Machine Operators Association, testified that the gambling industry is heavily regulated by rules.

(Tape : 3; Side : A)

Therefore, they use this process on a regular basis and they are concerned about changing this procedure and making it more difficult. She is skeptical about making any changes in MAPA.

Anne Hedges, representing the Montana Environmental Information Center, spoke about the distinction between when an agency has already written a rule and when the public would like an agency to make a new rule. The petition process under MAPA is utilized when the public wants an agency to do something proactive. The public would then go through the petition process and ask the agency to write a rule on a particular subject. Today, we are talking about when an agency already has a policy or guideline of general applicability that falls under the definition of MAPA. The current amendments require a person to go through this process to tell the agency to do something it was already required under law to do. MAPA is how we implement the public's right to participate under the Constitution. MAPA has a right to limit that constitutional right. If the agency has already written a rule or guideline, a petition will have to be filed to make that agency go back and adopt the rule under MAPA. These petitions are legal documents and are usually written by attorneys and are very lengthy. The agency has already written this guideline and chose not to go through MAPA. This is for a contested case under MAPA and not so much for rulemaking. Whether guidelines were followed under MAPA is a question of law, not a question of fact. The bill addresses the issue as if it is a question of fact.

Ms. Hedges distributed a couple of sections from MAPA to the Committee. **EXHIBIT(jus14a04).** These are what she refers to as

"the heart of MAPA." Sections 2-4-302 and 2-4-305 set forth the requirements for agencies in their rulemaking process. Agencies get in trouble when they write guidelines and do not follow the requirements set forth in these sections. **Ms. Hedges** also circulated a Montana Supreme Court case entitled State of Montana v. Vainio, **EXHIBIT(jus14a05)**. In this case, Mr. Vainio was going to be charged with an illegal activity which was only addressed through an internal agency guideline that had never gone through public review. When agencies are using guidelines, this is when they get taken to court. Agencies should not be using guidelines, unless they let the public know they intend to use them. **Ms. Hedges** does not see what this bill is trying to fix. One agency was told by one court if it has written a rule, it needs to go back and do it through the proper procedures, including allowing public comment. Rulemaking is something other agencies do on a regular basis. This lets everyone know what the rules of the game are. MAPA is simply and avenue which lets the public participate in what their government is doing.

Don Judge, representing Teamsters Local 190, restated other opponents' concerns. This is about one agency that failed to follow the procedures which allow public participation in the adoption of rules. All the agencies and boards have rulemaking authority. Sometimes, these agencies receive rulemaking authority that says you "shall" adopt rules; sometimes the Legislature gives that authority as you "may" adopt rules. This should concern the Legislature. As an example, **Mr. Judge** spoke about how agencies and positions change when a new Governor is elected. **Mr Judge** feels this legislation allows for inconsistent application of the laws and separates the public from the powers of government. It makes it very difficult for the average person to go to an agency and get the agency to act. **Mr. Judge** has attended a number of rule hearings, and he thinks monkeying around with the MAPA and the public's ability to participate will create a playground for attorneys. **Mr. Judge** does not believe the issue at hand is sufficient enough to warrant changing the law and the ability of the public to participate.

Questions from Committee Members and Responses:

SEN. AUBYN CURTISS asked what the origin of the biodiversity guidelines was.

Ms. Hedges responded the biodiversity guidelines were supposed to be based on the State Forest Land Management Plan. The agency voluntarily agreed to create a State Forest Land Management Plan under MEPA saying how they were going to manage their forests in the future. Based on that plan signed in 1996, in 1998 the agency suddenly came out with biodiversity guidelines. There was

some concern that these guidelines were not in accord with the State Forest Management Plan. There was a lot of discussion about how to deal with the discrepancy. After a couple of years of discussions and not being able to come to an agreement, Friends of the Wild Swan filed a lawsuit under MEPA and MAPA. Ultimately, Friends of the Wild Swan lost under the MEPA claim, but prevailed under MAPA.

SEN. CURTISS then referred the same question to **Tommy Butler, Trust Lands Attorney for the Department of Natural Resources and Conservation**, and asked **Mr. Butler** if he concurred with **Ms. Hedges'** interpretation.

