environmental quality council

STATE OF MONTANA
DECEMBER, 1974

THIRD ANNUAL REPORT

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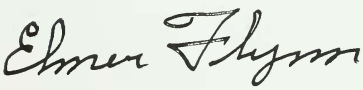
LETTER OF TRANSMITTAL

Honorable Thomas L. Judge
Governor
State of Montana

Members of the Legislative Assembly

The People of Montana

The Environmental Quality Council herewith submits its *Third Annual Report* for the fiscal year ending June 30, 1974, in accordance with Sec. 69-6514 of the Montana Environmental Policy Act.



Senator Elmer Flynn
Chairman

John W. Reuss
Executive Director

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Preface

The 1971 legislature enacted the Montana Environmental Policy Act. Passage of that act established a state policy for the environment, directed state agencies to comply with the act, and created the Environmental Quality Council (EQC).

Creation of the EQC was a major institutional innovation. Of the twenty-odd states having "little NEPAs," Montana alone decided to attach such an agency to the legislature. The strength of this approach is that it created an agency without day-to-day program operating responsibilities, allowing the EQC through its staff to serve the legislature by conducting policy studies and overseeing the performance of executive agencies within the policy framework established in the Montana Environmental Policy Act.

At the direction of the 1973 legislature, the EQC was requested to prepare two comprehensive state policy studies — one on land use and a second on energy. Interest in these subject areas and in helping develop EQC's policy research capabilities, led the Ford Foundation to assist in funding these efforts.

The year 1974 was one of testing for the EQC. The task of completing the policy studies in order to make recommendations and draft legislation to be considered by the 1975 legislature was complicated by personnel changes and the hiring of a new executive director. As it was, the studies assumed that the legislature would be meeting annually, providing for a more systematic review by the legislature and the holdover to the 1976 session of legislation concerning very complex and controversial issues. Pressure to finish the Montana Land Use Policy Study, problems connected with completing the Montana Energy Policy Study, and concern within the council over how to implement the land use recommendations, prevented the council from making any legislative recommendations for the 1975 legislature.

Nevertheless, the past year has seen the EQC mature and move another step toward fulfilling its mandate as provided by the Montana Environmental Policy Act.

I would like to thank the outgoing council members for their concern and the public for its continuing interest and support. I look forward to working with the new council and I pledge our continuing efforts to maintain and enhance the overall quality of life in Montana.

Senator Elmer Flynn
Chairman
Environmental Quality Council

Introduction

Last year's report, the EQC *Second Annual Report*, identified those issues — land use, energy, and saline seep — which were being researched by the EQC staff. Each of these issues represents a major problem of concern to all Montanans. In the conduct of this work, the EQC staff has sought to produce information, analyses, and recommendations that would foster public understanding and stimulate citizen involvement and assist the legislature as it attempted to define policies and design programs in response to these issues.

During the past year, the EQC continued to make substantial contributions to our knowledge of saline seep. Michael Harlow's *Environmental Impacts of Saline Seep in Montana* (September 1974) built on earlier EQC saline seep research by Loren Bahls and Marvin Miller. The importance of Harlow's effort is that it provides a comprehensive summary of the problem, a detailed literature search, a directory of agencies involved in saline seep in Montana, and a set of recommendations. The report was endorsed by the EQC Council at its meeting on December 6, 1974.

Ot continuing concern to Montanans is the development of the vast coal deposits in the eastern part of the state. For a year and a half, the EQC has been examining the Montana energy situation. The results of that effort are soon to be released to the 1975 legislature. This has been a particularly troublesome undertaking; staff changes, the absence of models to guide the research and synthesis of the work, and the uncertain role to be played by the Federal government complicated the task. But everything considered, the EQC *Montana Energy Policy Study* promises to be a useful handbook for finding out what energy development is going on or could be in future and for beginning to define more precisely what Montanans *can* do and *want* to do in developing their energy resources.

Surely the major EQC accomplishment of the past year was the release of the EQC *Montana Land Use Policy Study*. In many ways the *Montana Land Use Policy Study* is a model of what a state land use policy study ought to be and an example of the high calibre, professional policy analysis of which the EQC staff is capable. The *Montana Land Use Policy Study* is reprinted here in order to make it more widely accessible.

Earlier EQC annual reports had been distinguished by going beyond chest-beating articles that review the past year's work. This *Third Annual Report* is no different; Dave Kinnard's concise and insightful articles on land banking and development rights transfer complement and extend Chuck Brandes' analysis in the *Montana Land Use Policy Study*. Hopefully, these pieces will stimulate interest in examining the applicability of these techniques to the Montana setting. Rick Applegate's article on citizen participation and the environment concludes a major research effort reported in the EQC *Second Annual Report*. Montanans concerned with public involvement in Montana environmental issues will find it both highly intelligent and very useful — a rare combination.

All of the efforts of the past year have greatly enhanced the ability of the EQC staff to operate as envisioned by the Montana Environmental Policy Act. It is easy to comment on the excellence of the individual efforts of EQC staff members like our land use analyst Chuck Brandes, our ecologist Loren Bahls, and our economist Dick Bourke. Beyond that the EQC staff has demonstrated its ability to transcend disciplinary boundaries and produce work that is interdisciplinary. This is what MEPA envisioned and the EQC staff's skill at making it work is what ultimately determines its utility to the legislature which it serves.

In important ways the EQC *Third Annual Report* presents work initiated under the previous EQC executive director, Fletcher E. Newby. His choice of themes and staff was prescient and his influence is openly acknowledged.

John W. Reuss
Executive Director
Environmental Quality Council

Montana Environmental

Quality Council

THIRD ANNUAL REPORT

Land Use: The Problem and the Challenge

How often in the last few years have we heard that "Montana is at a crossroads"? So often, probably, that the phrase has become a meaningless cliche. More serious, the steady barrage of material competing for our attention on such matters as local planning and zoning, rural subdivisions, and energy development has eroded our confidence in being able to manage the future and dulled our capacity to act effectively.

The EQC Montana Land Use Policy Study *is different and deserves your careful attention. In most respects the study is a model of what a land use policy study ought to be. The study:*

—identifies and analyzes why a land use policy study is needed;

—carefully isolates Montana's land use problems and discusses the full range of their direct and indirect consequences;

—systematically assesses how current laws and their administration by state agencies aid or hinder the resolution of land use problems;

—summarizes the experiences of other states in managing their land resources, outlines what kind of laws they have enacted, and evaluates the applicability of those experiences and laws to Montana;

—begins, in a tentative way, the difficult process of articulating a land use policy for Montana; and finally,

—recommends that the legislature consider legislation that would establish a state land use commission and specify procedures whereby citizens, local and county governing bodies and the state can:

1) identify goals,

2) identify, designate and manage areas of state concern, and

3) regulate the siting of developments of greater than local impact.

It is important to remember that the EQC Montana Land Use Policy Study *may be divided into two distinct parts. One part deals strictly with facts — the problems, current state laws and agency programs, and land use legislation in other states. In this sense the study is a handbook designed to assist legislators and citizens as they consider various land use measures. The other section of the study deals with values and judgments — the attempt to present a preliminary state land use policy and the EQC recommendations.*

It is not expected that everyone will agree with the EQC land use policy statement and recommendations. The intent has been to eliminate the rhetoric from the land use issue in Montana. Most of the facts required to make the necessary policy and program decisions are contained in the EQC report. Those who disagree with the EQC conclusions and recommendations should make their own positions clear. It is through this process that comparisons among alternatives can be made and decisions reached that will ensure that Montana will be able to both accommodate change and retain those qualities that make it unique.

MONTANA LAND USE POLICY STUDY

Research Coordinated by Charles E. Brandes

I. MONTANA TODAY

HISTORICAL PERSPECTIVE

It is no accident that Montana is called the Treasure State, for her history is a tale deeply rooted in the wealth of the land. But even if other resources were to be depleted, Montana's most priceless treasures — space and beauty — could remain in a state of quality forever if Montanans pause now to consider the past and the future.

Even the best hopes rooted in the land sometimes returned only misery and sorrow for Montanans. Wrested from her original Indian stewards by advancing waves of trappers, cattlemen, miners and homesteaders, Montana gave much under forceful hands. The price of violence was real and lasting: mined-over Bannack is lifeless now; the Anaconda hillsides are barren of trees that fed smelters; the culture of the Indian people lies in the shadow of the white race; deserted towns and vacant shacks dot the landscape, testament to withered hopes and a retreat from sorrow. These are ugly scars, but worthwhile lessons for Montanans today.

For Montana again is on the brink of massive change — enormous plans are afoot for development and industrialization. Now the miners see coal, not gold and silver. Instead of picks and shovels, they carry grease guns for strip mine draglines and the endless coal conveyor belts. Characteristics that heretofore discouraged urbanization — remoteness, topography, climate and sparse population — ironically have become the lures of a new cadre of land dealers who see no conflict between wilderness and suburbia. Their sales pitches are new but the stakes — profit and turnover — were familiar even to homesteading Montanans in the early 1900s.

The early history of boom-bust Montana is perhaps a classic example of a dubious supposition that has had tragic national dimensions: that the relationship between a person and the land is purely private; that the land's only function is to enable its owner to make money.

Following the 1804-'06 Lewis and Clark exploration, the fur traders set about the first serious exploitation of natural resources in a way that characterizes much of Montana's history. Although the early beaver trappers responded to the whims of eastern fashion, it wasn't whimsy but a solid market that brought the open-range cattle industry to Montana in 1866. This lucrative enterprise satisfied eastern and foreign investors and depended on the seemingly endless sea of grass in eastern and central Montana. But overgrazing and the bad luck of drought weakened the herds. Finally, more than 400,000 cattle starved and froze in the winter of 1886-'87.

The placer miners, whose demand for meat had encouraged the luckless cattle owners, had their beginnings at Gold Creek in 1858. Major gold strikes through 1865 brought thousands of miners, the first of Montana's urban crime, and a permanent metals industry that swelled Montana's population to a quarter million by the turn of the century. Statehood, deep mining and copper smelters replaced the territorial placer diggings and brought bitter rivalries for power that manipulated the legislature and precipitated mining shutdowns and bloody labor fights.

Homesteading, encouraged by the railroads, land speculators, and the government, led 80,000 new citizens to Montana by 1918. They furrowed the prairies with horse-drawn plows and planted nearly as much wheat — 3.5 million acres — as is planted today with tractors. The drought of 1919 caused a crop disaster that eventually wiped out towns, banks and 11,000 family farms. Winds attacked the exposed topsoil and more drought finished off most of those who continued trying. More than 60,000 homesteaders eventually left the state. Montana farmers needed 50 years to make dry-land grain farming the success it is today. But the spread of saline seep indicates gaps in the knowledge needed to keep that particularly vital land use from becoming land abuse.

Conditions surrounding land use decisions have changed drastically since the last boom. Perhaps it is the quickening pace of change in general that points emphatically to the need for land use policy. Or perhaps it is the ever growing impact of the energies and machines that respond to our touch. A bulldozer can change in a day what once took a season's labor. The misjudgments of a few can materialize into nightmares for thousands with scant warning. Day by day, complexity feeds on complexity as today's tentative enterprise becomes tomorrow's entrenched practice.

Our descendants will surely judge us on what we do to heed the lessons of the past and provide for their future. Their lives, like ours, will grow from the land. This is the challenge and opportunity facing all Montanans today.

TODAY'S CONCERNS — TOMORROW'S REALITIES

Humans have a tendency to be unaware of undesirable trends until they result in full-blown crises. This is unfortunate, but understandable. Most people are too busy trying to make ends meet and responding to the events of the day to take the long view and try to separate causes from symptoms. Consequently, most individuals and most of society's institutions, public and private, react to problems only as they generate crises.

Typically, for what appear to be compelling reasons, something becomes labeled a "problem." Over time this is brought to the attention of decision makers who, if sufficient interest is evident, pass or amend a law. And so the process goes, a small change here and a minor adjustment there. Rarely are underlying assumptions openly and seriously examined and rarely is the full range of consequences from a particular action or decision assessed. This approach to problem-solving may cure symptoms but frequently results in new problems. The basic fallacy of the piecemeal approach, of course, is that problems must be seen in their context as part of larger systems if real solutions are to be found. Our inability to deal successfully with natural resource problems is a reflection of our failure to see problems as components of interrelated systems.

The foregoing observations should not be misinterpreted. The point is not that Montanans or the Montana legislature has been remiss in the attention devoted to environmental and natural resource issues. On the contrary, on many vital issues — utility siting, natural areas designation, strip mine reclamation — Montana legislation is looked to as a model by other states. But improving the capacity of Montana's citizens, local governments, and agencies of state government to respond to land use issues rationally and systematically is the object of the EQC *Montana Land Use Policy Study*.

Highlighting the land use related issues dealt with by the last three Montana legislatures shows clearly their responsiveness to a number of important problems. During these last three sessions, the legislature strengthened existing legislation and took new initiatives in a number of resource and land use areas such as water and waterway protection, wildlife management, mining and mine reclamation, pesticides and pest control, and prevention of environmentally abusive practices.

The 1971 legislature strengthened the coverage of the Stream Preservation Act of 1967, overhauled the water pollution act of 1967, and passed the floodway management act. In the mining field, the legislature enacted the Landowner Notification Act and passed legislation regulating the reclamation of hard rock mining activities. Some additions were made to the provisions of the statute dealing with city or city-county planning boards and zoning districts. Lastly, the legislature passed the Montana Environmental Policy Act (1).

The 1973 legislature will be remembered for its treatment of land use and energy-related issues. For example, the legislature passed the Utility Siting Act and the Water Use Act. In addition, the statute dealing with city-county planning boards was revised in the Montana Subdivision and Platting Act.

The passage of the Montana Strip Mining and Reclamation Act established what many regard as the model coal reclamation law. Along with other energy resource taxation and conservation measures, the legislature enacted the Strip Mined Coal Conservation Act. Lastly, concern over the impact of rural subdivisions on agricultural land led to enactment of a greenbelt law (2).

The 1974 legislature devoted much attention to environmental and natural resource issues. The legislature passed the Strip Mine Siting Act, The Montana Natural Areas Act, and placed a three-year moratorium on significant new appropriations of water from the Yellowstone River (3).

Even this cursory review of legislative action in the environment, land use, and natural resources areas illustrates some important emerging themes. First, time devoted to such issues indicates that the public is very concerned that development in Montana must be carried out with the least possible damage to the environment. Second, the legislature has taken steps to protect land and water as they relate to coal development. Revisions of the eminent domain laws, strip mine and energy conversion facility siting measures, and provisions specifying reclamation procedures are designed to give the state strong regulating

powers over coal development. Third, the legislature, through its concern with rural subdivision, the growing interest in industrial uses of the Yellowstone River, and the decline in the use of agricultural land near urban areas, is becoming increasingly concerned with the relationships among economic development, population growth and the quality of life in Montana.

Further, the legislature has declared that certain proposed developments have such enormous impacts that only state government can decide objectively whether they should be allowed. Hence the state has the last word in siting of strip mines and power generation facilities. The state must approve reclamation plans. The state reviews certain aspects of new subdivisions. The state also grants permits to water appropriators. Most of these activities require environmental impact statements which assist administrators and provide significant opportunity for citizen involvement in decisions, while providing a reference for what is happening to the state as changes occur.

Many of these concerns were reinforced when the staff of the Environmental Quality Council polled Montana county commissioners, conservation district supervisors, and city-county, county, and area-wide planning board members in April 1974 (4). These groups are extremely interested in land use issues. From a list of traditional land use problems, these groups indicated concern over the following issues:

1. **Preservation of the economic base represented by prime agricultural and forest lands.**
2. Cooperation among, state, regional, and local levels of government in decisions regarding the use of land and water.
3. Control of erosion, sedimentation, and the fillings and dredging of lakes and streams.
4. Encouraging desirable development.
5. Inability to influence land use decisions made outside the county which have effects within the county.
6. Guiding development to locations which minimize the undesirable effects of development.
7. Regulating subdivision location and design.
8. Protecting scenic, cultural, scientific, archaeological, and historical values.
9. Public access to state and federal lands and waters.
10. Cost of planning, both for the individual and the local government.

These same local officials were asked to list what they considered the most serious land use issues in their areas. Their response follows:

1. **Preservation of the economic base represented by prime agricultural and forest lands.**
2. Control of erosion, sedimentation, and the filling and dredging of lakes and streams.
3. Cooperation among state, regional, and local levels of government in decisions regarding the use of land and water.
4. Regulation of subdivision location and design.
5. Encouraging desirable development.
6. Water use, development and storage.

In addition, local decision makers, particularly county commissioners, questioned their ability to react effectively to the changes occuring within their jurisdictions. Reluctant to raise taxes, lacking adequate technical advice, often overwhelmed by private developers, and unfamiliar with all the impacts (benefits and detriments) associated with development proposals, Montana's county leaders need help before their concern over land use issues turns to cynicism.

More evidence of the growing interest in land use issues is provided by a series of meetings on land use sponsored by the Montana Committee for the Humanities. Nine regional workshops were conducted during October 1974 to bring citizens together to discuss and communicate their concerns over land use issues in their area.* A statewide conference in Great Falls integrated the issues identified locally and focused on those common elements which must be included in a statewide policy on land use.

These workshops illustrate that the issues surrounding land use in Montana are of tremendous concern to Montana citizens; a total of nearly 1400 persons attended the nine workshops. For example, more than 250 persons attended the Miles City workshop on October 29, 1974. During the course of the meeting nine questions emerged from the exchange of views identifying issues:

1. **Do we want to preserve agricultural land and if so, how?**
2. Can we maintain individual property rights in a planning process?
3. What are our concerns about government management of agricultural lands?
4. Land use planning should be done locally — but what kinds of planning and how?
5. How do we avoid national land use planning?
6. What kinds of state and local controls will support planning and how can we influence state government?
7. Where should planning and control take place?
8. How can we keep our own individual rights and avoid government planning at any level?
9. How can we benefit from the mistakes made in other communities?

*Workshops were in Lewistown, Kalispell, Missoula, Butte, Bozeman, Billings, Miles City, Havre and Wolf Point.

Is all this concern justified? Will not everything work out all right if we just go about our business?

Answers — the only ones now available — come from looking at other states. Governor Thomas L. Judge has commented that Montana is lucky that she is some years behind other states in development and has the opportunity to learn from their mistakes. Looking at other states we can gain a glimpse of a possible future.

What has happened to the orange groves and beautiful beaches of southern California and the magnificent view of the Rockies from Denver is a cliche that needs little repetition.

Likewise, the subdivision of Florida is infamous. Over 200,000 lots in recreation and retirement subdivisions are registered each year. In one disastrous example, a single company drained and subdivided 113,000 acres of swamp. Purchased for from $100 to $150 dollars an acre the lots were resold for as much as $1800 an acre. Ten years after the start of the subdivision there were three homes there. One landowner had discovered it would cost $2,880 to install a phone line reaching his site. The drained swamp also proved to be an extremely dangerous fire hazard (5).

In New Mexico, a basically rural state somewhat like Montana, estimates are that more than a million acres have been subdivided. If built upon, these lots could accommodate eight million persons, or eight times the present state population. State law requires developers to provide access and so bulldozers scraped many a grid out of the desert (5).

In one rural Pennsylvania county, subdividers mapped 25,000 lots and sold 12,000 in five years. The population of the county was less than 15,000 before the subdividers began their work. Soils in half the area subdivided are unsuitable for on-site sewage disposal systems, yet 89 percent of the subdividers provided no sewers (6).

In another Pennsylvania county, 46,000 acres were subdivided in five years beginning in 1967. By 1973 the rate of the subdivision reached 10,000 acres per year, and at that rate 30 percent of the county would be subdivided by 1980. In Pike and Monroe Counties, Pennsylvania, occupation of all the lots sold since 1968 would result in a "second home population" five times the local resident population (6).

If the implications of providing public services to such enormous developments are staggering, so are the implications of all that land remaining idle. With the passage of time, ownership will become clouded and consolidation of small lots impossible. If a handful of scattered houses spring up the subdivision may become a rural slum, served by poor roads and few services. Being too small for agriculture or other non-urban uses the parcels are neglected — *open space and farmland transformed into vacant lots.*

The Environmental Quality Council believes that Montanans must address land use issues and take bold, new initiatives. The Montana legislature has demonstrated its concern for the protection of the Montana environment. The legislature has provided strong guidance in select areas but more action is needed. The interest in rural subdivisions, the impact of accelerated energy development on Montana agricultural land, concern over planning, and what appears to be a consensus that a high quality of life in Montana is closely tied to maintaining the agricultural base of the state provides the backdrop against which a land use policy must be formulated.

Montana has two features that make it unique among the states. First, its agricultural way of life has resulted in a small, dispersed population. Second, Montana now has a healthy and stable environment. These two characteristics go hand in hand; one cannot exist without the other. Preserving the agricultural economic base and its accompanying way of life will limit both the type and number of other kinds of land use. Also vital is the concept of protecting land that either provides environmental health (for example, wildlife habitat and unique historical or natural areas) or endangers human activity (for example, floodplains and earthquake zones).

The time is ripe. Montana is at a crossroads. No Montana land use problem, be it rural subdivision, saline seep, or coal development, has yet reached the point where it is irreversible.

Because different patterns of land use over the years will have significantly different impacts on the local and regional community, the public is becoming more and more aware of the disadvantages of letting individuals implicitly or explicitly do the planning for current and future generations. When we look at other western states — Arizona, California, and Colorado — we can see what has taken place in the absence of effective public involvement in land use decision making. Today, pressures on Montana land lead us to the conclusion that now, more than ever, there is a valid public interest in private decisions regarding land use. Agreeing that we want, for example, to avoid repeating some of Colorado's mistakes but believing that it won't happen here or that we have plenty of time to devise some way of avoiding them, is not a very wise approach. Likewise, "business-as-usual" will not suffice. To do nothing would perpetuate practices proven to produce untoward consequences. Similarly, failure to acknowledge the legitimacy of public interest in land use decisions will produce ineffective programs.

The right to property by individuals is a basic one, guaranteed by the U.S. Constitution and particularly cherished by many Montanans. Like other rights, this one is not absolute; like other rights, its exercise entails considerable responsibilities. The individual right of property does not mean that the owner may do anything at all with the land.

The future of Montana depends on taking positive, public action now. Maintaining an environment capable of sustaining itself and providing a high quality of life for its citizens — provided today by the agricultural economy — is the responsibility of the state.

NATIONAL GROWTH AND THE ROCKY MOUNTAIN WEST

Depending on the national fertility rate, the nation's population is expected to jump from 209 million in 1973 to between 265 and 300 million by the year 2000.

The Western Region* of the U.S. Bureau of the Census is the only census bureau region whose share of the total U.S. population is projected to grow over the next 20 years if the interstate migration trends established before 1970 continue. Its share is expected to grow from 17.2 percent in 1970 to 19.1 percent in 1990.

The population of the mountain sub-region,** including Montana, is expected to increase from 8.28 million in 1970 to 10.89 million in 1990, or from 4.1 percent to 4.3 percent of the U.S. population (8).

Economists generally predict increasing discretionary income and leisure time over the next 20 to 30 years. Forecasting economic trends is always hazardous, however, for the future depends on many variables which seem to be in constant flux: international political and economic trends; the increasing and sometimes artificial scarcity of minerals and fossil fuels; availability of investment capital; governmental policy, and the supply of food and agricultural commodities. Recent high inflation rates and successive quarterly drops in the Gross National Product (GNP) have substantially tempered the short-term prospects of general economic growth, but few really expect the long-term future to hold apocalyptic economic problems.

What will be the impact of national trends on Montana's future? Three key trends will determine, in large part, Montana's future economy. First, demand for agricultural products will continue to outstrip world supply and will create an increasing need for Montana's agricultural production. Second, growing national demand for energy and minerals will continue to put pressure on Montana's resources. Third, Montana's unsurpassed physical appeal will remain in demand for recreational, second home and retirement purposes.

None of these trends appears transitory. Each promises to continue into the foreseeable future, placing ever larger demands on Montana's land and resource base, either for increased development or more intensive use. Requirements to satisfy the demands can conflict with one another, spawning difficult questions that have profound ramifications: Water for energy production or food production? Land for farms or subdivisions? Recreational resources for hunting, backpacking, camping and photography, or for all-season resorts, power lines, condominiums and aerial trams? Someday these conflicts will be resolved, but on whose terms? Who will decide? If the people of Montana do not debate and decide them through their elected representatives then the special interests will do it for them.

Some of these conflicts are upon us today. Aggregate water demand for industrial and agricultural purposes in the Yellowstone Basin exceeds prudent estimates of supply. Meeting the demand probably would require construction of large reservoirs, the flooding of many valleys and permanent changes in large regions and the permanent loss of miles of free flowing rivers. So far, this threat to the land has been stayed by a moratorium on large water diversions in the basin, but crucial decisions remain ahead.

Many impacts of Montana's growth are more subtle and widespread, such as the quiet blur of subdivision across thousands of acres of range and farmland. As population grows so will the demands and the potential for conflict. Irreversible commitments of Montana's land are being made today, and more commitments will come tomorrow. Accelerating Montana's population growth would spur the pace of change and compound the chances for damage.

Population Projections for Montana

Between 1960 and 1970 Montana's population increased 2.9 percent, from 674,767 to 694,409. In mid-1974, Montana's estimated population was 735,000, or 5.8 percent larger than in mid-1970, according to the latest federal census estimates (8). Earlier estimates of county population changes from 1970 to 1973, done by the University of Montana Bureau of Business and Economic Research in cooperation with the U.S. Bureau of Census, indicate growth of a similar magnitude. Nine counties had a 10 percent or greater increase. Only one county, Powder River, had a decrease greater than 10 percent (See Table 1).

The minimal population growth of the decade of the 1960s appears to be a thing of the past, notwithstanding recent accounts of a 7.8 percent drop in Montana's population by 1990 projected by the census bureau. This projection was the result of an analysis incorporating effects on Montana of the lowest projected national fertility rates (10).

Projecting Montana's 5.8 percent growth since 1970 yields a population of about 800,000 in 1980, a 15.1 percent increase during this decade. This is over five times the growth during the 1960s, and equal to Montana's population increase from 1950 to 1970.

In addition, the potential impacts of energy development on population in eastern Montana are staggering. Although difficult to forecast with any precision, it has been estimated that anywhere from 10,000 to 50,000 new primary and derivative jobs could be generated (11).

The primary determinant of population growth trends in Montana is in- and out-migration. The 1960s experienced out-migration. Preliminary estimates for 1970-1973 indicate that Montana is now experiencing a net annual in-migration of 1.4 percent.

*Montana, Idaho, Wyoming, Colorado, New Mexico, Arizona, Utah, Nevada, Washington, Oregon and California.

**All of the Western Region except Washington, Oregon and California.

TABLE 1 (9)

Estimates of the Population of Montana Counties (in 1970, 1972 and 1973)

County	July 1, 1973[a]	July 1, 1972	April 1, 1970[b]	Change, 1970 to 1973		Components of Change, 1970 to 1973[c]			
				Number	Percent	Births	Deaths	Net Migration Number	Net Migration Percent
Montana, total	721,000	716,000	694,409	26,000	3.8	39,000	22,000	9,600	1.4
Beaverhead	8,000	8,200	8,187	-200	-1.9	400	300	-200	-3.0
Big Horn	11,100	10,300	10,057	1,000	10.3	700	300	600	6.1
Blain	6,800	6,700	6,727	(z)	0.6	400	300	-100	-1.8
Broadwater	2,700	2,600	2,526	200	8.2	100	100	100	5.5
Carbon	7,800	7,500	7,080	700	9.7	300	400	800	11.1
Carter	1,800	1,900	1,956	-100	-5.9	100	100	-100	-6.9
Cascade	83,700	84,200	81,804	1,900	2.3	5,100	2,200	1,100	1.3
Chouteau	5,900	6,300	6,473	-500	-8.2	300	200	-600	-9.4
Custer	11,300	11,800	12,174	-800	-6.7	600	400	-1,000	8.2
Daniels	3,100	3,100	3,083	(z)	0.5	100	200	(z)	1.2
Dawson	10,900	11,000	11,269	-300	-2.9	700	300	-700	-6.3
Deer Lodge	15,800	15,900	15,652	100	0.8	800	600	-100	-0.5
Fallon	3,800	3,900	4,050	-200	-5.7	200	100	-300	-8.5
Fergus	12,700	12,600	12,611	100	0.8	600	500	(z)	0.2
Flathead	40,600	41,000	39,460	1,100	2.9	2,000	1,300	400	1.1
Gallatin	35,800	35,000	32,505	3,300	10.0	1,700	800	2,300	6.9
Garfield	1,800	1,700	1,796	(z)	-0.7	100	100	(z)	-1.9
Glacier	11,400	10,900	10,783	600	5.4	700	400	200	1.8
Golden Valley	1,000	900	931	(z)	3.4	(z)	(z)	(z)	1.6
Granite	2,600	2,600	2,737	-100	-4.4	200	100	-200	-6.6
Hill	17,600	17,900	17,358	300	1.5	1,000	500	-300	-1.6
Jefferson	6,700	6,200	5,238	1,500	28.3	300	200	1,400	26.3
Judith Basin	2,600	2,600	2,667	(z)	-1.0	100	100	-100	-2.6
Lake	15,600	15,400	14,445	1,200	8.2	800	600	900	6.6
Lewis and Clark	35,500	34,800	33,281	2,200	6.6	1,900	1,100	1,400	4.2
Liberty	2,500	2,400	2,359	100	4.0	100	100	100	2.8
Lincoln	17,700	17,900	18,063	-400	-2.2	1,100	400	-1,100	-6.2
McCone	2,800	2,700	2,875	-100	-1.9	200	100	-100	-3.9
Madison	5,600	5,600	5,014	600	11.2	200	200	600	11.0
Meagher	2,200	2,200	2,122	100	3.8	100	100	100	3.5
Mineral	3,300	3,200	2,958	400	12.7	200	100	300	9.5
Missoula	61,200	60,700	58,263	3,000	5.1	3,300	1,500	1,200	2.1
Musselshell	4,100	3,900	3,734	400	10.0	200	200	400	10.3
Park[d]	11,800	11,800	11,261	600	5.2	500	500	600	5.1
Petroleum	600	700	675	(z)	-4.3	(z)	(z)	(z)	-4.9
Phillips	5,200	5,200	5,386	-200	-3.8	300	200	-300	-5.4
Pondera	7,200	7,300	6,611	600	9.6	400	200	500	7.5
Powder River	2,100	2,500	2,862	-800	-27.0	100	100	-800	-29.2
Powell	6,800	6,900	6,660	200	2.4	300	200	(z)	0.6
Prairie	2,000	1,800	1,752	200	12.6	100	100	200	10.7
Ravalli	16,900	16,100	14,409	2,500	17.2	700	600	2,400	16.5
Richland	9,700	9,700	9,837	-100	-1.2	600	300	-400	-3.8
Roosevelt	10,000	10,600	10,365	-300	-3.3	800	400	-700	-6.4
Rosebud	6,600	6,400	6,032	600	9.2	500	200	300	4.3
Sanders	7,400	7,500	7,093	300	4.8	400	300	200	3.4
Sheridan	5,500	5,800	5,779	-200	-4.1	200	200	-200	-4.2
Silver Bow	42,200	42,100	41,981	200	0.6	2,500	1,900	-300	-0.7
Stillwater	4,800	5,000	4,632	200	4.4	200	200	200	3.9
Sweet Grass	3,000	3,100	2,980	(z)	0.5	200	100	(z)	-0.6
Teton	6,600	6,500	6,116	500	7.5	300	200	400	6.5
Toole	5,500	5,700	5,839	-300	-5.5	300	200	-400	-6.9
Treasure	1,100	1,200	1,069	(z)	1.0	100	(z)	(z)	-2.8
Valley	13,300	111,900	11,471	1,800	16.1	700	300	1,500	13.2
Wheatland	2,500	2,300	2,529	-100	-2.8	100	100	-100	-3.7
Wibaux	1,400	1,300	1,465	-100	-7.3	100	100	-100	-8.6
Yellowstone	92,300	91,000	87,367	4,900	5.6	5,000	2,200	2,100	2.4

Notes: The state estimates are shown to the nearest thousand and county estimates are rounded to the nearest hundred. Net migration is the difference between net population change and natural increase (excess of births over deaths); a negative figure denotes net outmigration.

Z denotes less than 50 or less than 0.05 percent.

[a] Provisional.

[b] Census.

[c] Births and deaths are based on reported vital statistics from April 1, 1970, to December 31, 1972, with extrapolations to June 30, 1973.

[d] Yellowstone National Park is included in Park County.

The 15.1 percent increase projected for 1970 to 1980 therefore may not be excessive. The Department of Intergovernmental Relations has projected 1975 and 1980 population estimates based on a 50 percent increase in net 1970 and 1980 migration. These IGR estimates give a 1975 estimate of roughly 741,000 persons and a 1980 figure of 807,000. The Department of Natural Resources (DNR) also has generated some low, medium, and high population forecasts through the year 2020, based on an analysis of many recent population and employment estimates. Their medium forecast for 1980 is 747,000 which, if current trends prevail, will be surpassed by 1975-'76. DNR's high forecast for 1980 is 908,000, which assumes there will be intensive energy development in southeastern Montana. Most likely our population in 1980 will fall somewhere between these last two estimates: near 800,000 persons.

If the present trend continues through the end of the century Montana will pass the million mark by the year 2000 — a 43 percent increase over our 1970 population. Population forecasting is fraught with assumptions vulnerable to changing circumstances. But prudence demands that in the face of potential population increases of this magnitude, Montanans begin now to protect the resource bases which lend security to the state's economy and offer high quality life styles to her citizens.

LAND USE TRENDS IN MONTANA

It has been said in many different ways that there is a special and pervasive closeness between the people and the land in Montana. Montana's huge spaces seem to sustain this closeness. But Montana's land is in finite supply, comprising 93,217,040 acres or 145,651 square miles (12). The quantity of "space" is not so easily measured, but its quantity and quality are determined by the use Montanans make of their finite land.

Table 2 presents the results of a 1967 land use inventory of 70 percent of Montana. Most of the area inventoried is non-federal land. The federal government controls about 26,570,000 acres of the state.

Land ownership in Montana is divided among the private sector, federal and state governments and Indian reservations. Federal land management agencies administer 29.6 percent of the state's total area while state agencies and institutions administer 6.5 percent. Indian reservations encompass 6.9 percent, and the remaining 57 percent is held privately (13).

TABLE 2 (13)

Land Use	Acres (thousands)
Irrigated cropland	1,648
Non-irrigated cropland	13,341
Pasture	1,263
Range	41,175
Irrigated native grassland	568
Forest and woodland	7,004
Inland water	897
Urban and built-up	818
Other*	520

*Other land uses include farmsteads, private roads, feedlots, ditch banks, rural non-farm residences, mine wastes, borrow pits, and investment tracts.

Many forces are causing changes in the use of Montana's land. Saline seep and coal development are among the easily identified ones. Increasing demand for Montana's agricultural commodities, mineral and forest resources and the growth of Montana's manufacturing and service industries will continue to provide jobs that will enable more people to work and live here. Spreading affluence will allow many more Montanans, and non-Montanans, to realize their dreams for homes in the country: on the lakeshore, in the mountain valley, near the creek. The cumulative effects of these and other more subtle forces on the use of land and on space are not so readily identifiable.

Montana's cities, by Colorado or California standards, are just beginning to show signs of suburban sprawl — the blight so familiar to many new residents arriving to escape metropolitan problems. As will be shown in this study, perhaps 510,000 acres of Montana lying outside cities and towns have been subdivided into 40-acre or smaller parcels and the amount of subdivided land could be growing by 20 percent per year. Yet as many as 60 percent of the existing subdivided lots may not have anything built on them. Unfortunately, the land being subdivided today includes some of the state's best agricultural land — land that will be needed tomorrow to sustain Montana's economic base.

Suburban Sprawl

During the 1960s Montana's overall population increased slightly while the rural farm and rural non-farm population generally decreased. The growth that occurred, occurred in the areas around the cities of western Montana and Billings.

Table 3 supports the contention that most of the growth of the 1960s occurred in urban growth centers, or "urban areas," with a 1970 population of 2,000 or more. Urban growth centers include a core city or town and part of one or more surrounding counties (14). During the 1960s, the population of Montana's urban areas grew 16 percent (Column 10, Table 3). However, on the average, the population of core cities and towns grew only 3 percent and the population of the surrounding counties grew only 5 percent. In the 10 fastest growing areas,* core cities and towns grew 19 percent, surrounding counties grew 20 percent while the areas themselves grew 43 percent. Clearly, Montana's urban areas are growing faster than the cities within them or the counties that contain them. In other words, Montana's cities are beginning to sprawl.

Table 4 presents additional evidence of sprawl based on 1973 estimates of net migration into the counties adjacent to five of Montana's most populous counties. Net migration is the difference between natural increase (excess of births over deaths) and total population increase.

*Billings, Missoula, Helena, Bozeman, Libby, Whitefish, Dillon, Sidney, Columbia Falls and Philipsburg.

TABLE 3*

Montana Urban Growth Centers

	Service Center Type[a]	Growth Class a 1960-70	1970			1960			Change 1960-1970						Urban Area Projections 1970-1985		
			Urban Area a Population	Incorporated b Population	County b Population	Urban Area a Population	Incorporated b Population	County b Population	Urban Area		Incorporated		County		1985 Estimate a (000)	Population Change a (000)	Percent Change a
									Population	Percent Change	Population	Percent Change	Population	Percent Change			
Billings	M	VF	76.4	61,581	87,367	57.5	52,851	79,016	+18.9	+ 33	8,730	+16.5	8,351	+10.6	116.4	+ 40.0	+52
Great Falls	M	F	73.1	60,091	81,804	64.1	55,244	73,418	+ 9.0	+ 14	4,847	+ 8.8	8,386	+11.4	95.0	+ 21.9	+30
Missoula	M	VF	52.3	29,497	58,263	37.2	27,090	44,663	+15.1	+ 41	2,407	+ 8.9	13,600	+30.5	86.6	+ 34.3	+66
Butte	R	D	41.4	23,368	41,983	44.4	27,877	46,454	- 3.0	- 7	-4,509	-16.2	-4,473	- 9.6	39.8	- 1.6	- 4
Helena	R	VF	31.5	22,730	33,281	21.7	20,227	28,006	+ 9.8	+ 45	2,503	+12.4	5,275	+18.8	45.3	+ 13.8	+44
Bozeman	R	VF	22.7	18,570	32,505	16.4	13,361	26,045	+ 6.3	+ 38	5,309	+39.7	6,460	+24.8	35.2	+ 12.5	+55
Kalispell	R	M	19.9	10,526	39,460	17.7	10,151	32,965	+ 2.2	+ 12	375	+ 3.7	6,495	+19.7	25.3	+ 5.4	+27
Havre	R	D	12.4	10,558	17,358	12.5	10,740	18,653	- 0.1	- 1	- 182	- 1.7	-1,295	- 6.9	13.8	+ 1.4	+11
Anaconda	C	D	12.3	9,771	15,652	14.6	12,054	18,640	- 2.3	- 16	-2,283	-18.9	-2,988	-16.0	10.3	- 2.0	-16
Libby	C	VF	11.9	3,286	18,063	6.9	2,828	12,537	+ 4.9	+ 71	458	+16.2	5,526	+44.1	13.4	+ 1.6	+14
Miles City	C	M	10.9	9,023	12,174	10.2	9,665	13,227	+ 0.7	+ 7	- 642	- 6.6	-1,053	- 8.0	12.8	+ 1.9	+17
Glendive	C	S	9.0	6,305	11,269	8.9	7,058	12,314	+ 0.1	+ 1	- 753	-10.7	-1,045	- 8.5	10.5	+ 1.5	+17
Livingston	C	D	8.5	6,883	11,197	8.7	8,229	13,168	- 0.2	- 2	-1,346	-16.4	-1,971	-15.0	7.0	+ 0.5	+ 6
Lewistown	C	S	8.0	6,437	12,631	7.9	7,408	14,018	+ 0.1	+ 1	- 971	-13.1	-1,407	-10.0	8.8	+ 0.8	+10
Whitefish	F	VF	6.8	3,249	39,460	3.0	2,965	32,965	+ 3.8	+127	284	+13.0	6,495	+19.7	10.9	+ 4.1	+60
Glasgow	C	D	6.4	4,700	11,471	9.9	6,398	17,080	- 3.5	- 35	-1,698	- 26.5	-5,609	-32.8	6.6	+ 0.2	+ 3
Hamilton	C	VF	6.2	2,499	14,409	3.6	2,475	12,341	+ 2.6	+ 72	24	+ 1.0	2,068	+16.8	9.6	+ 3.4	+55
Dillon	C	VF	5.9	4,548	8,187	3.7	3,690	7,194	+ 2.2	+ 59	858	+23.3	993	+13.8	7.2	+ 1.3	+22
Sidney	C	S	5.4	4,543	9,837	5.2	4,564	10,504	+ 0.2	+ 4	- 21	- 0.5	- 667	- 6.3	6.1	+ 0.7	+13
Deer Lodge	F	S	5.0	4,306	6,660	4.7	4,681	7,002	+ 0.3	+ 6	- 375	- 8.0	- 342	- 4.9	6.2	+ 1.2	+24
Columbia Falls	F	VF	4.7	2,652	39,460	2.5	2,132	32,965	+ 2.2	+ 88	520	+24.4	6,495	+19.7	9.0	+ 4.3	+91
Cut Bank	C	S	4.6	4,004	10,783	4.5	4,539	11,563	+ 0.1	+ 2	- 535	-11.8	- 782	- 6.8	5.5	+ 0.9	+20
Laurel	F	D	4.6	4,454	87,367	4.7	4,601	79,016	- 0.1	- 2	- 147	- 3.2	8,351	+10.6	6.2	+ 1.6	+35
Polson	F	M	4.1	2,464	14,445	3.7	2,314	13,104	+ 0.4	+ 11	150	+ 6.5	1,341	+10.2	5.4	+ 1.3	+32
Hardin	C	VF	3.9	2,733	10,057	2.8	2,789	10,007	+ 1.1	+ 39	- 56	- 2.0	50	+ 0.5	5.3	+ 1.4	+36
Wolf Point	C	S	3.6	3,095	10,363	3.6	3,585	11,731	- 0	0	-490	-13.7	-1,368	-11.6	4.1	+ 0.3	+14
Shelby	F	D	3.2	3,111	5,839	4.0	4,017	7,904	- 0.8	- 20	- 906	-22.6	-2,065	-26.1	3.5	+ 0.3	+ 9
Conrad	C	M	3.0	2,770	6,611	2.7	2,665	7,653	+ 0.3	+ 11	105	+ 3.9	- 1,042	-13.6	4.0	+ 1.0	+33
Baker	F	F	2.9	2,584	4,050	2.5	2,365	3,997	+ 0.4	+ 16	219	+ 9.3	53	+ 1.3	3.7	+ 0.8	+28
Poplar	I	D	2.7	1,389	10,363	3.2	1,565	11,731	- 0.5	- 16	- 176	-11.2	-1,368	-11.6	2.7	+ 0	+ 0
Plentywood	I	M	2.6	2,381	5,779	2.3	2,121	6,458	+ 0.3	+ 13	260	+12.3	- 679	-10.5	3.1	+ 0.5	+19
Malta	I	D	2.5	2,195	5,386	2.7	2,239	6,027	- 0.2	- 7	- 44	- 2.0	- 641	-10.6	2.2	- 0.3	-12
Ronan	I	F	2.5	1,347	14,445	2.1	1,334	13,104	+ 0.4	+ 19	13	+ 1.0	1,341	+10.2	3.6	+ 1.1	+44
Philipsburg	F	VF	2.4	1,128	2,737	1.3	1,107	3,014	+ 1.1	+ 85	21	+ 1.9	- 277	- 9.2	3.1	+ 0.7	+29
Eureka	I	D	2.3	1,195	10,063	2.6	1,229	12,537	- 0.3	- 12	- 34	- 2.8	5,526	+44.1	2.5	+ 0.2	+ 9
Roundup	F	D	2.3	2,116	3,734	3.1	2,842	4,898	- 0.8	- 26	- 726	-25.5	-1,164	-23.8	2.6	+ 0.3	+13
Thompson Falls	P	S	2.3	1,356	7,093	2.2	1,274	6,880	+ 0.1	+ 5	82	+ 6.4	213	+ 3.1	2.9	+ 0.6	+26
Troy	M	M	2.3	1,046	10,063	2.1	855	12,537	+ 0.2	+ 10	191	+22.3	5,526	+44.1	2.8	+ 0.5	+22
Chinook	F	D	2.2	1,813	6,727	2.6	2,326	8,093	- 0.4	- 15	- 513	-22.1	-1,364	-16.9	2.1	- 0.1	- 5
Choteau	F	S	2.2	1,586	6,116	2.2	1,966	7,295	0	0	- 380	-19.3	-1,179	-16.2	2.5	+ 0.3	+14
Belgrade	P	M	2.1	1,307	32,505	1.9	1,057	26,045	+ 0.2	+ 11	250	+23.7	6,460	+24.8	3.2	+ 1.1	+52
Browning	F	D	2.0	1,700	10,783	2.3	2,011	11,563	- 0.3	- 13	- 311	-15.5	- 782	- 6.8	1.8	- 0.2	-10
Forsyth	F	D	2.0	1,673	6,032	2.1	2,032	6,187	- 0.1	- 5	- 159	- 7.8	- 155	- 2.5	2.1	+ 0.1	+ 5
Harlem	P	D	2.0	1,094	6,727	2.6	1,267	8,093	- 0.6	- 23	- 173	-13.7	-1,364	-16.9	1.9	- 0.1	- 5
TOTAL			494.9	354,064	629,303	425.1	343,788	602,046	+69.8	+ 16	+10,276	+ 3.0	+27,257	+5.0	652.00	+157.1	+31

SOURCES:

a. Upper Midwest Council **Recent Trends/Future Prospects. A Look at Upper Midwest Population Changes.** (Minneapolis. The Council, 1973)

b. U. S Department of Commerce Bureau of Census, **1970 Census of Population: Number of Inhabitants: Montana** (Washington. U.S. Government Printing Office, 1970)

NOTE: Great Falls urban area population for 1970 includes Malmstrom Air Base, Population 8,374.