Mr. Butler replied that he did concur with **Ms. Hedges'** interpretation.

SEN. WHEAT asked **Mr. Schultz** if he was correct that the amendment being proposed today, even though it is broadly drafted so as to apply to every state agency, really is being brought because of the Friends of the Wild Swan case and the fact that DNRC lost their MAPA claim.

Mr. Schultz stated that was correct, adding that their concern that the precedent set has the potential to affect future policy and guidelines long into the future. He is attempting to set up a process by which future litigation potential can be addressed.

SEN. WHEAT then asked what **Mr. Schultz's** concern was with the policy set by Judge Sherlock.

Mr. Schultz replied his concern is that boards and departments have many policies and guidelines. It has never been his interpretation of MAPA that strictly because you had a policy or guideline, you were required to go through the rulemaking process. In his interpretation of Judge Sherlock's ruling, now rulemaking could be required on a guideline or policy. There are a multitude of policies and guidelines in existence that could be the subject of future litigation. This bill identifies a process by which someone who wants rulemaking to occur, or feels rulemaking should have occurred on an existing policy, has to go through. Now they have to petition the agency, and this process is already identified in MAPA.

SEN. WHEAT, in reviewing the Friends of the Wild Swan case, believes Judge Sherlock determined that the Biodiversity Implementation Guidelines were not adopted through the rulemaking process. The court then went on to find that the department was relying upon these guidelines in determining how it managed the state lands. That was the court's basis for its finding that

those guidelines were really rules. The public should have been made aware of these guidelines since the department was going to rely upon those guidelines in managing the state lands.

Mr. Schultz stated **SEN. WHEAT's** understanding was correct, but that these guidelines were never intended to have the force of law. They were supposed to be direction to foresters on the ground as to how to manage the land. The court did not find those guidelines deviated at all from the State Forest Management Plan. Those guidelines were consistent with the six years' of public input gone through in developing the State Forest Management Plan. Those guidelines took the standards identified in the plan and put them into a separate document to help the foresters on the ground to use to help design timber sales. There was nothing new or monumental in those guidelines. The court said since these guidelines looked like a rule, walked like a rule, they are a rule and the department should have implemented MEPA.

SEN. WHEAT followed up by asking why shouldn't the public be made aware of guidelines you intend to use, whether or not they have gone through the scrutiny of MEPA.

Mr. Schultz stated that copies of the guidelines were sent out to the public if they were requested. They just did not involve the public in the development of these guidelines because the department felt is was implementing the State Forest Management Plan which had gone through a six-year period of public comment. The other problem the department had is that rules have the force of law. Guidelines were never meant to be a hard and fast law. Once you make a rule, there is no discretion. Guidelines allow for management flexibility on the ground. The intent was not to exclude the public. Taking a guideline to a rule is a big step.

SEN. WHEAT then asked if there was a distinction between regular guidelines and those guidelines that are set out to determine how the agency administers state lands.

Mr. Schultz believes there is an exemption currently in MAPA for certain policies. You have to have the authority to do rulemaking. In answer to **SEN. WHEAT's** question, it could be appropriate if you have authority. There is no statute in Montana Code that talks about the management of old growth or management of biodiversity. There are existing statutes that fly in the face of some of the commitments made in the State Forest Management Plan which were adopted by the Legislature in 2001.

SEN. WHEAT asked **Mr. Berry** for his response to **Mr. Schultz's** explanation.

Mr. Berry believes Judge Sherlock did not overstep his bounds. He does not view this as a separation of powers issue. **Mr. Berry** feels the guidelines adopted by the department did meet the statutory definition of a rule. The problem is once you start to implement them in a decision-making process. If they are of general applicability, they should be adopted by rules. It is **Mr. Berry's** understanding the department is now going through and adopting those guidelines as rules. It has been **Mr. Berry's** experience that you can adopt rules that give discretion to the agency. While rules do carry the force of law, they can be drafted in such a way that they give discretionary authority.

(Tape : 3; Side : B)

SEN. McGEE questioned **Mr. Berry** if DNRC had gone through a MAPA process and stated they are not going to put in rules in place, but in fact, are going to follow their guidelines, would that have satisfied the court.