*Compiled by the Montana Commission on Local Government, 1974

URBAN SERVICE CENTERS

H—Hamlet
P—Partial Convenience Center
F—Full Convenience Center
C—Community Service Center

R—Regional Service Center
M—Metropolitan Service Center
N—National Service Center
A—Military Base

1960-1970 GROWTH CLASSES

VF—Very Fast	27% +	Growth rate more than twice U.S. growth rate
F—Fast	14-26%	Growth rate more than U.S growth rate
M—Moderate	7-13%	Growth rate more than Upper Midwest but less than U.S.
S—Slow	0-6%	Growth rate less than Upper Midwest
D—Decline	0%	Loss in population

TABLE 4

Inter-County Effects of Sprawl

County	Net Migration (%)	Adjacent County(ies)	Net Migration (%)
Lewis & Clark	+4.2	Jefferson	+26.3
		Broadwater	+ 5.5
Missoula	+2.1	Ravalli	+16.5
		Mineral	+ 9.5
Yellowstone	+2.4	Musselshell	+10.3
		Big Horn	+ 6.1
Cascade	-1.3	Teton	+ 6.5
Gallatin	+6.9	Madison	+11.0

Subdivision Activity

Until recently the only available information on statewide subdivision activity were the "suburban tract" classification data generated by the Board of Equalization (now the Department of Revenue), for inclusion in its biennial reports. For a number of reasons this information has inherent inaccuracies of a conservative nature but of undetermined magnitude:

1. There is no definitive definition of a suburban tract. The data, gathered by county assessors, are subject to time, effort, and interest constraints, as well as differing interpretations of the term suburban tract.

2. Generally speaking, lots greater than 5 acres are not necessarily included as suburban tract by county appraisers and lots greater than 40 acres are seldom included (15).

3. Not all real estate transactions are recorded by the county clerk and recorder. There is currently no legal requirement to record a deed for those real estate transactions falling outside the scope of subdivision as defined by the Montana Subdivision and Platting Act, enacted in 1973 and amended in 1974. Also, transactions on a contract-for-deed basis, tend not to be recorded at the time of sale. A 1973 state government inventory of subdivision activity in Ravalli County found 62 percent of current real estate transactions to be by contracts for deed, 73 percent of which were not recorded (16). This inventory data suggests that 45 percent of transactions in rural land never have been recorded.

During the summer of 1974, personnel from the Environmental Information Center* (EIC) researched the records of plats and of certificates of survey in 35 county courthouses. Excluded from the EIC inventory were subdivisions within cities and towns and parcels greater than 40 acres in size (see Appendix A for inventory methodology). Combining the EIC results with the suburban tract data and the results of the Ravalli County inventory provides an estimate of statewide subdivision activity.

Table 5 compares the EIC results to the Department of Revenue's suburban tract figures.

TABLE 5

Acres of Subdivision by County

County	Dept. of Revenue March, 1973 (17)	EIC Summer, 1974 (18)
Beaverhead	1,887	1,867
Big Horn	228	662
Broadwater	86	151
Carbon	2,325	2,621
Cascade	4,704	8,460
Custer	768	17,876
Deer Lodge	2,769	1,832
Fergus	1,142	1,460
Flathead	100,079	56,442
Gallatin	15,573	19,999
Glacier	1,909	635
Golden Valley	1,180	1,204
Granite	5,415	3,888
Jefferson	2,125	2,866
Judith Basin	193	1,460
Lake	19,977	9,880
Lewis and Clark	14,406	10,659
Lincoln	8,163	2,994
Madison	2,187	13,475
Meagher	870	1,402
Mineral	1,004	2,136
Missoula	33,800	40,816
Musselshell	-0-	33,031
Park	5,454	8,052
Pondera	776	558
Powell	12,205	6,928
Ravalli	19,239	50,267
Rosebud	342	454
Sanders	-0-	1,398
Silver Bow	-0-	2,129
Stillwater	6,029	8,713
Sweet Grass	380	703
Teton	651	353
Toole	702	2,081
Yellowstone	17,243	18,647
Total Acres Subdivided	**283,811**	**336,099**

Some obvious discrepancies between the figures can be explained easily:

1. The suburban tract classification also includes orchards. This may explain the substantially larger Department of Revenue figures in Flathead, Lake, and Lincoln counties.

2. In Custer County, Sundial Estates and Ranchettes encompasses 17,000 acres. The land had not been platted or filed; however 40-acre tracts were being sold.

3. In Madison County, Shining Mountains has subdivided 10,784 acres; 5,320 were recorded after March, 1973.

4. In Musselshell County, R.L.C., Inc. has subdivided 15,440 acres since March, 1973. Reforestation, Inc. has subdivided 10,306 acres; the dates were not recorded. Timber Tracts, Inc. holds 3,948 acres.

*The Environmental Information Center is a non-profit, public interest group devoted to environmental education. The EIC's main office is in Helena.

The Department of Revenue figures exceed those of the EIC by 1,000 acres or more in four counties; Glacier, Granite, Lewis and Clark, and Powell. Adding these differences to the EIC total of 334,018 acres reveals that, as of summer, 1974, there are at least 347,924 subdivided acres in the 35 counties.

According to the Department of Revenue these 35 counties contain 98 percent of the subdivided acreage statewide. If the 347,924 acres include 98 percent of all subdivisions, then 355,400 acres have been subdivided statewide. But this figure probably understates the actual total considerably because many real estate sales are on a contract-for-deed basis. As stated earlier, about 45 percent of contracts for deed in Ravalli County were not recorded. Conservatively assuming that 30 percent of subdivided acreage statewide has not been recorded, then about 510,000 acres lying outside cities and towns may have been subdivided into parcels less than 40 acres.

For comparison, 510,000 acres is almost 1 percent of the roughly 60 million acres of private land in Montana. It is 60 percent of the acreage of existing urban (built-up) areas and it equals 1 acre for every 1.5 persons residing in the state in 1974.

From 1963 to 1974 the acreage in suburban tracts increased by an average of 23 percent per year. From March 1972 to March 1973 suburban tract acreage increased 28.3 percent (See Table 6). Projecting the 23 percent average annual increase, Montana's subdivided acreage would increase from the estimated 510,000 acres of today to roughly 4.9 million acres by 1985, exceeding 8 percent of the private land in the state. Previously discussed deficiencies in the suburban tract data may have resulted in overestimating the rate of increase, but even a conservative 10 percent annual increase would result in 1.4 million subdivided acres by 1985.

TABLE 6 (17, 19, 20)

Year	Acreage in Agricultural Land	Acreage in Suburban Tract
1963	53,416,723	36,501
1972	52,037,832	225,886
1973	51,773,311	289,876
	Decrease	*Increase*
1963-1973	1,643,412	253,375
1972-1973	264,521	63,990

Speculation in Land

The subdivision of agricultural land is all but irreversible. The dispersal of ownership can make it too costly to combine parcels into economically viable agricultural units or into units for other large-scale developments. As cities continue to expand some conversion of land to urban uses is inevitable and in the public interest. But the subdivision of land for which there is little demand or for speculative purposes is a long-term public loss.

Data compiled for Flathead County indicate that, as of May, 1973, only 41 percent of all lots created through subdivision since the county was incorporated (1893) had been built upon and that 27 percent of the lots created had never even been sold (21).

A 1974 U.S. Forest Service study of 11 subdivisions developed in the West Yellowstone area since 1966 reports that only 10 percent of the lots created had been built upon and that 68 percent of them had not been sold (22).

Little additional information on land speculation is available. However, the 80-year period covered by the Flathead County sample lends it substantial significance. If similar amounts of subdivided land throughout the state are unsold and undeveloped, then perhaps 306,000 acres have been subdivided without justification of any housing need.

Conversion of Agricultural Land

U.S. Department of Agriculture data released in January 1974 indicate that there has been a 4.7 million acre decrease in acreage in its "land in farms" category during the last decade in Montana (23). State Department of Revenue figures suggest that 1,643,412 acres of land were removed from agricultural use during the same period. Land is taken from agriculture for a number of uses: Conversion to residential or second home use, annexed by cities or towns, conversion to industrial or commercial uses, mining, for reservoirs and highways. Land removed from agriculture for these uses usually is taken forever.

Of the Department of Revenue's estimate of 1.6 million acre decline in agricultural land, 16 percent (264,521 acres) was removed from agriculture during the 1972-'73 farm year alone. At this rate there would be 4.5 million fewer agricultural acres in 1990 than in 1973. Table 6 documents these changes in the use of land.

Table 7 shows acreage changes in the three major classes of agricultural land: irrigated, non-irrigated, and grazing. Interestingly, irrigated land shows the greatest proportional decrease, 7.7 percent. However, one reason for the decrease may be that acres placed in irrigation in 1963 proved economically unsuccessful and were removed. This explanation is supported by the fact that irrigated acreage in 1966 was substantially less than that in 1963. Non-irrigated and grazing land had roughly the same acreage decreases, although the percentage decline in non-irrigated acreage was three times that for grazing.

During the last year acreage in irrigated and non-irrigated farm uses has increased. Probably the increase is due to new irrigation projects and the cultivation of idle land in response to increased demand and prices for agricultural commodities. Grazing land decreased substantially in 1972-'73 mainly through conversion to non-irrigated cropland.

TABLE 7 (19, 24, 20, 17)

Acres in Agricultural Land Classification

Year	Irrigated	Non-Irrigated	Grazing
1963	1,477,428	12,622,753	38,807,403
1966	1,363,159		
1972	1,362,485	11,514,455	38,330,977
1973	1,363,171	11,870,777	37,976,082

Change in Acreage by Land Class

Year	Irrigated	%	Non-Irrigated	%	Grazing	%
1963-1973	-114,257	(-7.7)	-751,976	(-6)	-831,321	(-2.1)
1966-1973	+21	(-0-)				

The data on land conversion also indicate the dual effects of subdivision activity on agriculture. Not only is the acreage available to agriculture reduced, but the land taken out of production tends to be of better than average productivity.

Table 8 shows changes in acreage by agricultural land class for the seven Montana counties* having the most land classified in suburban tracts. During the last decade there have been 15.3 percent and 15.2 percent decreases in non-irrigated and grazing acreages, respectively, in these counties. These are significantly greater than the rates of change for the state as a whole, 6 percent and 2.1 percent respectively. The change in irrigated acreage in these counties has been negligible. The number of acres irrigated, however, is heavily dependent on single factors such as a new irrigation project.

TABLE 8 (19, 24, 20, 17)

Change in 7-County Acreage by Class

Year	Irrigated	%	Non-Irrigated	%	Grazing	%
1963-1973			-97-098	(15.3)	-615,157	(-15.2)
1966-1973	-3707	(-.9)				
1972-1973	-4929*	(-1.1)	- 9,222	(- 1.5)	- 80,545	(- 2.0)

*Excluding Lewis and Clark County. Lewis and Clark County had a significant increase in irrigated acreage in 1972-73 due to recently complete irrigation projects. Including this County would change the figure to +3828.

The assessed value per acre of agricultural land is an indicator of the productivity of the land. The assessed value is derived from estimates of the land's yield and is not affected by inflation. Table 9 compares the average assessed value per acre in the seven counties with that of the state as a whole.

TABLE 9 (19, 17)

Average Assessed Value per Acre (Dollars)

	Irrigated	Non-Irrigated	Grazing
1963			
7 Counties	39.13	20.21	3.60
State	33.03	12.43	3.18
1973			
7 Counties	33.55	22.78	3.74
State	32.92	16.42	3.39

It is apparent, that to the extent average assessed value per acre reflects the productivity of land, the seven counties with the greatest subdivision activity generally include land of better than average productivity. The superiority of the land in these counties is most apparent for non-irrigated land.

TABLE 10 (19,17)

Percent Change in Assessed Value Per Acre

1963-1973	Irrigated	Non-Irrigated	Grazing
7 Counties	-14.3	+12.7	+3.9
State	- .3	+32.1	+6.3

Table 10 indicates that the average assessed value per acre, and thus the average productivity of all irrigated land in the seven counties, dropped rather sharply from 1963 to 1973 while the average assessed values of the state's irrigated land in general remained about the same. The decline in average assessed value per acre indicates that the irrigated land going out of production in the seven counties is of better than average production for the counties. Because the seven counties are of generally better than average productivity to begin with, the land going out of production in these counties therefore is some of Montana's best agricultural land.

Information used in this discussion has been abstracted from *Biennial Reports* of the Montana Board of Equalization. The data are generated by county assessor's officers and are subject to the inaccuracies previously discussed. However, in aggregate these statistics can be assumed reasonably sound.

*Flathead, Gallatin, Lake, Lewis and Clark, Missoula, Ravalli and Yellowstone.

LAND CONVERSION AND ECONOMICS: THE COSTS OF GROWTH

Decisions committing land, often irreversibly, to a variety of uses are made daily in Montana. In many case, the decisions are determined by conventional profit and loss accounting, personal income accounting, or traditional cost and benefit analysis from the perspective of an individual agency. Generally, decisions are being made on a basis of what pays off for the decision maker. This is a popular way of doing things and has received little scrutiny. By definition however, this kind of decision making normally excludes consideration of the public impacts (externalities) it causes. The perspective of the individual usually is limited to a single purpose analysis such as return on investment, economic gain, point A to point B transportation networks, engineering feasibility, and so on.

No doubt these are valid concerns for the single decision making entity. However, decisions which affect land use usually have impacts which extend to the wider community. A decision to develop land either for residential or industrial purposes has many impacts on the local community, including:

1. A rise in taxable valuations in the vicinity of the development, which means higher taxes on nearby residents and increased revenues to the government having jurisdiction.

2. Increased traffic and congestion on nearby roads and in shopping areas.

3. Increased enrollment in the public school system.

4. Increased demand for public services, such as roads and road maintenance, libraries, police and fire protection, water supply and sewage and solid waste disposal.

5. The loss of previous land uses and the values they provided.

6. A temporary increase in development and construction activity.

7. In the case of industrial development, a peak construction cycle and increased and heavier use of local roadways and public utilities, all producing complicated effects on the local economy.

8. Perhaps a transfer in local retail trade income if the new families moving into the area are from another part of town, or a net increase in community income if they are mostly from outside the local area.

9. An irreversible commitment of land that will influence local growth patterns. Alternative uses of the land may be foreclosed. The development may have contributed greater benefits to the total community if it had used land resources elsewhere.

Traditional economic analysis, market economics, concentrates on the payoff to the individual or decision making unit. This ecnomic concept of focusing on payoff also can be applied by the total community through a modified cost and benefit approach. This involves assessing the impact of proposed land uses in terms of detriments and benefits accruing to the community immediately and in the future, and determining how the detriments and benefits will be distributed in the population. This approach can provide information needed to consider a proposed project in terms of its impacts on the total community. Major land use decisions are the most significant determinant of the future environments of cities, towns, and rural areas.

The first step in assessing a development's impact on the community is to define "community." It can be a political or tax jurisdiction, a geographic area or a region. For purposes of fiscal analysis it is helpful to use tax jurisdictions. For large developments it may be desirable to use large geographical areas.

Fiscal impacts are the easiest to define. Obvious benefits include increased tax revenues for the school district, and for the city or county. Demands for schools, sewers, storm drains, police and fire protection, municipal water supply, road upgrading and maintenance and public facilities are obvious public costs. Communities should ask (25):

- How many children will the new development bring, either directly or indirectly?
- Does the present school system have capacity to absorb additional children?
- If not, what will be the cost of additional teachers, staff and supplies?
- Will there be a need for additional buildings and playgrounds? If so, how much will they cost?
- Where will the money come from to meet these increased costs?
- At what stage of development will the community need to install a sewage system, a sewage treatment plant?
- How will the development affect the community water supply? Will additional wells lower the water table and conflict with existing water rights? Can the water supply be increased; at what cost?
- Will additional equipment and machinery be needed? Will additional workers be needed?
- How will the community dispose of the additional waste that will be generated by this development? Where will the community purchase new land fill areas? What will they cost?

- Will the installation of new, or additional, public utility systems mean special assessments for the entire community?
- Will the community's present recreational facilities increase in demand?
- Will any new recreational facilities created by the proposed development be open to the community as a whole?
- Has the community made adequate provisions for parkland and open space?
- If there is a volunteer fire system, will additional demands create a need for a paid staff, or for new fire fighting equipment?
- Will the existing water system provide adequate fire protection?
- Can the police force handle an increase in city population density, or will it have to enlarge to maintain the same quality of protection?
- Will the police or fire departments need a new station, or new equipment — automobiles, motorcycles, call boxes?
- Will the new development eventually force a need for expanded health care of the poor and elderly?
- Will there be a need for additional hospital or clinic capacity? If so, how many people will need to be hired; what buildings will be needed?
- What new roads will have to be built and what old roads will have to be widened, strengthened and paved? How much of the cost of the expansion will the community have to bear?
- Will the community have to supply additional public transportation? Will expansion of transportation requirements mean assessments against the existing population?
- What will be the effects on existing industrial and commercial enterprises, particularly on those in city or town centers?

Fiscal analysis also depends on other assumptions made about the proposed development. How many permanent, seasonal, or short-term (construction) residents are projected? Will they be newcomers or from another part of the same community? How long will it take for the development to be completed? Will the developer merely sell lots or also construct housing? Does the development complement or overload current and planned future community facilities and services? The answers to these questions indicate when the fiscal impacts will occur and whether a lag may exist between demand for public services and the financial ability of the jurisdiction to pay for them.

Another economic benefit associated with development includes an increase in community income due to real estate transactions, legal work, surveying and construction activity, and financing arrangements. Market values also may increase in the local area, and although this may be considered an increase in community wealth it may mean higher property taxes for nearby landowners, depending on local valuation and assessment procedures.

Impacts that are primarily non-economic are determined by the proposed development site, how the location relates to the surrounding community, and the prior use and value of the land. A development's impact on water quality will depend on the proposed source of water and its relationship to local watersheds, water tables, and the existing demands on them. The effect on air quality will depend on many factors including atmospheric conditions, transportation networks, and traffic generation.

The location of a development may be precedent setting and significantly affect future land use patterns of the community. The implications of development location are important and deserve careful study. Development of a scattered rather than compact nature has a pronounced impact on the quality of local wildlife and recreation resources. Valuable wildlife and recreation experiences are dependent on availability, access, and quality of resource. Suburban sprawl and second home development tends to decrease these values. Sprawl also requires many miles of roads, generates additional traffic and increases fuel consumption. Compact urban areas are an effective tool for conserving energy and free much human energy for activities other than commuting.

Rural subdivisions have similar impacts at perhaps greater cost. Lots remain unframed and unoccupied as owners wait out a speculation game. Land speculation confounds public revenue and expense forecasts and often causes land suitable for recreation or agriculture to lay idle. If enough lots remain undeveloped, market values of the property may fall, thus decreasing revenues to the local community.

Non-local ownership of subdivided land affects the timing of local fiscal analysis. Community income generated by non-local vacationers varies with the season and the frequency of use. Public cost estimates are invalidated as "vacation homes" become primary residences. Unforeseen demand can occur for public services, particularly road maintenance, water and sewage systems and schools.

When speculative activity and non-local ownership occur in rural areas attendent detrimental impacts are magnified. Surrounding land values become linked to the success or failure of the development. As the local economy becomes dependent on seasonal recreation it fluctuates unpredictably. Demand for services strain small communities that lack the resources to serve residents of distant subdivisions with roads, health care and police and fire protection. Locally valuable open space, recreation and wildlife resources are diminished and local social structures and mores are influenced by newcomers and vacationers who may not respect community traditions.

The subdivision of agricultural land has substantial economic and non-economic long-term costs. Sustainable agricultural production, open space, and a life-style dependent on a proximity to agriculture — all are foregone. As land values increase due to subdivision activity, market values of farm properties also increase in a chain reaction that gobbles up farmland and will eventually result in a decline in the agricultural base of the community and the nation as a whole. In the face of well-documented international food shortages and a U.S. policy of assisting in reducing these shortages, loss of agricultural land has significant national implications.

Whether for industrial, residential, recreational or second home purposes, land use conversions have detriments and benefits affecting the total community. Many of the fiscal and primary economic effects can be quantitatively estimated. Other physical and social effects can only be qualitatively discussed. Distributional effects of detriments and benefits must be analyzed over time and among segments of the population: Who will reap the benefits and who will suffer the detriments? Will today's citizens reap and tomorrow's citizens suffer?

Current Literature and Research

Average county-wide mill levies in the seven Montana counties which grew fastest between 1960 and 1970* were compared to average county-wide mill levies for the state as a whole. Mill levies are the taxes levied per dollar of valuation; they give an indication of changing tax burden over time. The mill levies used included state, county and school levies. Table 11 shows that in the seven fastest growing counties the average tax increased 38.2 mills, while statewide taxes increased 30.2 mills in an average county. Hence the seven counties had a tax increase 25 percent greater than average for the state.

TABLE 11 (19, 20)

Average County-wide Mill Levies

	1964	1972	Difference
Statewide	107.73	138.13	30.4
7 Counties	116.45	154.65	38.2

These results tend to contradict the often-heard contention that growth leads inevitably to increased economies of scale in financing community public services, but final determination of the relationships among rate of growth, population size and taxes awaits further research, and must include consideration of the quality of services provided. In the example above, quality of services was not considered.

Few current subjects produce more controversy than those dealing with the costs and benefits associated with community growth. Fundamental questions concerning how one computes costs and benefits as well as how one should make final comparisons are just two issues that remain unresolved. In addition, what factors need to be taken into account when conducting cost-benefit studies is unclear.

Resolving these issues is beyond the scope of this study. But Montana county commissioners are increasingly concerned about the costs of growth in their jurisdictions. One effort to help local decision makers and the public learn what new subdivisions may cost, in terms of additional public services, is the environmental assessment procedure established by the Department of Intergovernmental Relations in carrying out the provisions of the Montana Subdivision and Platting Act. Under this process, developers must provide the commissioners with detailed information on what additional services a project would require and who would be asked to bear the costs. (See Sub-chapter 22 of Title 22, Montana Administrative Code.)

What follows is a brief summary of some recent studies that have tried to specifically address the costs of growth. To some extent these studies try to lay open the same issues intended to be addressed in the subdivision environmental assessments. The summaries are presented to acquaint readers with the variety and scope of research currently under way.

A. *Impacts of Large Recreational Developments Upon Semi-Primitive Environments: The Gallatin Canyon Case Study* (26), investigates the effects of the Big Sky real estate development on the Gallatin Canyon and Gallatin County in southwestern Montana. Principal economic conclusions of the study follow:

1. From 1970 to 1974 the average price per acre for tracts less than 40 acres lying outside city limits rose to about $5,600 from $3,000, an increase of 87 percent.
2. From 1969 to 1975, annual maintenance costs for U.S. Highway 191 are projected to increase to $152,000 from a base of $103,000 annually.
3. Improvements at Gallatin Field, the Bozeman airport, are expected to require $10.3 million over the next 16 years.
4. Enrollment at Ophir School (District No. 72) increased from 10 pupils in 1970 to 62 in early 1974. The school budget jumped to $40,000 from $8,500 during the same period. Levies in the school district jumped from 140.16 mills in 1970 to 185 mills in 1974, a 32 percent rise.
5. Since 1970, about $7 million has been added to local payrolls.
6. A 1973 sample of attitudes expressed by fishermen and hunters found that 68 percent of the anglers and 78 percent of the hunters feared that the Big Sky project would harm the quality of their recreational hunting and fishing experiences.

B. A research project (27) by five University of Montana seniors under the direction of Professor Arnold Bolle, School of Forestry, investigated selected economic impacts of two subdivisions near Lolo, Montana: Lakeview Addition, and Bailey's Trailer Court. The study found that:

1. Of the 143 occupied dwellings in Lakeview Addition, families sent 144 students to grade school in Lolo and 36 students to high school in Missoula, generating a total increase in school operation and maintenance expendi-

*Missoula, Gallatin, Flathead, Lewis and Clark, Ravalli, Cascade and Yellowstone. Lincoln County would have ranked among the list of seven but was excluded because its growth was caused primarily by the construction of Libby Dam, an isolated project. Ranking is based on 1970 federal census.

tures of $125,684. In 1973, the residents paid $57,327 in property taxes, 68 percent of which ($38,982) went to the public school system, according to the county commissioners. Simple subtraction reveals a net financial drain on the school systems of about $88,000.

2. In Bailey's Trailer Court, owners of 60 mobile houses paid $5,520 in personal property taxes in 1973. The real property tax on the trailer court itself was $989. Hence total taxes were $6,509 on the trailers and the court, 70 percent of which ($4,556) went to education. Residents of Bailey's Trailer Court sent 51 students to school in Lolo, costing the school district $31,212; one student attended Sentinel High School in Missoula, costing that district $1,071. Subtracting the $4,556 paid in school taxes from the total school system costs of $32,283 reveals a financial drain of almost $28,000.

C. Economic information continues to be gathered about the impact of large-scale industrial development on the town of Colstrip in southwestern Montana. Workers are building two 350-megawatt coal-fired power plants in a previously rural setting. Here are some highlights:

1. Federal projections of "most likely" coal developments predict an increase of 6,000 residents by 1985, 1,500 percent more than in 1970. Compared to 1973-'74 school year records, school enrollment will increase 470 percent by 1985 to 1,600 students, requiring capital expenditures of $6.4 million. Two thousand housing units will be required by 1985, not counting the temporary demands of construction families (28).

2. The Colstrip school district budget has increased from $276,647 (1972-'73) to a projected $976,914 for 1974-'75. The budget projects a per-student cost of $1,062, an increase over the current $1,028 (29).

3. Taxable valuation in Rosebud County increased 32 percent from 1973 to 1974, to $26.65 million. Power generating facilities now nearing completion contributed only 26 percent of the increase (30). Colstrip school district mill levies increased 13 percent between 1972 and 1974, from 114.2 mills to 129.3 mills (30).

D. *Local Tax Impact of Recreational Sub-Divisions, A Case Study* (31). This is a study of a "recreational, rural-residential" subdivision of 1,300 acres into 1,850 lots in central Oregon. Its principal conclusions:

1. Currently there are 67 improved lots, 26 year-round dwellings, 23 public school students and three community college students. Subdivision contributed $82,000 in county and school district property tax revenues with a mill rate of .2259. Estimated costs of local government public services to the subdivision, including school and community college, were $25,255, with a result of a net fiscal contribution of $56,745.

2. Assuming 50 percent development and a constant mill levy, the analysis would discover a net fiscal deficit of about $93,000. To cover the deficit the county-wide mill levy would have to reach .2388.

3. A full development, the fiscal deficit would reach $293,748. The mill levy would have to increase to .2627.

E. *Exploring Options for the Future: A Study of Growth in Boulder County, Vol. V.* (32). Some of this study's conclusions:

1. Boulder, Colorado, per capita city government expenditures in constant (1967) dollars increased from a 1950-'53 average of $42.80 to a 1968-'70 average of $75.30, a 76 percent jump during the city's expansion.

2. During the period analyzed, per capita income also increased, from $1,899 in 1950-'53 to $2,851.70 in 1968-'70, a 50 percent increase in constant dollars.

3. Comparing per capita city expenditures with per capita income, spending increased 1.5 times faster than income of the taxpayers.

F. *The Costs of Urban Growth: Observations and Judgments (33).* This study offers a summary of available information on the costs of growth. A summary of its conclusions:

1. On the average, large communities and fast growing ones cost more money per capita to operate than do small ones and slowly growing ones. If there is an optimum community size for maximum governmental efficiency, it appears to be in the neighborhood of 25,000 people. If there is an optimum growth rate for the same purpose, it appears to be close to zero, since any rate higher than this leads to higher per capita costs.

2. On the average, the quantity and quality of public services is adversely affected by large population size and by high population growth rate. Contrary to popular belief, public services appear to be better in small and slowly growing communities than in large and fast growing ones.

3. Colorado 5prings, during two decades of rapid growth, suffered the same costs that fast growing cities generally suffer: increasing tax rates (at constant dollars), declining quality of services, decreasing average per capita income (relative to the national average), and increasing congestion and crime.

G. *The Direct Costs of Growth* (34). This study compared information on 34 Colorado counties, excluding Denver County, divided into three groups: 12 "growth," 11 "stable," and 11 "declining" counties, based on population changes between 1960 and 1970. Principal conclusions:

1. Analysis of per capita expenditures by all local jurisdictions within any single county (including counties, municipalities, school districts and special tax districts) revealed that total per capita expenditures increased in each of the three groups during the study period but in varying amounts: Growth Group, 46.7 percent; Stable Group, 50.6 percent; and Declining Group, 40 percent.

2. This table shows total expenditures as a percentage of adjusted gross personal income at beginning and end points of the study period:

Change in Per Capita Expenditures (percent)

Group	1960	1970
Growth	12.5	12.2
Stable	15.6	17.1
Declining	27.3	26.9

LAND USE POLICY TODAY: Piecing it together

Montana has a land use policy. But it is implicit, hidden away in the nooks and crannies of the law and of the administrative codes of the many agencies of state government. For the people, the legislature, and the governor, an unstated policy is hard to evaluate. It is difficult to suggest changes in an unstated policy or use it to measure the efforts of state agencies.

Montana has policies at two levels. There are policies which direct the state agencies and there are policies which establish and guide the actions of local government in the land use area.

State Agency Review

Seven state agencies* administer the bulk of law in which Montana's unstated land use policy can be discovered. Montana's legislature, like many others, has attached declarations of state policy to many laws to direct their force to a specific function or area. Taken together all these isolated policy statements comprise an expression of legislative policy. But the legislature has rarely considered the interaction of one policy statement with another. Within the overall policy there are many contradictions and inconsistencies. No means has been provided to resolve these conflicts. Conflict resolution must await the action of the governor, the courts, or the legislature. This does not have to be so. The legislature could establish clear priorities and procedures for implementing a consistent state policy with regard to the use of land.

State land use policy directs the use of state-owned land and the actions of state agencies which influence the use of private lands. Private land use decisions can be affected directly by state policy, through regulation, and indirectly through the secondary effects of decisions made concerning state lands and projects. For example, the state directly affects the use of certain subdivided lands through its review of sanitary facilities. Whereas a decision to locate a highway interchange affects directly only the land on which it is built, it may indirectly affect the use and value of the land in a wide surrounding area.

Many of Montana's state agencies exercise these direct and indirect influences over the use of the state's land. The seven reviewed in this study exercise most of that influence.

THE FISH AND GAME COMMISSION

The Fish and Game Commission, acting through the Department of Fish and Game, has been granted a broad range of powers to influence and control the use of land in Montana. This range of powers implements a state policy of providing perpetual hunting and fishing opportunities to the residents of the state. The 1965 legislature declared:

> **It is hereby declared to be the policy of the state of Montana that its fish and wildlife resources and particularly the fishing waters withih the state are to be protected and preserved to the end that they be available for all time, without change, in their natural existing state except as may be necessary and appropriate after due consideration of all factors involved (Section 26-1501, R.C.M., 1947).****

This policy has been applied directly to any action by a state agency or political subdivision, such as counties and cities, which might affect the natural form of a streambed or its banks. All agencies and political subdivisions are required to file notice, plans and specifications of such action with the department before commencing construction. If the department finds that the proposed project adversely affects any fish or game habitat it must recommend modifications or alternatives to mitigate the effects. If the agency proposing the project refuses to comply with the recommendations, the department may have the dispute submitted to binding arbitration by three residents of the county or counties where the project is located. The arbitrators are selected by judges of the local district court.

The legislature also has clearly stated the public's right to use navigable waters, whether the water crosses public or private land, for fishing (26-338), and has directed the department to obtain hunting and fishing rights on lands surrounding federal wildlife preserves and refuges (26-1120).

The legislature has indicated, however, that the policy of the state is to provide hunting and fishing opportunity without placing additional burdens on local taxpayers. In counties where the department holds more than 100 acres of land it is directed to pay "in lieu of taxes" the amount the county would be due in taxes if the land were in private ownership (26-133). In obtaining hunting and fishing rights around federal preserves and refuges, the department is authorized to compensate landowners for those rights. And when rights granted Fish and Game to control waters on state owned lands for the propagation of fish diminish the value of the land around those waters to a potential buyer, the rights granted the department may be terminated on notice to the commission (26-118).

The department also is charged with the preparation of the Statewide Outdoor Recreation Plan and the delineation and maintenance of state parks, monuments, and recreation areas and exercises direct control over the use of such lands. By this mandate the legislature clearly established a state policy regarding the conservation of "scenic, historic, archaeologic, scientific, and recreational resources of the state, and for providing for their use and enjoyment, thereby contributing to the cultural, recreational, and economic life of the people" (62-301). The location of a state park, monument or recreation area can significantly affect use of surrounding lands.

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*The departments of Fish and Game, Health and Environmental Sciences, Highways, Intergovernmental Relations, Natural Resources and Conservation, State Lands, and Revenue.

**Hereafter in this section reference to the codes of Montana will be made parenthetically by section number only.

The State Antiquities Act (enacted in 1973) is administered by the department to provide for the "identification, acquisition, restoration, enhancement, preservation, conservation and administration of the historic, archaeological, paleontological, scientific, and cultural sites and objects of the state of Montana" (81-2502). The department is given, with the agreement of the state Historical Society and the state Board of Land Commissioners, direct control over state lands for the purposes of the Antiquities Act. The land board may withdraw or reserve additional state land as needed to protect a site or object registered under the act. No state land may be sold or developed if such action will disturb a site or object registered under the act. The legislature has declared the care and management of antiquities "a worthy object of the trust as specified in [the section of the codes ascribing powers and duties to the Board of Land Commissioners]" (81-2504).

The legislature also has authorized Fish and Game to enter into agreements with private landowners to provide for the protection or registration of sites and objects on private lands and has directed the department to use the courts if necessary to prevent the waste, removal or destruction of a registered site or object. A court may grant an injunction for up to a year and meanwhile, the department may be directed to present to the parties involved a plan for the protection of the site or object (81-2510).

In addition to the direct controls granted to the department, Fish and Game administers and enforces a number of laws which, in achieving certain policy objectives indirectly affect the use of land. Chief among these indirect influences is the power to set and enforce hunting and fishing seasons and catch limits and to expend funds for the protection and propagation of fish and game and non-game animals.

Fish and Game wardens are authorized to enforce state laws pertaining to criminal mischief, trespass and littering (32-4410) on private lands opened to the public for recreation (26-110.1). In addition, wardens enforce laws prohibiting harassment of game or livestock by snowmobiles (53-1020), and driving vehicles off roads or trails without permission (26-301). The department also may offer several forms of relief to private landowners whose property is subject to excessive damage from wildlife.

These laws and others like them indicate an unstated policy to induce landowners to open their lands to the public in exchange for services provided by the state. In fact, the whole body of laws administered or enforced by the Department of Fish and Game embodies a state policy on outdoor recreation, hunting and fishing. Unfortunately, the legislature has failed to clearly establish the relationship of the policies administered by Fish and Game to other policies the legislature has promulgated. Even in the one instance where the legislature has provided a procedure to identify and resolve interagency conflicts no guidance is given to the arbitrators: what they are to consider in their decision is left to their discretion.

THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES

The Department of Health and Environmental Sciences has little direct control over the use of land in Montana; however, the regulatory and licensing authority it exercises has substantial indirect effect on land use.

The legislature has charged the state Board of Health, acting through the Department of Health, with the regulation of various land uses that are of only minor significance in terms of this study. The department has the sole responsibility for the preparation and administration of a comprehensive health plan for the state and thus is involved with the siting of non-profit hospitals and other health facilities. Tourist campgrounds and trailer courts require a license from the department but review of their applications is limited to sanitation and the protection of public health (69-5602 and 69-5601).

In addition, the legislature has declared "the public policy of this state to control refuse disposal areas to protect the public health and safety" (69-4001). Private refuse disposal areas must obtain a license from the department and public facilities must meet requirements outlined in the law. No agency is charged specifically with long-term solid waste planning for the state.

The department also supervises local boards of health which, among other duties, are responsible for abating public nuisances affecting health. The broad definition of nuisance in the statutes could permit such abatement to have a significant impact on land use: "Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property" (57-101). This is the law cited by the new residents of a rural subdivision when they wish to force a dairy, hog farm or other agricultural operation out of their area by alleging that the farm is a public nuisance. Montana's nuisance law was enacted in the late 19th century and has not been substantially amended since then. The policy implications of the law have been left to the courts and the department.

Water

The 1967 legislature dictated firm policy on the quality of public water supplies and directed the Department of Health and Environmental Sciences to implement that policy: "to protect, maintain, and improve the quality and potability of water from public water supplies and domestic uses" (69-4901).

The same legislature protected other waters of the state by another broad policy statement:

> **It is the public policy of this state to:**
>
> **a) conserve water by protecting, maintaining, and improving the quality and potability of water for public water supplies, wildlife, fish and aquatic life,**

agriculture, industry, recreation, and other beneficial uses;

b) provide a comprehensive program for the prevention, abatement, and control of water pollution (69-4801).

The definition of water pollution is quite broad and includes any substance, "likely to create a nuisance or render the waters harmful, detrimental, or injurious to public health, recreation, safety, welfare, livestock, wild animals, birds, fish, or other wildlife" (69-4802). Protected state waters include any body of surface water, irrigation and drainage systems, and underground water. The legislature also declared that it is not necessary for wastes to be rendered more pure than the natural condition of the receiving water. "Natural" has been defined to include pollutants from runoff or percolation over which man has no control or material from developed areas where all reasonable soil and water conservation practices have been applied (69-4801).

The legislature's directions to the Board of Health describe a specific policy of maintaining the highest practicable water quality while giving consideration to the water's "most beneficial use," and social and economic costs. Sec. 69-4808.2 directs the board, among other things to:

1. Formulate standards of water purity and classifications of water according to its most beneficial uses, giving consideration to the economics of waste treatment and prevention.

2. Require that any state waters whose existing quality is better than the established standards as of the date on which the standards become effective, be maintained at that high quality unless it has been affirmatively demonstrated to the board that a change is justifiable as a result of necessary economic or social development and will not preclude present and anticipated use of these waters.

The Department of Health and Environmental Sciences administers a permit system covering the discharge of sewage, industrial and other wastes into state waters and may impose limitations on their volume, strength or other characteristics. In the administration of the water pollution control laws, the department and board are advised by the state water pollution advisory council, which is composed of public and private representatives having special interest in the problem of water pollution control.

The board and the department have also been designated by the governor, and as of June 10, 1974, by the U.S. Environmental Protection Agency, as the agency to administer the provisions of the Federal Water Pollution Control Amendments of 1972, within Montana. In passing this law Congress established as a national objective the restoration and maintenance of "the chemical, physical, and biological integrity of the Nation's waters," and recognized that the primary responsibility to prevent, reduce, and eliminate pollution, and to plan the development and use of land and water resources lies with the states (33 U.S.C. 1251).

There are two programs under the federal legislation which significantly affect water pollution control efforts in Montana. The first, compilation of Water Quality Management Plans, requires a planning process for waste monitoring and treatment on an area-wide or regional basis throughout the state. The department's Water Quality Bureau, in compliance with federal requirements, is preparing plans for waste treatment needs in 16 Montana river basins and establishing a 20-year regulatory program. A significant consideration in the process is the identification of agriculturally and silviculturally related pollution, including runoff from manure disposal areas and from land used for livestock and crops. Also to be identified are mine-related pollution sources, including runoff from surface and underground mines (33 U.S.C. 1288). The plans are to establish priorities for waste treatment facilities and may include guidance for their location. Any plan for guiding water treatment facilities will affect profoundly the rate and direction of growth of an area. Yet coordination with local residents, local governments and other state agencies is not well-provided for in this law. The department has, on its own, begun procedures for involving citizens in the planning process. The state legislature, however, currently has no direct involvement in this process.

The second program, the National Pollutant Discharge Elimination System, now the Montana Pollutant Discharge Elimination System or MPDES, requires state permits for the discharge to surface or underground waters of domestic sewage, industrial wastewaters and wastewaters from confined animal feedlot operations and large irrigation districts.

The system includes the rules and regulations established under the Montana water pollution control act (69-4801 *et. seq.*) and expands the policies of that act to additional areas covered by the federal act.

Air

The 1967 legislature also assigned air pollution control responsibilities to the department and Board of Health and Environmental Sciences under the Clean Air Act of Montana. With this act the legislature declared a strong policy:

> **to achieve and maintain such levels of air quality as will protect human health and safety, and to the greatest degree practicable, prevent injury to plant and animal life and property, foster the comfort and convenience of the people, promote the economic and social development of this state and facilitate the enjoyment of the natural attractions of this state (69-3905).**

The policy statement further affirms a need for a distribution of responsibility and coordination between state and local governments to balance health, economic and social values in the public interest.

The definition of "air pollution" in the statute indicates the breadth of the application of the policy: "the presence in the outdoor atmosphere of one or more air contaminants in

a quantity and for a duration which is or tends to be injurious to human health or welfare, animal or plant life, or property, or would unreasonably interfere with the enjoyment of life, property, or the conduct of business" (69-3906).

The department and board are granted powers to establish standards and regulations under the law. Sec. 69-3913 allows stringent air quality standards in those areas of the state where pollution sources or population are concentrated, or where the nature of the local economy, land and land use so requires. Citizen involvement is through the air pollution control advisory council and the hearing process authorized by the administrative codes. Montana's air quality regulations and standards are among the most stringent in the nation. They appear to be in compliance with the policy of the legislature.

Additional authority for air pollution control comes from the federal Clean Air Act Amendments of 1970. The act established national air quality standards and requires states to prepare an implementation plan to attain air quality at least equal to the standards. If a state fails to comply, the U.S. Environmental Protection Agency (EPA) will prepare a plan for the state. The plan must include procedures to prevent projects that would violate the standards.

This implementation plan, prepared by the Department of Health and Environmental Sciences and approved by the governor as required by federal law, has been mired in procedural and jurisdictional complications since January, 1972. The plan, however, makes this policy statement:

> **it is hereby declared to be the policy that ambient air whose existing quality is better than the established standards, will be maintained at that high quality unless it has been affirmatively demonstrated to the Department of Health and Environmental Sciences of the State of Montana that a change is justifiable as a result of necessary economic and social development vital to the state (p. 6,** *Implementation Plan for Control of Air Pollution in Montana,* **Department of Health and Environmental Sciences, revised June 30, 1972).**

Two 1973 federal court decisions* have greatly influenced the Clean Air Act's impact on the use of land. The first case requires states to consider the cumulative atmospheric impact of development and in particular, to control major facilities which may be pollution-free themselves but will contribute to localized air pollution violations by attracting large number of motor vehicles.

Because case-by-case review would be inadequate to control this long-term incremental air quality degradation, the EPA is requiring states to prepare plans for those areas which have the potential to exceed air quality standards in the next 10 years. The plans must consider impacts on air quality from a regional perspective and it is likely that portions of many of the plans will concern patterns of land use. The department has declared eight Air Quality Maintenance Areas in Montana and is beginning to prepare plans for them. Coordination with other state agencies and local governments apparently is informal so far.

The second court case concerns EPA's position on the protection of areas where existing air quality exceeds minimum national standards. The U.S. Supreme Court affirmed a lower court's ruling that "significant deterioration" of air in these areas must be prevented. It has taken the EPA a year to propose regulations to comply with the high court's ruling.

The EPA recognizes that preventing significant deterioration of air quality is likely to have a major influence on land use. Land use planning is of necessity a complex process including many variables, only one of which is air quality. In the opinion of the EPA administration, regulation of land use based on air quality as the single overriding factor is not desirable for most areas of the country. The EPA has proposed regulations to "inject consideration of air quality into land use decisions, but not to mandate land use decisions based solely on air quality . . . not to restrict or prohibit economic growth, but rather to ensure that desirable growth is planned and managed in a manner which will minimize adverse impacts on the environment" (35).

Recognizing that minimum air quality standards must be achieved throughout the nation, the question of what is "significant" deterioration of air quality becomes largely subjective. Varying social, economic, and environmental characteristics will result inevitably in varying definitions of "significant."

Under proposed EPA regulations, the states would be delegated the responsibility to prevent the significant deterioration of air quality and could re-delegate this responsibility to local government. The EPA would encourage this re-delegation. For those states unwilling to accept the responsibility, the EPA would enforce the law. In any case, the EPA would retain some review authority.