Mr. Berry is not comfortable speaking for Judge Sherlock, but he would like to think Judge Sherlock would have said if you are going to adopt guidelines in the sense of a rule, then you should adopt them as rules. **Mr. Berry** stated he has not seen the procedure followed as outlined by **SEN. McGEE** and he is not sure what a court would say. **Mr. Berry** feels if you are going to make a policy applicable to your decision-making, the public should be notified and have input into that.

SEN. McGEE wondered is the argument about whether they have rules, or is the argument that they did not follow MAPA to have whatever guidelines they currently have.

Mr. Berry responded the argument was they did not follow MAPA in adopting those rules.

SEN. McGEE expanded by asking if the department had a MAPA process to establish they were not going to conduct a lot of rule making because they wanted flexibility and, therefore, would be adopting guidelines, would that have satisfied the court? If they had done this they would have adhered to MAPA guidelines. Or, is the court saying the department has to adopt rules. **SEN. McGEE** feels these are two entirely different issues.

Mr. Berry stated he does not know what the court would have done. **Mr. Berry** repeated there is a way to draft rules giving the agency the discretion to make management decisions.

SEN. McGEE asserted that the concern the department is expressing is that the court overstepped its bounds. If the argument is the department did not follow the procedural aspect of MAPA to reach the point where you said you are not going to have rules, but rather you are going to have guidelines, then maybe the court is correct. On the other hand, if the court is saying the department not only has to follow MAPA, but, in addition, has to have rules, maybe the court did overstep its bounds.

Mr. Berry agreed that he can see the difference, and then made the point that quite often the Legislature has directed agencies to draft rules by stating the agency "shall" adopt rules. On the other hand, quite often, the Legislature authorizes rules by stating the agency "may" adopt rules. This makes rulemaking discretionary. Once an agency starts making decisions, if they have not informed the public as to the basis of those decisions, and have adopted processes or procedures to guide those decisions without going through MAPA, then they have violated MAPA.

SEN. McGEE is trying to determine whether the court overstepped its bounds. If MAPA was not used by the department to reach a point where they said we are not going to do rules, but are going to use guidelines, and those guidelines were fashioned in such a way that satisfies the making of guidelines, then maybe the court was correct. If, on the other hand, the department did not want to make rules and this was discretionary on their part, did not follow MAPA in deciding they are not going to make rules, then the court was incorrect and did overstep its bounds.

Mr. Berry stated he understands **SEN. McGEE's** point and agrees with the department insofar as he does not believe MAPA is an independent authorization to make rules, nor is it an independent direction to make rules. That has to come from the Legislature. The Legislature has to tell the agency it "shall" or "may" adopt rules. **Mr. Berry** also noted the decision was not appealed to the Supreme Court and no one knows if the Montana Supreme Court would have agreed with Judge Sherlock.

SEN. PERRY asked if there was anything in the bill which would allow the appeal process so as to deny the public due process.

Mr. Berry responded he did not believe so, but stated he has not reviewed the bill from that aspect. **Mr. Berry** feels **Ms. Hedges** brought out a couple of good points: First, when she stated you are now placing the burden on the public to demonstrate by clear and convincing evidence, which is a fairly high legal standard, that the agency acted improperly; and second, the reference to the court only looking to see if the agency's decisions are supported by substantial credible evidence. These are fact-

finding standards which are not normally part of the rulemaking process. This creates a much higher standard for the public to reach in order to challenge an agency rule, but it probably does not violate due process.

SEN. MANGAN asked **Mr. Schultz** why no other agencies testified in favor of this bill.

Mr. Schultz responded he did not know why no other agencies were present. It is his experience that agencies do not typically support other agencies on their issues. He does not believe other agencies have run into this issue.

SEN. MANGAN stated it comes back to the definition of "rule" and wanted to know why they are not taking a look at this definition instead of putting it back on the public. **SEN. MANGAN** feels it is an internal problem with the agency.

Mr. Schultz stated they had discussed making this change, and there was concern that changing the definition of "rule" may be more inflammatory. They did consider limiting the definition. **Mr. Schultz** feels anything he puts down on paper could meet the definition of "rule" as it stands now.