How Montana will respond to EPA's non-degradation rules is up to the executive branch; in particular, to the Board and Department of Health and the governor. Any decision by the state would have significant land use, social and economic effects. Is the Department of Health and Environmental Sciences the agency to consider, weigh and decide such far-reaching questions? What policies will its decisions follow? Firm answers cannot be offered now.

Subdivisions

Another area with significant land use implications is sanitation in subdivisions. The 1967 and 1973 legislatures have declared a clear policy:

> **It is the public policy of this state to extend present laws controlling water supply, sewage disposal, and solid waste disposal to include individual wells affected by adjoining sewage disposal and individual sewage systems to protect the quality and potability of water for public water supplies**

*Natural Resources Defense Council v. E.P.A., 475 F.2d 968 (D.C. Cir 1973) and Sierra Club v. Ruckelshaus, 344 F. Supp. 253 (D.D.C. 1972), aff'd. sub nomine Fri. Sierra Club, 412 U.S. 541 (1973).

and domestic uses; and to protect the quality of water for other beneficial uses, including uses relating to agriculture, industry, recreation and wildlife (69-5001).

Before a subdivision plat may be filed with a county clerk and recorder, the department and the local health officer having jurisdiction must certify that the subdivision lots are free of "sanitary restrictions." Until the restrictions are removed, the subdivider may not sell any lot, or erect any building or shelter requiring water supply, sewage or solid waste disposal facilities. If the restrictions are made conditional, then no permanent building requiring sanitary facilities may be occupied until the conditions are met.

The department has rules, including sanitary standards, for the enforcement of the law. However, the department's interpretation of the broad policy and rules set forth by the legislature (Sec. 69-5005) has resulted in significant and unproductive conflict between the department and those concerned with the protection of the environment. Some contend that the department has neglected those sections of the policy and rules calling for the protection of water quality "for uses relating to agriculture, industry, recreation, and wildlife," and that the department appears concerned only with drinking water. As a result, the department has been taken to court twice in the last year.

The policies of the body of law administered by the Board and Department of Health are clearly policies favoring strong environmental protection. The procedures required by the 1971 amendments to the water pollution control act, demanding affirmative proof to the board that a decrease in water quality is justifiable as a result of "necessary economic or social development," also are commendable. But the legislature has yet to determine what constitutes "justifiable" or "necessary" development.

In addition, although mentioning wildlife in several policy statements, the legislature has failed, judged by the action of the department, to provide sufficient guidance for the inclusion of wildlife protection in administrative decisions of the department.

With respect to overall state policy, the legislature has failed to provide for the coordination of the legal policies administered by the board and department with the policies of laws administered by other departments.

THE DEPARTMENT OF HIGHWAYS

During 1973 the Montana Department of Highways, acting under the policy direction of the Highway Commission, spent more than $80 million on highway construction projects. The commission and the department operate under an extremely broad legislative policy directive. The 1965 legislature declared that it intended:

(1) To place a high degree of trust in the hands of those officials whose duty it is, within the limits of available funds, to plan, develop, operate, maintain and protect the highway facilities of this state for future use.

. . .

(3) That the state shall have integrated systems of highways, roads, and streets, and that the department of highways, the counties and municipalities assist and co-operate with each other to that end.

(4) To provide sufficiently broad authority to enable the highway officials at all levels of government to function adequately and efficiently in all areas of their respective responsibilities, subject to the limitations of the constitution and the legislative mandate hereinafter imposed (32-2202).

The location of highways, and the provisions of access to them, has a profound effect on the patterns of land use, the social structure, economy and environment of an area. The law expresses little recognition of these significant impacts of highway development.

The legislature has recognized: the undesirable interaction of highways and livestock and so has provided for highway fencing, stock gates and stock passes (32-2426); the enjoyment derived from scenic surroundings while traveling and so has provided for the use of federal money to purchase scenic easements (32-2423), and the economic impact of highways and so has provided for the designation of economic growth centers (32-2620). Economic growth centers may be designated by the governor with the approval of the secretary of the U.S. Department of Transportation. Once designated, economic growth centers receive priority in appropriation of state matching funds for primary, secondary, and urban highways (32-2622).

The highway department has also been granted authority to regulate certain land uses near highways. Junkyards within 1000 feet of the right-of-way of interstate and primary roads require a license issued by the Department of Health and Environmental Sciences with the concurrence of the Department of Highways. The erection of outdoor advertising within 660 feet of the right-of-way is regulated by the Department of Highways under regulations adopted by the Highway Commission.

The enormous indirect effects of highways on land use decisions go unmentioned in the codes. Not even the advertising unit of the highway department is guided by legislative policy. The unit evolved out of a legislative directive (32-1614), since repealed, directing the department to prepare an official highway map.

Access

The indirect effects of a highway are determined by its location and by the accesses provided. The legislature has declared that it is the policy to:

facilitate the flow of traffic and promote public safety by controlling access to:

(1) Highways included by the federal highway administration [roads] in the national system of interstate highways.

(2) Throughways and intersections with throughways.

(3) Such other federal-aid and state highways as shall be designated by the commission in accordance with the requirements set forth in this chapter (32-4301).

Any portion of interstate highway may be designated for controlled access by resolution of the commission. The commission must find that it is "necessary and desirable that the rights of, or easements to access, light, air, or view be acquired by the state so as to prevent such portion [of the highway to be designated "controlled access"] from becoming unsafe for or impeded by unrestricted access of traffic from intersecting streets, alleys, public or private roads or ways of passage" (32-4303). Whereas, in the past, this authority has been exercised only in the case of interstate highways, many primary road projects now are being designed for limited access.

The policies of the department and commission, listed in the Montana Administrative Codes (MAC, 18-2.6A(1)-S607), attempt to establish access standards "which will tend to reconcile and satisfy the needs and rights of both the property owner and the highway user." The department requires that a permit be requested from its Maintenance Division for any new access or for the reconstruction of existing access on any highway under the Federal Aid System (interstate, primary or secondary).

The highway department has not taken it upon itself, nor has the legislature directed, that the land use effects of access be considered. Access decisions have been based solely on highway engineering and the interests of the "motoring public."

Location

Highway decisions probably always have been controversial. The Montana legislature has addressed this issue in very limited areas. For example, Sec. 32-1628 prohibits the department from constructing or relocating a highway so as to cause traffic to bypass an incorporated municipality unless the highway is part of the interstate system, or the governing body of the municipality consents.

In response to an increasing public awareness that highways affect many values in addition to travel time and motorist convenience, Congress included in the Federal Aid Highway Act of 1970 (23 U.S.C. 101, *et seq.* (1970)) stipulations that all impacts of federally assisted highway construction be considered in planning and design decisions. Congress directed the secretary of the U.S. Department of Transporation to:

> **assure that possible adverse economic, social, and environmental effects relating to any proposed project on any Federal-aid system have been fully considered in developing such project, and that the final decisions on the project are made in the best overall public interest (23 U.S.C. 101, at Sec. 109 (h)).**

This language also was intended to meet the environmental impact statement requirements of the National Environmental Policy Act.

The Montana highway department has prepared an *Action Plan* in response to the rules promulgated by the U.S. Department of Transportation. The *Action Plan*, in part, declares it to be the policy of the Department of Highways that:

> **. . . full consideration be given to economic, social and environmental factors in the planning and design of highway projects.**
>
> **. . . provisions for ensuring the consideration of economic, social and environmental factors be incorporated in the decision making process utilizing a systematic, interdisciplinary approach.**
>
> **. . . decisions on highway project planning and design be made in the best overall public interest, taking into consideration the need for fast, safe and efficient transportation, public services, and the costs of eliminating or minimizing possible adverse economic, social, and environmental effects (Sec. 2.1, *Montana Action Plan*).**

The *Action Plan* helps identify social, economic, and environmental effects of a project. Specifically, the department must assess the impacts of alternative highway locations and designs and consider a number of factors, including regional and community growth, conservation and preservation, public facilities and services, and aesthetic and other values.

Whether the plan embodies a policy, with respect to land use, consistent with that desired by the people of the state as expressed by their legislature, remains a question. Because the department is itself in a policy transition stage, independent analysis of what constitutes highway department land use policy is difficult. Historically, the department expressed disbelief that its actions could have any influence on land use and saw its mandate as simply highway construction. Recently, the department has realized that these notions are inconsistent with reality and with other policy declarations of the legislature. Yet in the absence of explicitly stated priorities and with access to large sums of federal money the department remains in a position of determining its own policy.

There remain two significant considerations that to some extent subvert *Action Plan* policies. The routing of a secondary highway is determined pursuant to the *Action Plan*, but the decision on its beginning and end points is made primarily by the Board of County Commissioners requesting the highway. Secondly, although substantial portions of the interstate highway system remain to be constructed here, essentially all of Montana's interstates were planned and located before the *Action Plan* was developed and do not reflect its policies.

THE DEPARTMENT OF INTERGOVERNMENTAL RELATIONS

In the authority exercised by the nine divisions of the Department of Intergovernmental Relations are both direct and indirect means of influencing the use of land. The legislature has directed the department to administer "laws

pertaining to relationships between the state and local and federal governments" (82A-901.1) and the department was organized to provide liaison and services to local governments.

Most of the department's land use related functions that can be traced to a statutory base come from the Planning and Economic Development Act of 1967, which created a Department of Planning and Economic Development. In this act (as amended) the legislature declared:

> **Community planning, greater diversification, and attraction of additional industry, accelerated development of natural resources, expansion of existing industry, creation of new uses for agricultural products . . . are all necessary in order to create additional employment opportunities, increase personal income, and promote the general welfare of the people of this state (82-3702).**

Under the act the department was directed to adopt a comprehensive plan for the physical development of the state; prepare long range plans for economic and resource development; locate and maintain information on prime sites for industrial, agricultural, mineral, forestry, commercial, and residential development, and on sites of historical importance, and make recommendations for protecting and preserving those sites; and consult with, coordinate, and advise state agencies and local planning commissions with respect to land use, demographic and economic studies, and comprehensive plans (82-3705).

When the Department of Intergovernmental Relations was created, the Department of Planning and Economic Development was made a division and then, through the Administrative Codes, split into three divisions: Planning, Economic Development and Research and Information.

Aeronautics

Of the divisions of the department, the Aeronautics Division exercises the most direct control over land use. With the policy guidance of the Board of Aeronautics, the division operates the 10 state-owned airports and assists in planning funding and designing airports owned by local governments. The division also supervises the in-state use and disbursement of federal airport assistance funds.

The legislature has given the division a single-purpose mandate to "encourage, foster, and assist in the development of aeronautics in this state and to encourage the establishment of airports and other air navigation facilities" (1-204). The codes do not suggest criteria for the establishment or abandonment of airports except to designate, expand, and modify a state airways system to best serve the interests of the state (1-204).

The legislature has recognized the need to eliminate or prevent dangerous obstructions in the air space surrounding airports. Within Secs. 1-701 to 1-723 there are two statements by the legislature on airport hazards.

Sec. 1-704 requires a permit to erect any structure or grow any natural thing within two miles of an airport and prohibits the issuance of a permit if the height of the structure or object would exceed the limits fixed by law. Sec. 1-703 makes it the duty and authority of governing bodies controlling airports to enforce the provisions of the law, but the permit system has been ignored generally.

Sec. 1-710 to 1-723, enacted by the 1947 legislature, authorize every local government having an airport within its jurisdiction or controlling an airport to adopt, administer and enforce airport zoning regulations for airport hazard areas. The legislature has declared that an airport hazard is one that "endangers the lives and property of users of the airport and of occupants of land in its vicinity, and also . . . [tends] to destory or impair the utility of the airport and the public investment therein" (1-711).

A local government owning or controlling an airport affected by a hazard located outside its territorial limits may adopt joint airport zoning regulations with the local government in whose territory the airport or hazard is located. If that local government fails to cooperate in adequate airport zoning regulations, the affected local government may adopt and enforce regulations for the airport hazard area in question. If a conflict occurs among airport zoning regulations the local government owning or controlling the airport shall prevail (1-712). If a conflict occurs between airport zoning regulations and other regulations governing the same area, the more stringent regulations shall prevail (1-713).

Airport zoning regulations are adopted like any comprehensive zoning regulation. The legislature has provided for permits and variances, an airport zoning commission, and a board of adjustment.

Housing

The Housing Division of the Department of Intergovernmental Relations was created administratively and is "responsible for the delivery, conservation, planning, and promotion of housing, especially as applicable to persons of low and moderate income . . . [and] assists in the organization and development of local housing authorities, non-profit sponsors, and local, state, and federal housing planning groups" (MAC, 22-2.1-0100, page 22-5).

The division is attempting to develop a program for financing the construction of low and moderate-income housing. Such a program could have significant effects on land use decisions, but the legislature has offered no policy guidance to the division.

Economic Development

The Economic Development Division has assumed the mandate of the policy statement of the Planning and Economic Development Act of 1967 (quoted above). The division identifies opportunities for industrial, manufacturing, recreational and agri-business potentials within the state and encourages developers to pursue these opportunities. The division also provides technical assistance to local governments and organizations on development programs.

The legislature has offered this division no guidance on the development desired in the state or on the aspects, other than economic, which should be considered in promoting development.

Planning

The Planning Division has assumed the non-economic planning functions outlined in the Planning and Economic Development Act of 1967. Because the policy of that act pertains almost exclusively to economic development planning, the division essentially functions without legislative policy guidance. The act does direct the development and adoption of a comprehensive plan for the state, but provides no guidelines or purpose for the plan. Similarly there are no statutory guidelines for intra-departmental cooperation or inter-departmental coordination of functional planning.

The division has emphasized local planning assistance but is now moving to fill a larger role. The division administers the U.S. Department of Housing and Urban Development's "701" planning grants and offers assistance to local governments in the establishment of planning boards. A significant new mandate given the division by the 1973 legislature is the adminstration of the Montana Subdivision and Platting Act. In the act the legislature expresses clear purpose with regard to the regulation of subdivision:

> **It is the purpose of this act to promote the public health, safety and general welfare by regulating the subdivision of land; to prevent overcrowding of land; to lessen congestion in the streets and highways; to provide for adequate light, air, water supply, sewage disposal, parks and recreation areas, ingress and egress, and other public requirements; [and] to encourage development in harmony with the natural environment (11-3860).**

The act directs the division to prepare minimum subdivision regulations including detailed criteria for environmental assessments to be submitted by all subdividers. The environmental assessment must include a discussion of the natural characteristics, such as hydrology, soils, vegetation, topography and wildlife, of the area to be subdivided. It must report the anticipated effects of the subdivision on local services. Local services to be considered include schools, roads and road maintenance, water supply, sewage and solid waste disposal facilities, fire and police protection (11-3863).

The governing body of every county, city and town is directed to provide for the enforcement and administration of subdivision regulations "which meet or exceed the prescribed minimum requirements" by July 1, 1974, or the Planning Division must promulgate regulations to be enforced by the governing body as of January 1, 1975 (11-3863).

The division also must offer a process for the review of preliminary subdivision plats by state and local government agencies and affected public utilities. The comments and recommendations generated by the review process are transmitted to the local government having jurisdiction over the subdivision.

The local government must hold a public hearing and decide to deny, approve or conditionally approve a subdivision within 60 days of receiving the preliminary map unless the developer agrees to an extension. The legislature has directed the local governing body to review the subdivision "to determine whether it conforms to the local master plan if one has been adopted . . . to the provisions of this act [the Montana Subdivision and Platting Act], and to rules and regulations prescribed or adopted pursuant to this act" (11-3866). The legislature has neither prescribed the procedure for review nor limited review to these three items, nor prescribed the concern to be given to each. In fact, there is no provision to insure that the three items are even considered.

Provisions of the act implement a policy of granting local governing bodies that accept their responsibilities greater latitude in their actions. The act provides that governing bodies taking a strong and active role in the regulation of subdivisions may exercise flexibility with regard to the requirements for an environmental assessment and the dedication of parkland.

The Planning Division also is involved in the promotion of district councils. The state was divided into 12 districts by the former Department of Planning and Economic Development in response to suggestions of federal agencies. The 1967 legislature provided for cooperative organizations among local governments with the Interlocal Cooperation Act (16-4901 to 16-4904). District boundaries were quite rigid but now may be changed upon petition by a local government.

District councils are not intended to be another layer of government. They are not responsible for the delivery of services nor do they exercise taxing authority. They are voluntary organizations concerned with policy planning, program development and coordination. A majority of the voting members of a certified council must be executive officers of local governments within the district and must represent at least 75 percent of the district's population.

Once a district council is certified applications for certain federal moneys from governmental organizations within the district and all state agency plans for facilities and work programs which affect the district must be submitted to the council for review and comment. A council may attempt to resolve conflicts between proposals and the district's adopted comprehensive plan.

THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

The Board and the Department of Natural Resources and Conservation are charged with administering a large body of law, much of which directly and indirectly affects the use of land. Included within the scope of the department are oil,

gas, water and forest resources, soil and grass conservation, and the review of energy conversion and transportation facilities.

The Board of Oil and Gas Conservation is attached to the Department of Natural Resources and Conservation for administrative purposes only; it has retained almost complete independence. The board regulates all facets of the drilling, production and plugging of oil, gas and associated wells. Its only direct charge with regard to land use is to cooperate with the Department of Natural Resources and Conservation in locating the owners of abandoned wells, sumps and seismographic shot holes which have not been reclaimed in compliance with the board's regulations. Perhaps the essential legislative policy regarding the Board of Oil and Gas Conservation can be inferred from its retention of independence throughout executive reorganization.

The Division of Forestry directly controls almost 490,000 acres of state-owned timber lands. With regard to these lands the division is under the jurisdiction of the Board of Land Commissioners and the Department of State Lands. The policies guiding the division are considered under the discussion of the Department of State Lands.

The division also is involved in a number of programs related to private lands, reduction of fire hazards, cooperation in forest management, and watershed protection. Fire protection on private lands is financed by private land owners through a forest fire protection tax assessment established by the legislature (28-109).

Soil and Grass

The soil and grass conservation programs and the rangeland resource program coordinated and administered by the Department of Natural Resources have substantial impacts on the use of the land for agricultural purposes. The conservation district program, in particular, includes the potential for very significant impacts on land use outside of incorporated cities and towns.

The legislature has declared firm policies and purposes with respect to the conservation of soil and grass resources of the state. The State Conservation Districts Law, enacted in 1939 and amended in 1959, declares that it is state policy to:

> **provide for the conservation of soil and soil resources of this state, and for the control and prevention of soil erosion, and for the prevention of floodwater and sediment damages, and for furthering the conservation, development, utilization, and disposal of water, and thereby to preserve natural resources, control floods, prevent impairment of dams and reservoirs, preserve wildlife, protect the tax base, protect public lands and protect and promote the health, safety, and general welfare of the people of this state (76-102).**

Grass conservation districts may own land, purchase and market livestock and equipment and supplies needed by the livestock industry, and manage and control the use of district rangeland. Grazing rights are distributed to members and limited by the carrying capacity of the range. However, the legislature has directed that "a sufficient carrying capacity of range shall be reserved for the maintenance of a reasonable number of wild game animals, to use the range in common with livestock grazing in the district" (46-2332).

The department also promotes and supports the Montana Rangeland Resource Program. The basic objectives of this program are articulated in a 10-year goal statement and include improved range, increased stockwater availability, increased recreational use and enhanced wildlife habitat.

Conservation districts are political subdivisions of the state governed by a board of conservation district supervisors. The legislature has stipulated in great detail the factors to be considered in the establishment of a district. Provision is made for attempting to consider the interest of all who might be included. Districts including one or more incorporated municipalities have two supervisors appointed by the governing bodies of the municipalities, the other supervisors (either five or seven) are elected within the district. Similarly, Sec. 11-3810 requires that county planning boards include at least one member of a board of conservation district supervisors in those counties where there are conservation districts.

The legislature has granted the districts extensive powers to study and regulate the use of land. Districts may prepare comprehensive plans for the conservation of soil and water, for flood protection, and for the development and disposal of water in the district. To carry out these plans, district supervisors have authority to prepare and adopt regulations which may mandate needed engineering operations, specify methods of cultivation and grazing, require retirement from cultivation of areas highly susceptible to erosion or areas where erosion cannot be adequately controlled if cultivation is carried on, and other provisions necessary to conserve soil and prevent erosion. In addition, supervisors may classify and regulate land within the district according to its agricultural characteristics (76-109).

Land use regulations proposed by the supervisors must be approved by the majority of electors within the district before they can be adopted. After adoption, the supervisors must provide for a board of adjustment to hear appeals rising from practical difficulties and hardships resulting from the regulations. The regulations may be enforced through the courts.

No conservation district has adopted land use regulations. However, because the relationship between county regulations and district regulations has not been clarified by the legislature, if the two sets of regulations were to disagree conflicts would have to be decided in court.

In addition to the stated policy, the State Conservation Districts Law (cited above) includes an implicit policy of voluntary compliance. The legislature apparently concluded that the right of a person to misuse the land is superior to the public's right to prevent that misuse. Erosion is no longer the threat to the state's farm and grazing lands it

once was. But blowing soil remains the state's chief air pollutant and sediment is the state's chief water pollutant. Soil that is blown or washed away is lost forever. The underlying conflict of rights, therefore, is substantial.

Water

Land use, like life itself, is intimately linked to the availability of water. However, the subject of water is complex. The legislature has addressed the subject of water in many different laws, but the policy declarations of the legislature have remained similar. The Montana Water Resources Act, as amended in 1974, declares, in part:

1) The general welfare of the people of Montana, in view of the state's population growth and expanding economy, requires that water resources of the state be put to optimum beneficial use and not wasted.

2) The public policy of the state is to promote the conservation, development and beneficial use of the state's water resources to secure maximum economic and social prosperity for its citizens.

. . .

5) The water resources of the state must be protected and conserved to assure adequate supplies for public recreational purposes and for the conservation of wildlife and aquatic life.

. . .

8) The greatest economic benefit to the people of Montana can be secured only by the sound coordination of development and utilization of water resources with the development and utilization of all other resources of the state (89-101.2).

The policy statement of the Montana Water Use Act, enacted in 1973, concurs:

> **It is the policy of this state and a purpose of this act to encourage the wise use of the state's water resources by making them available for appropriation consistent with this act, and to provide for the wise utilization, development, and conservation of the waters of the state for the maximum benefit of its people with the least possible degradation of the natural aquatic ecosystems (89-866 (3)).**

The legislature has provided organizational and administrative frameworks for the management of the water resource of the state and for the resolution of conflicts surrounding that resource. The statutes provide for irrigation districts, drainage districts, flood control and water conservation projects by counties, municipalities, and conservancy districts, and they implement a policy of developing the water resource. All such programs indirectly affect land use.

For example, conservancy districts may be established and incorporated for numerous purposes, including flood and erosion prevention and control; land drainage; promoting recreation; conserving water and related lands, forests, fish and wildlife; and agricultural, industrial and municipal uses. Districts are authorized to exercise broad powers relating to the use and distribution of the water controlled by the district (89-3401 to 89-3449).

The Department of Natural Resources and Conservation has been directed by the legislature through the Water Resources Act to prepare a comprehensive state water plan for the approval and adoption of the Board of Natural Resources and Conservation. The plan is to be based on the multiple-use concept and is to "set out a progressive program for the conservation, development and utilization of the state's water resources, [and] propose the most effective means by which these water resources may be applied for the benefit of the people, with due consideration of alternative uses and combinations of uses" (89-132.1). A draft of the first segment of this plan, done for the Flathead River Basin, will be available for public review and comment early in 1975.

Public hearings are required during adoption of the plan. As the plan is completed sections are to be submitted to the legislature, but the legislature has not established the legal significance of the plan except to tie it to the general objectives of the Water Resources Act and to "protect the waters of Montana from diversion to other areas of the nation" (89-101.2).

The legislature also has charged the department with administering the law designating controlled groundwater areas and the regulation of withdrawals from them. The legislature recognized that in areas where groundwater withdrawals could be exceeding recharge, strong regulation is required. The Board of Natural Resources and Conservation is required to hold hearings, prepare written findings and issue an order which may set an annual withdrawal limit for an area. Allocation of the allowed withdrawal must abide by pertinent water rights. The same law charges the department with preventing the wasting of groundwaters, defined as applying groundwater to other than a beneficial use (89-2911 to 89-2936).

The 1972 Montana Constitution also addresses the topic of water. In response to Article IX, Sec. 3 of the Constitution, the 1973 legislature declared (through the Water Use Act) that any use of water is a public use, that all water in the state is state property for the use of its people, and that water may be appropriated and used only for beneficial uses. Sec. 89-867 defines "beneficial use" as:

> **a use of water for the benefit of the appropriator, other persons, or the public, including, but not limited to, agriculture (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal power, and recreational uses; provided, however, that a use of water for slurry to export coal from Montana is not a beneficial use.**

The legislature has directed the department to establish a centralized record system of existing rights and begin a process of adjudication, under the supervision of the district court, to determine those rights exactly. The legislature also has sustained the policy that between appropriators, "the first in time is the first in right" (89-891 and 89-896).

Significantly, and perhaps in recognition of its stated policies with regard to wildlife and aquatic ecosystems, the legislature directed that the Department of Fish and Game may represent the public to establish any existing public water rights for recreational use under the act. However, the legislature specifically declared that it was not making a legislative determination of whether recreational uses established prior to the effective date of the law (July 1, 1973) are beneficial uses (89-872).

From the date of the Water Use Act became effective all water appropriations and changes in purpose or place of use require a permit from the department, except in the case of a well outside a controlled groundwater area with a maximum yield of less than 100 gallons per minute. The legislature has declared that a permit must be issued if:

(1) there are unappropriated waters in the source of supply;

(2) the rights of a prior appropriator will not be adversely affected;

(3) the proposed means of diversion or construction are adequate;

(4) the proposed use of water is a beneficial use;

(5) the proposed use will not interfere unreasonably with other planned uses or development for which a permit has been issued or for which water has been reserved (89-885).

Clearly the act establishes a rational process for appropriation and "wise utilization, development, and conservation" of water. However, the last part of the act's policy statement, that water should be appropriated with the "least possible degradation of the natural aquatic ecosystems," appears to have been forgotten in the procedures formulated for reviewing permit applications.

Regulating water use and appropriation indirectly influences the use of land; in addition, the 1971 legislature charged the department with directly regulating the use of lands in the floodplains of rivers. The legislature has recognized "the right and need of watercourses to periodically carry more than the normal flow of water" and has provided the department with the necessary authority to carry out a comprehensive floodway management program for the state (89-3502).

The department has been directed to delineate the 100-year floodplain on all streams and rivers in Montana. (The 100-year floodplain is that area likely to be flooded on the avreage of once every 100 years. In other words, the 100-year floodplain has a 1 percent chance of being flooded in any given year.) The local government having jurisdiction and the affected people must be afforded opportunities for input to the floodplain delineation process.

Local governments having jurisdiction over designated floodplains have six months from the state's notification of floodplain designation to adopt land use regulations for the area designated. The regulations must at least meet the minimum floodplain regulations adopted by the Board of Natural Resources and Conservation. If a local government fails to comply, or adopts regulations failing to meet the minimum standards, the department must enforce the minimum standards within the designated floodplain (89-3504).

The legislature has prohibited certain land uses in the floodplain and allowed others. Some uses require a permit. Permits are issued by the local government having jurisdiction over the floodplain if the local government has adopted adequate regulations; otherwise permits are issued by the department. The department retains the right to suspend the permit power of a local government if it fails to enforce its own regulations. Sec. 89-3507 outlines criteria for the review of permits and emphasizes that danger to life and property is the primary consideration.

As declared in the policy and purposes of the act, the legislature has attempted to "balance the greatest public good with the least private injury" (89-3502). To this end the legislature has defined a two-zone floodplain with more stringent regulations required for an inner area or floodway, where the danger is greatest, and less stringent regulations required for the outer floodplain.

The legislature, through the Montana Utility Siting Act of 1973, charged the department with direct regulation of a very broadly defined land use: energy generating and conversion plants and their associated facilities. Included are transmission lines, dams, aqueducts, transportation links and certain pipelines. The legislature paraphrased the environmental declaration of Article IX, Sec. 1 of the 1972 Montana Constitution and further decreed that "no power or energy conversion facility shall hereafter be constructed or operated within this state without a certificate of environmental compatibility and public need" issued by the Board of Natural Resources and Conservation (70-802).

The legislature has emphasized the all-encompassing intent of this section by the scope of the act's definition section (70-803) and the long list of information required in the evaluation of an application for a public need certificate. The act orders other state agencies to cooperate with the Department of Natural Resources and Conservation to compile information on the impact of the proposed facility (70-807).

The legislature has declared that the board must issue decisions in writing accompanied by complete findings including: the basis of the need for the facility; assurances that the facility will have the minimum adverse environmental impact given available technology and economic realities; that the facility will not violate state and federal air and water quality standards; and that the facility conforms to applicable state and local laws except when the board finds local laws excessively restrictive in view of existing technology, economics, or the needs of consumers (70-810).

A policy of maximizing the opportunity for public involvement in the certification process can be inferred from the list of groups made parties to the certification proceedings and granted the right to seek judicial review of decisions of the board. Parties to the proceedings include the applicant,

the department, local governments affected or potentially affected by the board's decision, and any interested person or group of persons (70-808).

In addition, all utilities are required to maintain an annual plan covering projected demand and construction for the following 10 years. This plan is to be filed with several state agencies and is publicly available (70-814).

Precedents

In the body of law administered by the Board and Department of Natural Resources and Conservation, the legislature has established two significant precedents. The floodway management and regulation act (89-3501 to 89-3515) establishes that there are areas of the state where there exists, due to the characteristics of the area, an overriding state interest in the regulation of the use of land. The Utility Siting Act (70-801 to 70-823) establishes that there exist types of development, that is, land uses, with such widespread effects that they cannot be reasonably regulated by local government.

THE DEPARTMENT OF STATE LANDS

Approximately 5.25 million acres of state-owned land (just over 5 percent of the state) are under the direct control of the state Board of Land Commissioners. In addition, the commissioners exercise permit power over certain land uses on all non-Indian trust lands within the state.

State-owned lands were granted to Montana by the federal enabling act of 1889 which provided for Montana's statehood (25 U.S. Statutes at Large 676, as amended). Sections 16 and 36 in every township across the state were given to the state for the support of common schools and additional lands were given for the support of other educational institutions. Where these sections or any part of them were no longer available to the federal government for granting to the state, the state was allowed to select comparable land from the public domain.

The enabling act also directed the state to establish permanent funds from the proceeds of the sale of timber, oil and other minerals found within the granted lands, and from the sale of the lands themselves. The interest from these funds and rentals received from land leases, interest payments on land sold, and all other actual income is made available for the maintenance and support of school systems throughout the state.

The Board of Land Commissioners was created by the 1899 Constitution and was recreated by Article X, Sec. 4 of the 1972 Constitution. The board consists of the governor, the superintendent of public instruction, the state auditor, the secretary of state and the attorney general. The Department of State Lands acts under the direction of the board, administers the laws charged to the board, and manages most state-owned land. However, state forest lands are managed cooperatively by the Department of Natural Resources and Conservation and the board.

The 1927 legislature declared for the board and department what is now becoming a somewhat troublesome mandate:

> **the guiding rule and principle [of the Board] is that these lands and funds are held in trust for the support of education, and for the attainment of other worthy objects helpful to the well-being of the people of this state; and the board shall administer this trust to secure the largest measure of legitimate and reasonable advantage to the state (81-103).**

To this basic policy mandate the 1969 legislature added the direction to manage the lands under the multiple-use management concept, a concept defined briefly as harmonious and coordinated use of the various resources of the land without impairment of the land's productivity and with "consideration being given to the relative values of the various resources" (81-103).

The 1967 legislature enacted a law declaring as state policy that:

> **It is in the best interest and to the great advantage of the state of Montana to seek the highest development of state-owned lands in order that they might be placed to their highest and best use and thereby derive greater revenue for the support of the common schools, the university system and other institutions benefiting therefrom and that in so doing the economy of the local community ... is benefited (81-2401).**

This act allows up to 2.5 percent of specified income from state-owned lands to be used to develop or conserve state land resources including surface and underground water (81-2401 to 81-2408).

Most of the state's land (about four-fifths) is leased for grazing or agricultural use. The policy that can be inferred from the laws regulating leasing for agricultural use is one of maintaining the long-term productivity of the land and a long-term return to the school trust funds. Leases may be cancelled for mismanagement: overgrazing, allowing excessive wind or soil erosion, permitting an abundance of noxious weeds, or inefficiently using the productive capability of the land (81-422). The legislature has also expressed a concern for the rights of the leaseholder and provided a process to compensate him or her for improvements made to the land if the lease changes hands (81-421).

State lands also may be leased for other uses, primarily the extraction of oil and gas, and the mining of coal, metals, and non-metaliferous minerals.

Coal leases may be issued on lands under lease for grazing or agriculture or on lands which have been sold but in which coal rights have been reserved by the state. In either case the board is directed to exercise care to protect the rights of the lessee or purchaser (81-501). (However, this "care" has tended to be interpreted as compensation for damages.) In addition, the legislature has directed that coal mining on state lands must not be wasteful or make future mining operations more difficult or expensive (81-501).

The law provides that leases for the mining of metaliferous minerals or gems, for the mining of non-metaliferous minerals and for the extraction of oil or gas must provide for protection of the rights of any affected agricultural or grazing lessee (81-608, 81-703, 81-1701). However, the legislature has resolved explicitly only conflicts among those wishing to mine metaliferous minerals or gems and those wishing to extract coal, oil or gas. Where coal, oil, or gas leases are in effect, permission of the coal, oil or gas lessee is required before a mineral lease can be issued on the same land (81-610). No legislative guidelines have been provided to resolve conflicts when agricultural or grazing leases come into direct conflict with coal, gas, oil, or mineral leases.

The legislature has expressed a policy of conservation with regard to oil and gas leases on state lands. Although Sec. 81-1711 does not directly mandate so-called unit operation, it is strongly encouraged to insure that the maximum quantity of oil or gas is extracted from each reservoir.

Land likely to contain valuable deposits of coal, oil, oil shale, phosphate, metals, sodium or other valuable minerals is not subject to sale (81-901). This furthers the policy of insuring best possible return to the state; the worth of a mineral deposit is not likely to be known fully until after its extraction. Also to further the policy of maintaining a long-term return to the school trust fund, the legislature has prohibited the sale of timberland (81-901) and has authorized measures to achieve sustained production on state lands.

Interestingly, the legislature has declared it to be department policy to:

> **As far as possible to determine the lands shall be sold only to actual settlers or to persons who will improve the same, and not to persons who are likely to hold such lands for speculative purposes intending to resell the same at a higher price without having added anything to their value (81-908).**

In addition, the Montana Natural Areas Act of 1974 provides for the protection of areas with "significant scenic, educational, scientific, biological, and/or geological values," and which appear to have been affected primarily by natural forces (81-2702). These "natural areas" may be designated on state-owned land by the Board of Land Commissioners or by the legislature. The board may acquire qualifying private land as a natural area by any legal means, but may exercise the power of eminent domain only in specific instances authorized by the legislature (81-2707).

Reclamation

The Montana Constitution directs the legislature to provide effective requirements and standards for the reclamation of lands disturbed by the removal of natural resources: "All lands disturbed by the taking of natural resources shall be reclaimed. The legislature shall provide effective requirements and standards for the reclamation of lands disturbed" (Article IX, Sec. 2, Montana Constitution). The legislature has charged the Board of Land Commissioners with the implementation of state policy in this area.

There are four laws which state, in varying forms, the state's policy with regard to mining and reclamation: The Strip Mine Siting Act (1974); The Montana Strip Mining and Reclamation Act (1973); Open Cut Mining Act (1973); and the 1971 act providing for the reclamation of mining lands, usually referred to as the hard rock mining act.

Perhaps the one policy statement which best condenses and expresses in simple terms the thrust of all four is that of the Open Cut Mining Act:

> **It is the policy of this state to provide for the reclamation and conservation of land subjected to . . . mining. Therefore, it is the purpose of this act to preserve natural resources, to aid in the protection of wildlife and aquatic resources, to safeguard and reclaim through effective means and methods all agricultural, recreational, home and industrial sites subject to or which may be affected by . . . mining to protect and perpetuate the taxable value of property, to protect scenic, scientific, historic or other unique areas, and to promote the health, safety, and general welfare of the people of this state (50-1502).**

To this, the 1973 legislature added, through the Strip Mined Coal Conservation Act, a policy prohibiting the waste of strip mined coal: "it is declared to be the public policy in providing for the orderly development of coal resources through strip mining to assure the wise use and to prevent the waste of coal" (50-1402).

The Montana Strip Mining and Reclamation Act (50-1034 to 50-1057) has been touted as the nation's most stringent and comprehensive law regulating mining and reclamation. Any person removing or intending to remove by strip mining more than 10,000 cubic yards of coal, uranium and/or overburden must obtain a permit from the Department of State Lands. Permits are issued for a period of one year and must be renewed annually. An application for a permit must include a plan for the mining operation and for the reclamation, revegetation, and rehabilitation of the land and water affected by the mine. The law requires a detailed pre-mining inventory of the natural and man-made characteristics of the mining area including vegetation, wildlife, soils, overburden, surface and ground water hydrology, ownership patterns, location of all water, oil, and gas wells, roads and utility lines. During the operation of the mine continued water quality, soil and overburden sampling is required.

Area strip mining, a method of operation which does not produce a bench or fill bench, is required. Furthermore, the mined area must be restored to approximately its original contours and topsoil must be conserved. To insure that the provisions of the permit are carried out, a bond must be filed with the department for an amount determined by the board based on the characteristics of the area to be mined. The bond may be neither less than $200 nor more than $2,500 for each acre or portion of an acre to be mined, provided that the bond equals the estimated amount that

would be required for the state to complete the work described in the reclamation plan. Return of the bond is contingent on the mine operator's faithful performance in meeting the act's requirements. In no case can a bond be released sooner than five years after revegetation.

In addition to forfeiture of bonds, the department may enforce the law through the suspension of existing permits and, in the case of a mine operator who has more than one permit, the denial of permission to mine lands under the other permits. Civil and criminal penalties are provided for in the act, and the right to seek mandamus in district court to compel state officials to perform their duty under the act is granted to all residents of the state. The act regulates prospecting in much the same manner.

The Strip Mine Siting Act (50-1601 to 50-1617) also applies to coal and uranium mining but extends the review of the department to mine location and site preparation. Site preparation includes the construction of roads, railroad spurs, transmission lines, draglines, and train load-out facilities. The authority granted under the act prevents a situation in which a mine operator would spend a large sum of money on site preparation and then go to the department for a strip mining permit. Obviously, it would be extremely difficult for the board objectively to consider a permit application after a firm invested millions of dollars in site preparation.

The Open Cut Mining Act (50-1501 to 50-1516) applies to any mine operator intending to remove by surface mining 10,000 or more cubic yards of bentonite, clay, scoria, phosphate rock, sand or gravel. The act contains provisions and stipulations similar to those of the Strip Mining and Reclamation Act including the requirement that bond of $200 to $1000 per acre be filed with the department. Instead of a permit system, the law requires mine operators to enter into a contract with the state providing for the reclamation of mined land. The contract may be enforced by the department through forfeiture of bond and criminal penalties.

The hard rock mining act (50-1201 to 50-1226) applies to the mining of all minerals not covered by the Strip Mining and Reclamation Act and the Open Cut Mining Act. Permits are required from the department for exploration, development, and mining if the proposed operation will remove at least 100 tons, in the aggregate, in any 24-hour period. Miners removing less than 100 tons a day must submit a mining plan and obtain a "small miners exclusion" statement from the department. Hard rock mining act regulations are based on potential uses of the land; difficulties of grading and revegetation; procedures needed to control drainage and stream pollution; and the protection of human life, and property, wildlife and vegetation. The law requires that a bond be filed with the department for not less than $200 nor more than $2500 per acre or fraction of acre mined. However, the total bond must be sufficient to cover the estimated costs to the state of completing the reclamation of the mined lands. In addition to forfeiture of bond, the act provides for civil penalties for violation of the provisions of the act.

The Board of Land Commissioners was assured of eventual policy contradictions by the laws establishing the trust lands and creating the basic management concepts for them. Inevitably, interests groups promote differing uses for public lands; the legislature has brought the situation to a head by assigning additional duties to the department and board without resolving long standing questions surrounding the use of state-owned lands.

Generally, past commissioners have interpreted the law to mean that the school trusts must be compensated for each use of trust lands, and that uses offering the greatest long-term compensation are preferred. It has been argued, on the other hand, that the legislature has declared that trust lands are not solely for the support of education and may be used for "other worthy objects helpful to the well-being of the people of this state" (81-103). The legislature may have exceeded its authority by including "other worthy objects" in its directions to the board. The federal act granting the trust lands to Montana mentions only the support of common schools (25 U.S. Statutes At Large 676, as amended). In any event, the application of the law has not always been consistent.

It is often argued that state lands are not now leased to bring the highest return to the state. The 1973-'74 fiscal year income from the leasing of state land was approximately $13.5 million. Averaged over the approximately 5 million acres of state lands, the total reduces to about $2.75 per acre. Significantly contributing to this low per-acre income are the relatively low grazing rentals established by the legislature (81-433). (36)

State forest lands now are open to the public for recreation (grazing and agricultural lands are not) without additional compensation to the trust; such activity tends to lessen the value of the land for simultaneous grazing leases.

Access for public recreation is, in fact, one of the big issues surrounding the leasing of state land for grazing and other agricultural purposes. There is a clear policy conflict in this area that is resolved currently by administrative discretion.

Other areas of conflict include the policies indicated in the Montana Natural Areas Act of 1974 (81-2701 to 81-2713); the State Antiquities Act (81-2501 to 81-2514); and the classification and reclassification of state lands directed by House Bill 22, enacted by the 1974 session (81-302). Which takes precedence, the enabling act, the general mandate to the board, or subsequent legislation? The legislature has not spoken to this issue.

When reviewing applications for prospecting or mining permits, statutory considerations of the board are limited to the feasibility of and procedures for reclamation (50-1208). Strip mine permits are reviewed on a broader basis which includes consideration of "special, exceptional, critical, or unique characteristics" of the land to be mined, and to some extent, of adjacent lands (50-1042). However the social, environmental and economic impacts on the greater surrounding area, the county, the region, and the state, for that matter, need not be considered. The laws do allow for hearings, but currently there are no required procedures except those of the Montana Administrative Procedure Act. There is no mechanism to obtain input from the local people or their governments or from citizens generally.

except through environmental impact statement review process.

When reviewing applications for strip mining coal on state-owned lands, the board finds itself in a particularly conflicting position. Sec. 9 of the Strip Mining and Reclamation Act (50-1042) directs the board to deny a permit if the land to be mined possesses "special, exceptional, critical, or unique characteristics." Yet to comply would violate the legislature's declaration that state lands be managed for maximum long-term return to the school trust fund. The board might argue that to mine the land now, reclaim and return it to grazing or agriculture would produce the maximum long-term proceeds. However, this argument does not avoid violating the directions of Sec. 9. The situation is made even more untenable by the board having invoked Sec. 9 to deny permits for strip mining on private lands.

A deceivingly simple solution to this dilemma would be the transfer of the administration of mining laws to another state department. But the legislature still would need to state which policies, those of the general mandate given the board, or those regarding mining, should take precedence on state land. The declaration in the Montana Constitution regarding reclamation might be useful in resolving this conflict.

THE DEPARTMENT OF REVENUE

With few exceptions, the legislature has not acknowledged the relationship between taxation and the use of land, let alone set conscious policies in this area. The basis of the property tax structure in Montana has been set in a clear legislative directive: "All taxable property must be assessed at its full cash value except the assessment of agricultural lands shall be based upon the productive capacity of the lands when valued for agricultural purposes" (84-401). However, the directive has not been implemented as stated. The assessment of land and land improvements in general (excepting agricultural lands) has been administratively set at 40 percent of market value; that is, "full cash value" is now defined as 40 percent of market value.

The legislature also has divided all property into nine classes and has stipulated the percentage of the assessed value to be taken as taxable value. The taxable value multiplied by the mill levy equals the taxes owed. All land and improvements on land, with the exception of certain industrial property less than three years old, has been placed in the same class.

The legislature has declared that owners of new industrial property are to be given a tax break during the first three years' use of the property. During this period eligible industrial property is taxed at 7 percent of assessed value as opposed to 30 percent (84-301). It is debatable to what extent this tax break, even when associated with other economic incentives available to the state such as mortgage guarantees and assistance, actually affects the decision of an industry to locate in Montana. Other variables such as distance to markets, transportation links, labor and raw material appear to be of much greater significance. However, the tax break does indicate a policy.

Railroad and public utility properties are also taxed somewhat differently than most land and improvements on land. Historically, the assessed value of railroad property has been determined by consideration of such factors as original cost, depreciation, and net earnings. The assessed value of utility property is based on similar factors, but appears to be more heavily influenced by original cost data (37).

Although agricultural land is classed with all other land it is assessed somewhat differently. The legislature has declared a tax policy which gives preferential treatment to agricultural land. In recognition of the large fluctuations in the value of agricultural products, the assessed value per acre of agricultural land has been linked to its productive capacity. This productive capacity is converted to dollars using the 1963 market prices of agricultural products. In 1963 this resulted in an assessed value of 20 percent of market value (15). Figures for 1973-74 indicate that assessed value of agricultural land is between 2 and 16 percent of current market value (38).