SEN. MANGAN stated that under the Constitution and way the Legislature has worked, they want to keep the definition broad to enable the public to participate in that process.

Mr. Schultz stated that is why they have the amendment, so they would not have concern about access to the courts. It may be a cumbersome process because of the petitioning to agencies, but it gives the agency an opportunity to respond.

SEN. MANGAN feels agencies are in a much better position to understand the laws, and what the agency has to do to comply with those laws, than the general public is. **SEN. MANGAN** questions shifting the burden to the public.

Mr. Schultz stated that their legal counsel advised them how to proceed. They were not going blindly down a path. They legitimately felt they were not required to follow MAPA, and the court ruled against them. **Mr. Schultz** feels it is not as black and white as some people think. As evidenced at the hearing today, even attorneys cannot agree.

SEN. MANGAN agrees there is a lot of difference of opinion, but his concern, in general, is putting the burden onto the public.

SEN. PERRY asked **Mr. Berry** about the second sentence in the bill which reads, "in any action challenging the agency's decision not to adopt rules, the burden of proof is on the person challenging the decision. **SEN. PERRY** asked if striking the word "not" would make that a true statement.

SEN. PERRY stated if the agency adopts rules, the burden of proof is on the public. Logic would follow that if "not" is left in, then it is consistent with existing practice.

Mr. Berry does not believe that would lead you back to the status quo. The concept of this amendment is entirely new within the rulemaking procedure. Currently, there is not a burden on either party in that process. If you take "not" out, you are still placing the burden on the public and they will be required to carry the load by "clear and convincing evidence."

SEN. PERRY asked if an agency today enacts its own rules, and he objects to those rules, doesn't he have to challenge those rules.

Mr. Berry replied he would.

SEN. PERRY inquired how a person can object to the placement of "not" in this case, and the reason for objecting to that is that it places the burden of proof on the public, when current law places the burden of proof on the public to challenge agency rules. **SEN. PERRY** sees a conflict in logic.

Mr. Berry stated it is not a question of the burden not being currently on the public. If an agency makes a rule and you are harmed by it, it is up to you to challenge that rule. The difference would be the remainder of the provisions which will place a much higher standard on the public to make that challenge.

SEN. MANGAN explained that he understands **SEN. PERRY's** concern, but when a rule is proposed, there is a public hearing, notice, and opportunities for the public to address those concerns.

SEN. McGEE asked **Mr. Berry** if he testified that he has some background with MAPA.

Mr. Berry stated he does have experience with MAPA.

SEN. McGEE asked whether there is a responsibility on the part of the department to advertise and go through a public hearing process when it is choosing not to have a rule.

Mr. Berry replied there is no such requirement.

Closing by Sponsor:

SEN. LAIBLE closed by stating the process is broken and it has affected people and also the school trust funds have been affected by the court's ruling. As far as the appeal to the Montana Supreme Court, **SEN. LAIBLE** stated it was discussed and it was decided to clarify the statutes. Therefore, they brought the issue to the Legislature instead. The State Forest Lands Management Plan, which had much public participation, contained biodiversity plan guidelines as a result of public input. The agency decided not to have a rule. The court decided the agency "shall" have a rule. This is a very important comment. This will not affect access to the court by the public because 2-4-315 is still in effect. **SEN. LAIBLE** stated if your neighbor is tired of your barking dog, does he come to you first, or go straight to the court? This bill requires the neighbor to come to you first. This bill will require a person to go to the agency first and ask for a redress of his concerns. It will also require substantial credible evidence, and this is what they should require. **SEN. LAIBLE** repeated that this bill does not affect public access, it just requires going to the agency first. Although this has only affected DNRC so far, it is just the camel's nose under the tent. If this language is not changed, the whole camel will be in the tent. **SEN. LAIBLE** cautioned that almost anything can be determined to be a rule and will then be subject to MAPA.

ADJOURNMENT

Adjournment: 11:45 A.M.

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SEN. DUANE GRIMES, Chairman

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CINDY PETERSON, Secretary

DG/CP

EXHIBIT(jus14aad)