The taxation of agricultural land is the one area where the legislature has acknowledged a relationship between taxation and land use. In what is popularly known as the "greenbelt bill" the legislature stated:

> **Since the market value of many farm properties is based upon speculative purchases which do not reflect the productive capability of farms, it is the legislative intent that bona fide farm properties shall be classified and assessed at a value that is exclusive of values attributed to urban influences or speculative purposes (84-437.1).**

The law provides that land meeting specified criteria may be taxed only on its value for agriculture regardless of its market value. If land taxed under the provision of the law is taken from agricultural use the landowner is penalized by the difference between what he is paid in taxes and what he would have paid without the greenbelt bill during the previous four years.

The policy embodied in this law is the protection of agricultural land from unsupportable tax burdens that would result in the sale of the land for suburban uses. Whether the law accomplishes this purpose, or merely provides a tax shelter for speculators, depends on the criteria used to define agricultural land. Unfortunately, the Montana greenbelt law may not be accomplishing the intended purpose. This will be discussed later in the study.

The inclusion of timberlands in the same class as all other lands also has significant policy implications. The market value of timberland is a function of both the market value of its standing timber and the market value of the land. A high tax on standing timber has been interpreted as an incentive

to log and a disincentive to the practice of good forestry management by landowners who choose not to harvest. (The higher the quality of one's timber, the higher one's taxes.)

Lacking motivation and time to keep up with continually inflating market values, locally elected assessors tended to under-assess many types of property, particularly property lying outside city boundaries (38). In addition, local assessors may have been responding to political pressures for assessments lower than those that would have been made otherwise.

Under-assessment of vacant lots and of all land with respect to buildings and improvements also contributes to the speculative holding of vacant land in cities, and in conjunction with lower rural taxes, to suburban sprawl. Under-assessing expensive property with respect to other land contributes to the spatial separation of the wealthy from others.

The 1973 legislature moved to strike inequities in the state's assessment procedures by making county assessors agents of the state Department of Revenue and providing for statewide record keeping and unified direction of assessment activities (84-402). The legislature was not motivated by land use considerations, however, but by considerations of equity in taxation.

Assessment is only the first step in determing taxes. The mill levy is the final step. Mills may be levied by state, county, city and town governments, and school and special districts.

School district levies in particular contribute to differences in property taxes among counties and between urban and rural areas. Urban areas and more urbanized counties have consistently higher school levies even though the 1972 legislature corrected this difference somewhat by shifting the funding of certain deficiencies in school appropriations from county and school districts to statewide levies.

However, Montana's basic policy commitment to the financing of local government through local property taxes insures continued and substantial tax rate differences among counties and between urban and rural areas. In Montana, 96 percent of local government tax revenues, and 62 percent of all local government revenues are from property taxes. Both figures are significantly above the national average. In most states property taxes are used for financing capital improvements; here, property taxes provide the operating revenues of local government (39). Relying on property taxes for operating revenues increases the difficulties faced by local government in providing public facilities, preserving open space, and making capital improvements. Local government is forced to seek land uses that pay high property taxes and discourage all others. In addition, the system tends to keep poor local governments poor and make wealthy local governments wealthier.

Local governments that cannot afford public facilities or capital improvements are less attractive to development yielding high property tax revenues. But without such developments local governments dependent on the property tax for civic improvements will never be able to afford them.

There is one area, however, where the legislature has instituted a tax to remedy the undesirable effects of a land use. Stating that "It is the policy of this state to provide against loss or damage to our environment from the extraction of nonrenewable natural resources" (84-7002), the legislature provided for a resource indemnity trust funded by a tax on the extraction of mineral resources. Revenue from the fund is to be used to improve Montana's environment and correct past damages.

With the exception of the assessment of agricultural land, then, the legislature has not recognized the land use effects of taxation. Nor has it established policies in this area. The effects, however, occur with or without the recognition of the legislature. The last section of this study discusses the use of taxation to guide future land use decisions.

THE MONTANA ENVIRONMENTAL POLICY ACT

To the laws administered by the executive agencies, the 1971 legislature, through the Montana Environmental Policy Act (MEPA), declared a state policy on the environment intended to supplement all other policies. The environmental policy states: "it is the continuing policy of the state of Montana . . . to create and maintain conditions under which man and nature can coexist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Montanans" (69-6503).

The significance of this legislative action should not be underestimated. The Montana Environmental Policy Act (69-6501 to 69-6517) is a rare example of an effort by the legislature to establish and fund an agency to insure the implementation of a single coherent policy. MEPA establishes a process to review all state agency decisions that may significantly affect the quality of the human environment and provides for a legislative agency, the Environmental Quality Council (EQC), to oversee the process. The EQC reports to the legislature and governor on state actions and programs contributing to or interfering with the environmental policy.

What has not been resolved, either by the legislature or the courts, is the degree to which state agencies acting under other state policies are bound by the environmental policy. The legislature through MEPA declared a sweeping state policy but generally has provided neither specific guidance for its implementation, nor a system for resolving conflicts between MEPA and other state policies. In the absence of commanding legislative direction, conflict resolution is left, by default, to administrative discretion, and, perhaps the courts.

How It Adds Up

Abstracting and consolidating the various policy statements identified in the state agency review can reveal the

existing, but implicit overall land use policy of the state. Nowhere is this policy stated in full, and it is unlikely that anyone would suggest it be adopted as a consolidated policy the way it stands. This implicit statement, however, makes it state policy to:

1. **Protect and preserve fish and wildlife resources and provide Montanans with adequate hunting and fishing opportunities for all time.**
2. **Protect areas primarily affected by natural forces and areas of historic, archeological or paleontological significance.**
3. **Conserve the scenic and recreational resources of the state and provide for their use and enjoyment.**
4. **Conserve the grass and soil resources of the state on a voluntary basis.**
5. **Secure maximum economic social benefits of water use with as little degradation as practicable, while preserving fish and wildlife, avoiding waste, and providing adequate supplies for all uses.**
6. **Balance all values affected by air pollution control while protecting public health and preventing injury to plant and animal life and property.**
7. **Provide an integrated system of highways but limit the discretion of highway officials with few statutory guidelines, limit them primarily by the availability of federal and state funds.**
8. **Promote the development of airports.**
9. **Use state lands to provide maximum return to the school trust fund except to protect natural areas and antiquities, provide some recreation, but fail to protect surrounding land use values.**
10. **Reclaim mined land and prevent the waste of coal.**
11. **Diversify and expand the economic base of the state, create new uses for agricultural products, and accelerate the development of natural resources.**
12. **Consider land use effects of taxation only with respect to agriculture.**
13. **Create and maintain a productive and harmonious relationship between man and nature while implementing the first 12 policies.**

By its breadth, such a policy statement offers little guidance to state officials. Encompassing a great many interests and values, the statement fails to acknowledge that it is not possible to simultaneously promote all interests and protect all values. Tradeoffs must and will be made in administering the law. Although recent legislatures have moved to reduce administrative discretion in making required tradeoffs, existing statutes do not adequately resolve the conflicts among the values and interests that are involved in decisions affecting the use of land. In the absence of a commanding overall policy, state officials almost always will rely on the single policy expressed in the particular law they are administering.

Moreover, the legislature does not always include in a law adequate provisions to accomplish the goals of the law's policy statement. Lacking provisions implementing the articulated policy, state officials are most likely to carry out whatever policy is implicit in the procedures provided.

For example, officials of the Department of Natural Resources and Conservation acknowledge in the final environmental impact statement, *Prickly Pear Creek Water Diversion Proposal* (Department of Natural Resources and Conservation, August, 1974), that provisions of the Montana Environmental Policy Act and of the water quality act might be relevant to the diversion decision at hand. In particular, the latter act declares a public policy to "conserve water by protecting, maintaining, and improving the quality and potability of water for public water supplies, wildlife, **fish and aquatic life,** agriculture, industry, recreation, and other beneficial uses" (69-4801, emphasis added).

Likewise, the policy statement of the Montana Water Use Act, the law under which the decision was being made, declares that "It is the policy of this state and a purpose of this act . . . to provide for the wise utilization, development, and conservation of the waters of the state for the maximum benefit of its people with the **least possible degradation of the natural aquatic ecosystems"** (89-866, emphasis added).

Yet in reaching their decision, the officials of the department felt they were restricted to the five specific criteria laid out in the act:

(1) there are unappropriated waters in the source of supply;

(2) the rights of a prior appropriator will not be adversely affected;

(3) the proposed means of diversion or construction are adequate;

(4) the proposed use of water is a beneficial use;

(5) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved (89-885).

Protection of natural aquatic ecosystems or of wildlife and provisions for recreation are not included in these criteria. In fact, officials of the department argue that they would be obligated to grant a water use permit in response to an application satisfying the criteria even if it would result in the "dewatering of the stream" (p. 38, *Prickly Pear Creek Water Diversion Proposal*).

When the legislature does not stipulate the policy that will prevail in conflicts among state policies then the formulation of governing policy is left to administrative agencies. Conflicts will be resolved through the most convenient interpretation of agency mandates or through bureaucratic infighting. Too often the policy favored by the agency with access to federal funding will be the policy followed.

Montana's existing land use policy is a composite of many policy statements: many complementary, a few

contradictory. But the lack of legislative recognition of the interactions of the policy statements leaves the determination of the direction provided by state policy to state administrators.

Local Government Review

In Montana the overwhelming majority of decisions concerning land use are made and carried out without the direct involvement of state government. A great many such decisions do, however, involve local government. Montana's 126 incorporated cities and towns and 56 counties exercise both direct and indirect influence over the use of land. They could, at least theoretically, exercise direct regulatory review over almost every land use decision if they chose to do so.

The legislature has delegated extensive land use control authority to local government, but the body of law containing this authorization is cumbersome and occasionally confusing, particularly with regard to county government.

Montana's old Constitution made a distinction between counties and incorporated cities and towns that was construed to mean that counties could not exercise legislative power while cities and towns could. The 1972 Constitution narrows the difference and declares that counties as well as incorporated cities and towns may exercise legislative and administrative power. Viewing the provisions in the old Constitution, the confusion in the laws, and a Montana Supreme Court decision striking down as unconstitutional the zoning powers granted to counties in 1957, counties have been very reluctant to exercise any direct land use control.

The 1972 Constitution also directs the legislature to provide for review of existing local government forms and for an election to allow choice of alternative forms of city, county and city-county government. The 1974 legislature created a state Commission on Local Government to carry out the local government review at the state level and provided for local government study commissions to carry out the review at the local level. Elections on alternative local government forms are set for 1976. This extensive review of local government could alter significantly the role of local government in land use decisions; meanwhile, local governments operate under a body of law that has accumulated over the last 45 years.

ZONING

The 1929 legislature authorized incorporated cities and towns to regulate the use of land through zoning. Zoning regulations must be prepared in accordance with a comprehensive plan and designed to:

> **lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements (11-2703).**

Cities of the first class (classes of cities are based on population) may extend their zoning authority three miles beyond their boundaries; cities of the second class may do so for two miles and cities and towns of the third class may extend zoning for a mile. City zoning may be extended only if the area over which the zoning authority is to be extended has not been zoned by the county under the broader of the two county zoning authorities (Title 16, Chapter 47, to be discussed below). To exercise this authority a city-county planning board must be formed for the area to be zoned, or the city planning board must be increased to include two representatives from the area.

A safeguard is provided in the authorization of zoning through the provisions for a board of adjustment to act on requests for special exceptions from the zoning ordinance. A counterbalancing safeguard requires a three-fourths vote of the members of the city or town governing body to change the zoning ordinance if 20 percent of the property owners affected by a proposed change sign petitions of protest (11-2705).

Counties have been granted the authority to zone under Secs. 16-4101 to 16-4107 and Secs. 16-1701 to 16-4711. The first of these grants of authority, known as the rural zoning law or the 40-acre law, allows county commissioners to zone districts of at least 40 acres in size when they are petitioned to do so by at least 60 percent of the landowners in the district. However, commissioners may not create this type of zoning district in an area which has been zoned by a city under its powers to extend zoning authority outside city boundaries (16-4101).

Whenever a zoning district is created, the county's commissioners, surveyor and assessor must sit as a planning and zoning commission. The commission must prepare and adopt a development pattern for the physical and economic development of the district. The commission may prepare zoning regulations to enforce the pattern and the regulations may be adopted officially by the county commissioners. However, a district may not regulate land used for grazing, horticulture, agriculture, or the growing of timber (16-4102).

The second grant of zoning powers allows county and city-county planning boards to recommend, for consideration by county commissioners, zoning regulations for areas with adopted comprehensive plans. In addition to conforming to the comprehensive plan county zoning regulations must be designed to accomplish the same ends as city zoning ordinances as laid out in Sec. 11-2703 (cited above). Moreover, county zoning regulations may not prevent "the complete use, development or recovery of any mineral, forest, or agricultural resource" (16-4710).

The legislature has provided substantial safeguards in the procedures for adopting county zoning regulations. If 40 percent of the landowners within a proposed zoning district submit written protest against establishment of the district or the adoption of the regulations, the county com-

missioners may not act and another zoning resolution may not be proposed for that district for at least a year (16-4705). When zoning regulations are adopted the county commissioners must provide for a board of adjustment to act on requests for special exemptions from the zoning regulations.

The 1971 legislature expanded the county's zoning authority by allowing adoption, as an emergency measure, of a temporary interim zoning map or regulation to "classify and regulate uses and relate matters as constitutes the emergency" (16-4711). The emergency action automatically expires a year after adoption, but the county commissioners may extend the regulation for an additional year (16-4711).

An earlier effort to grant zoning power to county commissioners was found unconstitutional by the Montana Supreme Court in 1961 (*Plath v. Hi-Ball Contractors, Inc.*, 139 Mont 263, 362 P.2d 1021). The Court found that the legislature had lodged excessive discretion in planning boards and had unconstitutionally granted legislative power to county commissioners.

Cities, towns and counties also are authorized to zone around airports to eliminate or prevent dangerous obstructions. The statutes granting this authority are discussed as part of the state agency review under the Department of Intergovernmental Relations heading earlier in this study.

PLANNING BOARDS

The legislature has authorized counties and incorporated cities and towns to create planning boards. Planning boards are strictly advisory. A planning board may be created by an incorporated city or town, or by a county or by any combination or group of these local governments. However, a city or town wishing to establish a planning board must notify and allow the county commissioners opportunity to create a city-county planning board instead. The jurisdiction of a city-county planning board normally extends 4½ miles beyond the boundaries of the city or cities represented on the board. The jurisdiction may be extended by petition of 5 percent of the landowners in the area to be included, provided that a majority of the resident landowners in the area do not sign protests against the proposed extension. County commissioners may not establish a county planning board if a majority of county voters (residing outside of cities and towns or the jurisdiction of existing city-county planning boards) disapprove in writing.

Planning boards must prepare and propose to the appropriate local governing bodies master plans for their jurisdictional areas. Master plans may include:

1. Surveys and studies of existing conditions and probable future growth.
2. Maps, charts and descriptive material presenting the existing natural and man-made characteristics of the area.
3. Recommendations and plans for development, redevelopment and improvement of the area.
4. Long-range development plans for public works projects. The local governing bodies may adopt the master plan. If they do, they must use it as a guide and consider it in their decisions regarding public facilities and structures, zoning, and subdivision regulations (11-3840).

SUBDIVISION REGULATION

The Montana Subdivision and Platting Act directs counties and incorporated cities and towns to regulate land subdivision under statutory standards. The act is discussed in the state agency review under the Department of Intergovernmental Relations heading earlier in this study.

OTHER POWERS

At one time counties held substantial acreage. To cooperate with county commissioners in administering county land the 1933 legislature created a County Land Advisory Board in each county and gave the boards purpose by declaring a firm policy:

> **To promote the conservation of the natural resources of the state; to provide for the conservation, protection and development of forage plants, and for the beneficial utilization thereof for grazing by livestock under such regulations as may be considered necessary; to put into crop production only such lands as are properly fitted therefor; to encourage the storage and conservation of water for livestock and irrigation; to place the farming and livestock industries upon a permanent and solid foundation; . . . to gradually restore to private ownership the immense areas of lands, which have passed into county ownership because of tax delinquencies (16-1505).**

Cities directly control the use of land or influence land use decisions through the power of eminent domain (11-977); the power to organize special improvement districts for construction, improvement and maintenance of streets, malls, parking facilities, drainage and flood control works, lighting districts and other projects (11-2201 to 11-2288); and the powers granted to accomplish urban renewal (11-3901 to 11-3925).

Counties influence land use decisions through the powers to establish rural improvement districts (16-1601 to 16-1638); metropolitan sewer districts (16-4401 to 16-4418); and county water and sewer districts (16-4501 to 16-4535). These three chapters of law contain careful procedures for the establishment of such districts and for effective protest by citizens affected by county actions.

County commissioners also have responsibility for locating county roads and for recommending routings of secondary highways (32-2801 to 32-2820). They also may establish a park commission to acquire, establish and maintain parks, play-

grounds, swimming pools, golf courses, libraries and other projects (16-4801 to 16-4807).

The Planned Community Development Act of 1974 revamped the procedure used by cities and towns to expand through annexation and declared a state policy that "Areas annexed to municipalities . . . should receive the services provided by the annexing municipality as soon as possible following annexation" (11-515). This legislation was enacted to curtail annexation merely to increase the tax base yet allow annexation of unincorporated areas benefiting from city services.

Each municipality and county also may influence land use decisions by acquiring land, buildings, and other improvements for an industrial project through the issuance of bonds that impose a limited obligation on those local government bodies. Projects financed by these bonds may be sold or leased as the governing body sees fit but may not be operated by either the municipality or county. The law stipulates that any such project must be "suitable for use for commercial, manufacturing or industrial enterprises, recreation or tourist facilities, and hospitals, long-term care facilities or medical facilities" (11-4402, 11-4401). The law does not stipulate any criteria for selection of projects or require that they conform to a land use plan for the area (11-4102).

The legislature also has directed that cities, towns, counties, municipalities and the state may acquire land for permanent open space. The Open-Space Land Act, enacted by the 1969 legislature, authorizes jurisdictions to acquire land for permanent open space or to designate as open space land already controlled. Open space designations must conform to urban area comprehensive plans (62-604).

Land designated as permanent open space may not be used for other purposes unless equivalent land is designated permanent open space in its stead. In addition, the taxes on open space land in which there is less than full public ownership must reflect the change in market value resulting from the public interest (62-605, 62-608).

Much Offered, Little Required

The legislature has not attempted to dictate policy to local governments. Much is left to the discretion of locally elected officials. The policy inherent in the laws relating to land use and local government is one of offering many powers to local government officials, but only requiring them to exercise a few. Only in rare cases has the legislature mandated the policy to guide the use of those powers. For example, the Montana Subdivision and Platting Act requires local governments to review certain subdivisions in a specified way, but it does not bind local officials to a decision making policy. Certainly, with regard to issues of purely local concern, this is as it should be.

Montana's land use policy at the local level is thus a composite of the policies of 126 cities and towns and 56 counties.

II. WHAT MIGHT BE DONE

LAND USE ACTIVITIES IN OTHER STATES

Montanans are not alone in their struggle to come to grips with the implications of land use decisions on the future. Similar efforts are occurring in county courthouses, town halls, and legislative assemblies throughout the nation. Seven states* in particular have moved to the forefront of this struggle by enacting and implementing a variety of land use policy legislation. The following is a review of their efforts. Also included is a review of the draft of the American Law Institute's Model Land Development Code, the culmination of a 12-year effort to replace the aging foundations of American planning and zoning law.

Not included here are the efforts of those states which have regulated only shorelines or coastlines. The circumstances surrounding such efforts, particularly the incentive and direction provided by the Federal Coastal Zone Management Act of 1972, make their experiences only marginally applicable in Montana.

There are common themes and distinctive contrasts in the seven state efforts. Each is the product of a unique combination of political and cultural forces as they were arrayed when the legislation was enacted. Yet some lessons and ideas from the experiences of these states are worthy of consideration by Montanans.

The state land use efforts reviewed demonstrate, for example, that state government can directly involve itself in the land use decision making process and must do so when local government cannot or will not act. The experiences of Hawaii and New York show that state government can exercise the authority to zone, however, most other states have rejected that option. In Vermont, Florida, Oregon and Colorado, people and local governments retain primary responsibility for land use decisions with the state supplying assistance and review. However, in each case local government is required to broaden its perspective and consider long as well as short-run considerations; the wide ranging implications of actions as well as localized effects.

State level involvement in land use is not without costs, both in money and in adjustments required in the expectations and perceptions of those being regulated. Additional costs to developers will be reflected in the price of their developments, and the cost of government review will be reflected in taxes. But what are the costs of not acting? These costs also can be measured in money — for additional services, for roads, for schools — as well as in lost values and amenities. The states reviewed here have decided that the costs of not acting far exceed the costs of state level involvement.

State level involvement is not an instant cure-all for all land use problems, however. In the seven states reviewed there remain difficulties. Insuring that all projects intended to fall under the purview of the legislation are included in the implementation procedure and that the decisions made under the procedure are enforced, is one. Coordination of the land use policy with other state programs, taxation in

*Hawaii, New York, Vermont, Florida, Maine, Oregon and Colorado. New York's action was confined to its Adirondack Park

particular, is another. In most of the states difficulties are only beginning to surface, although they are clear in the Hawaiian case.

A serious problem common among many state programs is the limiting of the review of land use decisions to a case-by-case basis. Frequently, cumulative effects of many small decisions, and the basic question whether development should occur at all, are not considered. Recognizing this problem, Oregon, Hawaii and Florida have instituted programs to define the goals and priorities of their citizens.

In the seven states land use decisions have been opened up to public scrutiny. The decision makers have been forced to consider the effects of their decisions. And the whole process has increased public awareness of the implications of land use choices. The mechanisms established also provide a means to guide future growth as the goals and desires of each state's citizenry are articulated.

A final lesson that emerges is the need for strong leadership in guiding land use legislation through a state legislature. In almost all the reviewed states the governor or the governor and a concerned group of legislators provided strong support for the legislation and worked hard for its enactment.

The experiences of other states can offer Montanans insights and ideas, but only Montanans can choose and implement a land use policy for Montana.

HAWAII

Passage of the Land Use Law (1961) made Hawaii the first state to express in law a modern awareness of the effects of land use on the quality of life available to the state's citizens. Hawaii took a strong stand, stronger than any other state which has followed, but perhaps the perception of land as a resource is particularly clear to those who live on islands. The Hawaiian effort is the only U.S. example of statewide zoning and offers the lessons of over 10 years' experience with this approach to land use regulation.

How It Works

The Land Use Law and its amendments established the State Land Use Commission, directed the commission to classify all the lands of the state into four districts and authorized the adoption of rules and regulations governing land use within the districts.

The commission is composed of seven private citizens, appointed by the governor and confirmed by the senate, the director of the Department of Lands and Natural Resources and the director of the Department of Planning and Economic Development. The entire state has been divided by the commission into four districts stipulated in the statute: urban, rural, agricultural, and conservation.

Urban districts include substantially all currently urbanized areas plus a reserve of land theoretically sufficient to accommodate urban expansion for approximately 10 years. The Land Use Law requires a review of all district boundaries every five years. Uses permitted within urban districts are determined by county zoning regulations, but the county is not obligated to zone all land in the district for urban uses. Thus, county and state approval are required for most urban development.

Rural districts are characterized by low density residential development of a semi-rural nature. Lots must be a half-acre or larger (large lots by Hawaiian standards). This classification has been used quite sparingly.

Agricultural districts include crop and grazing lands plus sugar mills and other industrial activities associated with Hawaiian agriculture. Parcels must be at least an acre. Delineation of agricultural districts is based primarily on detailed studies of agricultural suitability. However, lava flows and other lands unsuited for agriculture are included in agricultural districts when conservation district criteria cannot be met.

The Land Use Commission regulates land use in the rural and agricultural districts and may issue special permits for certain uses, such as the location of a new town, in either kind of district. Such permits require the concurrence of the appropriate county planning commission.

Conservation districts include Forest and Water Reserve Zones (state-owned lands reserved for conservation purposes under earlier law), some private lands in mountainous areas of more than 20 percent slope (in 1969 at least a third of the land in conservation districts was privately owned (40)), and a 20- to 40-foot shoreline buffer zone around the entire coast of the Hawaiian Islands. Land use within the conservation districts is regulated by the Department of Land and Natural Resources. Among uses permitted are cabins, residences, recreational trailers, resorts, hotels, golf courses, marinas, and governmental activities. The Board of Natural Resources passes on all applications for permits within the conservation districts. As might be expected, there is a continuing debate over the activities that should be allowed in the districts (40).

Only the Land Use Commission may set district boundaries. From 1964 to 1973 there were 244 applications for boundary changes filed with the commission (42). Proposed boundary changes and applications for special permits are decided under specific time constraints established by the statute. A public hearing is held in the county where the land is located and the county planning commission reviews the request and offers comments. Six of the nine Land Use Commission members must vote for the boundary change to effect passage. It is particularly noteworthy that public agencies must obtain permits from the Land Use Commission or the Board of Natural Resources for their activities within rural, agricultural, and conservation districts.

Effects and Problems

The major effect of the Land Use Law appears to be the preservation of agricultural land and a compactness of cities. From 1964 to late 1970 the commission received requests to reclassify more than 100,000 acres to urban district status. Only 30,000 acres on the fringes of existing urban areas were reclassified, and of these only 3,500 acres

were considered prime agricultural land. In addition, there is evidence that plantations are now planned for long-term growth and stability due to the assurances inherent in the Land Use Law. The flexibility of the commission allowed by its clear and powerful legislative mandate also enables it to play an active role in directing the pattern and rate of growth. The commission has the potential to become the main instrument for guiding the state's growth (41).

The Hawaiian system is not without its problems. Housing is very costly in Hawaii. The 1970 census estimated the median value of owner-occupied housing to be $35,000 — more than twice the national average of $17,000. It is argued that containment of the urban areas and allowing only moderate expansion on the urban fringe has driven up the price of residential land and led to high housing costs (40). A consultant's report in 1969 concluded that the Land Use Law may have aggravated the housing shortage but other factors may have contributed including large profits made by builders, a shortage of heavy equipment and experienced construction workers, a choice by developers to construct only high cost housing because it brings a great return, and the amount and cost of required improvements on lots. Generally acknowledged is the problem of time delay between the application for agricultural or rural land reclassification (usually to urban land) and the ensuing approval by the county.

There have also been problems in carrying out the law. With its small staff the Land Use Commission cannot follow up on permits to enforce conditions and restrictions; nor can it check on development that might be occurring without a permit. The Land Use Law directs the counties to enforce the decisions of the commission but there is no check on this process. Similarly, the Department of Lands and Natural Resources does not have the staff to make field inspections of the areas for which permits are requested, let alone inspect for violations of conditions attached to permits that are granted.

The Land Use Law directs assessors to give consideration to the commission's classifications in making assessments, but this seems to have had little effect. (Hawaii has uniform statewide property assessment.) Some observers say the commission and the Department of Revenue even appear to be working at cross purposes; however, some of the difficulties can be traced to contradictions in the statutes (40).

County officials are said to be unhappy with several aspects of the Land Use Law. They like having control over urban development in urban districts through zoning but they resent the final authority of the Department of Land and Natural Resources in controlling urban uses in conservation districts. It is also argued that county level planning now is more sophisticated than state planning and that the counties' recommendations should be given the greater weight in decisions of the Land Use Commission. (County decisions are required to be based on sound planning since the Hawaiian Supreme Court ruled that all rezoning must be supported by a comprehensive planning decision.) In addition, the Land Use Commission is said to maintain little contact with county public works departments and thus has no knowledge of the county's ability to provide public services to areas under consideration for reclassification to urban (40).

The credibility of the Land Use Commission has been hurt by accusations of conflict of interest. The commissioners also are said to show favoritism to their home island in land use decisions (40, 42). Considering the influence of the decisions made by the commission such accusations are not surprising. In addition, the circumstances surrounding the passage of the Land Use Law have changed; there is now some question about the desirability of preserving all agricultural land when the markets for Hawaiian pineapple and sugar have been depressed. The last few years have seen a number of unsuccessful attempts to alter the law.

Lessons

Before considering the applicability of the Hawaiian experience to Montana, the circumstances surrounding passage of the Land Use Law must be studied. In 1961 any threat to the sugar and pineapple industries was a serious threat to Hawaii's economy. The draftsmen of the law and the owners and operators of large plantations saw such a threat in the gradual sprawling of Honolulu on to the prime agricultural land of the central valley of Oahu. Hawaii does not have much prime agricultural land to lose. Only 10 percent of the state's four million acres are suitable for crops. The great tourist boom of the late 1950s also was seen as a threat to agricultural land.

On the political front, there were few small landholders to feel threatened by the law; the large landholders considered it desirable. Nearly 90 percent of the privately held land in the state (almost half of the total area) is controlled by a small number of people. Such is certainly not the case in Montana.

Several other factors peculiar to Hawaii also must be considered. Hawaiians have long been accustomed to a strong, centralized territorial government and they had no tradition of local government. Before becoming a territory, Hawaii was ruled by a monarchy. Under its Polynesian law areas of land were decreed usable for certain purposes only. Alternative use of the land was subject to severe penalty — a system very similar to that of the Land Use Law (40). After statehood Hawaii retained simple governmental structure: four counties and the state (the city-county of Honolulu includes about 82 percent of the state's population). In addition, Hawaiians have long nurtured a conservation tradition.

One lesson Hawaiians have learned from their experience in regulating land use is that land use regulations alone cannot guarantee the protection of those values which make the islands such desirable places to live and visit. Hawaii is among leading states beginning to grapple with the basic growth questions that underlie land use issues. The 1973 Hawaiian legislature established a permanent Commission on Population and directed it to investigate the carrying capacity of the state regarding agricultural production, waste recycling and natural system regeneration.

The 1974 legislature adopted a resolution directing the executive branch and a joint interim legislative committee to analyze a report by the state's Department of Planning and Economic Development that recommended a slow growth policy for the state (43). The resolution specifically directs the development and submittal of recommendations to the 1975 legislature for action programs to implement the "slow growth" alternative outlined in the report.

ADIRONDACK PARK

Adirondack Park in upstate New York is another example of innovative land use controls applied by state government. The park includes approximately six million acres (twice the size of Yellowstone) and embraces all or part of 12 counties and 89 towns. Sixty percent of the area within the park boundary is in private ownership. The 40 percent in public (state) ownership has been protected since 1894 by a provision of the New York Constitution directing that these lands be kept "forever wild." There have been more than 100 efforts to weaken this directive in the last 80 years, almost all rejected at the polls.

Long a playground for the wealthy, the Adirondack Mountains have experienced a tremendous increase in use over the last 30 years. About five years ago, a private study recommended turning the area into a national park. This suggestion irritated many New Yorkers who felt that the state had been, and could continue to do a better management job than the federal government. The change in character that would result from national park status was said to threaten the subtle values of the park. The governor responded by appointing the Temporary Commission on the Future of the Adirondacks, which recommended a permanent park agency and the preparation of a park plan.

Continuing where the temporary commission left off, the Adirondack Park Agency developed a sophisticated plan and land use program to guide future park development. The plan and program is quite complicated, rich in detail, and not easily summarized. There are really two plans: one for the public lands, and one for the private lands. The first needed only the approval of the governor, and this was obtained in July of 1972; the latter needed to be enacted into law because it dealt with private property rights and was extremely controversial. The private land use and development plan passed the legislature on May 14, 1973 by a 117 to 12 vote in the Assembly and 52 to 3 in the Senate. The governor signed the bill into law the following week (44).

How It Works

The master plan for the state's 2,275,000 acres of park classifies the land into four broad categories: wilderness, primitive area, canoe area, and wild forest. In addition, there are intensive use (major travel corridors) and special management (wild and scenic river) areas.

The master plan for the private land places each parcel into one of six use categories: industrial, hamlet, moderate intensity, low intensity, rural, or resource management. For the last four categories, general density guidelines and lists of compatible land use activities were issued to reflect the land's ability to withstand use and maintain its general character. The purposes and objectives of each use category are explicitly stated in the plan. Density guidelines and compatible use lists were not developed for hamlets or industrial use areas. The development of such areas is left to local discretion in hopes that a diversity of environments will result. There are also comprehensive shoreline restrictions throughout the park with varying requirements for each use category.

The densities in the guidelines range from 15 principal buildings per square mile (approximately one building per 42 acres) in resource management areas to 500 buildings per square mile (approximately one per acre) in moderate intensity use areas. Determining density for a particular area further depends on such factors as soil conditions, slope, elevation, wildlife habitats, and the ability of local government to provide services. The effect of the plan can be illustrated by noting that 53 percent of the private land has been designated as resource management area and that the next most restrictive category, rural area, includes an additional 32 percent of the private land (44).

Responsibility for administering the Adirondack Park plan and land use program is shared by local government and the park agency. Enforcement is through a permit system. Certain specified types of development (the type varies with the use category) and development in critical environmental areas are reviewed by the agency irrespective of local government jurisdiction. Jurisdiction over other specified types of development is given to those local governments that have land use programs approved by the park agency. If the local government does not have an approved program the development is reviewed by the agency. However, in all cases the agency has standing to participate in local review and to seek judicial review of permits granted by local government.

Effects and Problems

Perhaps it is too soon to see what the effects of the Adirondack Park management program will be. Certainly, it has stopped the land rush that was beginning in the late 1960s. There will be very few large second home developments in the park. The town of Altamont, population less than 6,700 in 1972, will not grow into a suburb of 640,000 as would have been permitted under its zoning ordinance. The effects on the local economy are still unpredictable. The area is poor, with high unemployment and a dependency on logging and recreation businesses. The forest products industry complains that there are insufficient industrial sites within the park, and that the cost of hauling to available sites will hurt the logging industry. This same group traditionally has been unhappy with the "forever wild" directive in the Constitution (45).

Adirondack Park is quite expensive to the people of New York. The state pays about $6 million a year in lieu of taxes on the state lands. The executive secretary of the Northeastern Loggers' Association has estimated that opening up all state forest lands in the park to "intensive management" would save the state an additional $46 million a year (45). In addition, the state has made money available to aid local

governments in developing land use programs. The whole question of taxes and the park is under investigation by the State Board of Equalization and Assessment. The board will submit a final report with recommendations to the governor and the legislature in early 1976.

Lessons

The Adirondack Park example shows that the state can zone, both in cooperation with local government and by superseding local government. The park experience also demonstrates that when the people of a state have enough interest in protecting a district they may do so with only reasonable consideration for the local economy. But Adirondack Park is a special case and the experience is not easily transferable.

Whether it is a park or not, the Adirondack Park name has maintained a special significance to New Yorkers. The park preserves what once was and represents a haven where the air is still clean and fresh, most lakes and rivers are clear and unpolluted, and the mountain streams provide water that does not have to be treated for drinking. Given the circumstances it is not difficult to understand how the 19 million New Yorkers who do not live in the park could decide to trade some of the expectations of the less than a quarter million landowners who do live there for the preservation of the integrity of the park. It is hard to imagine similar circumstances occurring in many other areas though, particularly in Montana.

VERMONT

With the passage of Act 250, the Land Use and Development Control Law, in 1970, the Vermont legislature demonstrated that one of the country's most rural state legislatures also could be one of the most progressive. Vermont had been a rural enclave lying north of the Washington-New York-Boston megalopolis and south of the recreation sphere of Montreal. The 1960s brought interstate highways, generally increased mobility and 55,000 new residents — an increase of only 15 percent, but five times the increase of the previous 10 years (46).

Taxes continually increased in response to demands for expanded services. The trend toward agglomeration of the traditional Vermont small holding into larger farms accelerated, but perhaps the last straw was an announcement, in the summer of 1968, of plans for a 20,000-acre development on hilly land covered by thin soils, clearly unsuitable for septic tanks, in the southern part of the state. The project was being proposed by a subsidiary of the paper company that had owned the land for decades.

A Commission on Environmental Control was established by the governor and immediately recommended State Health Department review of water supply and sewage disposal on projects of three or more lots of 10 acres or less. The final report of the commission recommended strong state intervention in the regulation of land use — an idea that historically would have been opposed by most Vermonters. Yet Act 250, the bill embodying the recommendations, passed almost unanimously.

Many factors contributed to the passage of the act. The year 1970 saw nearly universal concern about the environment and Vermonters were tired of the misuses of land they had seen occurring in their state. But existing law required a town plan before a town could implement controls over land use. (In Vermont, local government is at the township level.) There also was a generally recognized lack of planning competence at the local level. It was seen that preparing town plans could prevent action in most areas of the state for many years. The only alternative was to sanction a strong state role (40, 47).

How It Works

Act 250 established a permit process for the following activities: housing or trailer park developments of more than 10 units; commercial or industrial improvements of more than 10 acres; subdivision of land for sale in parcels of 10 or fewer acres; and any development on land higher than 2,500 feet above sea level. To encourage local government responsibility, permits are required for all commercial and industrial developments of more than 1 acre (instead of 10) in towns without permanent zoning and subdivision regulations. The permit process also applies to developments proposed by state and local agencies.

The act divided the state into eight districts; established a district commission in each to implement the permit process; and established a State Environmental Board to oversee the permit process, hear appeals from aggrieved parties and perform certain specified planning functions.

Each district commission comprises three local residents appointed by the governor. The chairman serves a two-year term; members serve staggered four-year terms. The commissioners work part time and receive $25 a day for expenses. Initial review of all permits is done by these local, lay citizens, and the general acceptance of the permit process has been attributed in part to this system. It avoids arousing the distaste many people have for far-removed bureaucratic authority (46).

The Vermont Environmental Board is an independent regulatory agency composed of nine lay citizens appointed by the governor. Members serve four year terms; the chairman is appointed for two years but serves at the pleasure of the governor. The board meets about four times a month and members receive $25 per day. The board is within the Agency of Environmental Conservation for administrative purposes and may draw upon agency's staff. In addition, the board has a small staff of its own including area coordinators, who work with the district commissions and the field investigators who are in charge of enforcement.

The permit process begins when a party desiring to undertake a project falling under the purview of the law files an application with the appropriate district commission and notifies the affected municipality and regional planning agency. A copy of the application is sent to the Agency of Environmental Conservation, which prepares, with the help of other state departments, a position statement on the application. State level review, which includes an investigation of the project's impact on roads, schools, and the local economy, is coordinated by the Act 250 Interagency Review Committee; it meets biweekly, and includes

the Departments of Health, Highways, and the Agency of Development and Community Affairs.

The district commissions hold public hearings on all applications. Adjoining property owners, local and regional planning agencies, and local government members are parties to the application by law. In addition, the district commission may allow any interested citizen or group of citizens to testify and often invites comments from parties who apparently represent an involved interest. The style of the hearing varies somewhat from district to district, but generally it is informal and the commissioners rarely conduct their own investigation. Usually they act solely on the record presented to them.

To approve a permit the commission must find that the project is consistent with criteria in the statute. Briefly, the project must not cause undue air or water pollution, place an unreasonable burden on existing water supplies (the project must have an adequate supply of water), highways, schools, or other government services, result in excessive erosion or have an undue adverse effect upon scenic, historic or cultural values of an area. The application must conform to state plans, when adopted, and the attorney general has ruled that an application also must conform to adopted local and regional plans. However, most sub-state plans are too general to offer much guidance (40).

The district commission may deny an application, approve it, or approve it with conditions. The latter alternative is used most of the time, and the power to impose conditions has been applied broadly by the commissioners. Conditions have included protective covenants and specifications for plumbing and electrical wiring. The type and specificity of conditions appears to vary from district to district and some say this is a reasonable reflection of the differing concerns throughout the state.

The decision of a district commission may be appealed to either the Environmental Board or a county court. Further appeal can be made to the state Supreme Court. The law grants appeal to the applicant, a state agency, the regional and municipal planning commissions and the municipality affected. The board, however, generally accepts comments on an appeal from any party which appeared before the district commission. Acting on an appeal, the board schedules a new hearing and bases its decision on the same criteria that govern the district commissions. New issues or additional proof may be presented to the board.

Act 250 also directs the Environmental Board to prepare and adopt a series of three plans to guide district council and board decisions. First, an interim capability plan setting forth the ecological constraints on development. Second, a capability and development plan attempting to reconcile ecological capability with citizen desires and future needs and establishing state goals for development. Third, a state Land Use Plan translating the goals into detailed maps of land use designations.

The exact purpose of the Land Use Plan has become somewhat muddled. Originally, it was recommended that the plan be adopted by the Environmental Board and approved by the governor, but not the legislature — making it a generalized guideline not expected to be followed exactly. However, during the debate on Act 250 the legislature decided to reserve to itself final approval of the plan after the board and the governor had endorsed them. This stipulation would give the Land Use Plan the effect of law.

Both the interim land capability plan and the capability and development plan passed the legislature on schedule, but the Land Use Plan was not enacted by the 1974 legislature. Actually delineating areas where certain kinds of development could or could not occur came as quite a shock to many legislators. The proposed plan aimed to encourage local land use plans by allowing local government time to act before the state acted. However, not even weak drafts developers tend to comply because local residents are very aware of their actions, but many state officials believe that many small developments theoretically covered by the act occur without review. The act does require that the property transfer tax form required to accompany every sale of land in the state include a certificate of compliance with or exemption from Act 250. This certificate must be signed under oath by the seller, and a copy is sent to the Agency of Environmental Conservation.

Effects and Problems

A major benefit of the Act 250 permit process has been the ability of the district commissions to enforce existing but previously poorly enforced state and local environmental controls. In addition, the Interagency Review Committee has created important communication channels among state departments to exchange views on policy and coordinate activities (40).

Most Vermonters agree that the permit process has improved the quality of growth; many believe that it has slowed the rate of growth. But is is very difficult to substantiate the effect on the rate of growth since this would require knowing what has not been built as well as what has. A 1973 study by the Conservation Law Foundation described Act 250's impact as "improving development rather than directly forbidding it, and . . . not a mechanism for directing the rate and location of growth (46)."

There are many problems with the exemptions and limits written into the original law. The "grandfather clause" could allow an increase of a third in the number of housing units in the state without any review, and the highway department insists that many new roads fall under the provisions of the clause.

Acreage requirements in Act 250 bear little relation to the potential for environmental harm a project may offer. As with Montana's subdivision law, there has been a proliferation of projects just beyond the acreage limits in the act. Signs advertising "lots — 10+ acres" are as common in Vermont as in Montana (40). It has been estimated that only 20 to 30 percent of all developments comes under Act 250's purview (46).

The exemption of all construction for agricultural, logging, and forestry purposes on land at elevations of less than 2,500

feet reflects the view that the interests of farmers and timber owners coincides with the public interest if the land remains in open space. This is not always so.

The costs of development also have increased as a result of the law; some estimate by as much as 10 percent (46). Although it is true that the additional requirements probably will result in long term savings to the community (if not the individual home owner), the greater initial development costs tend to favor the big time developer.

The effects on the availability of housing have been mixed. The commissioner of housing admits a minor effect in raising the cost of first homes for Vermonters, but also points out that it may be helping to increase the supply of first homes. He poins to a case where a developer scrapped a plan for recreational home development after the district commission's hearing and is planning instead a project including first as well as second homes (46).

The Environmental Board has tried to answer the reasonable complaints of developers concerning the number of permits required by various state and local agencies but the board has been only partially successful in reducing the number of permits required. All permits issued within the Agency of Environmental Conservation have been consolidated.

Enforcement of the law in general and of the conditions attached to permits by the commissioners has been particularly troublesome. The act provides stiff penalties for violations, but the board has had to rely on the efforts of officials in other departments within the Agency of Environmental Conservation for field investigations. Large developers tend to comply because local residents are very aware of their actions, but many state officials believe that many small developments theoretically covered by the act occur without review. The act does require that the property transfer tax form required to accompany every sale of land in the state include a certificate of compliance with or exemption from Act 250. This certificate must be signed under oath by the seller, and a copy is sent to the Agency of Environmental Conservation.

Lessons

The Vermont experience underscores the important benefits derived from giving local citizens the power to review projects: ordinary local citizens, not so-called experts, and definitely not experts off in the capital. Vermont's existing regional planning commissions were not given the review power for the same reason; they had become experts (46). The strongest power the district commissions have is that of persuasion; this power can best be exercised by respected local residents. Vermont has been lucky in being able to call upon many of its citizens to devote long hours to reviewing plans with only minimal compensation.

Vermonters also have learned that a permit process by itself is not enough to guide growth or control the future of their state. They have acknowledged the need for a growth policy and have completed the first two steps of a process that may someday establish clear guidelines for the state's future. They also have recognized the need to coordinate land use planning with other state activities, particularly taxation. In 1973 the Vermont legislature enacted a capital gains tax on land speculation which has succeeded, in the opinion of many, in slowing speculative land sales. House Bill 651 introduced and killed in the 1973 Montana legislature was modeled after the Vermont law.

But perhaps the most important lesson of the Vermont experience is that when conditions are bad enough the citizens of a state will sanction what is for them extreme measures to rectify the situation. Montana is not yet suffering the severe development pressure that Vermont faced in the late 1960s, but must we wait until we are before we act?

FLORIDA

During the 1960s, 4,500 new residents moved to Florida each week. By early 1974 the rate had climbed to almost 6,000 new residents a week with some 57,000 acres of land becoming urbanized each year to accommodate the influx. In the face of such growth many Floridians have become concerned that the amenities and the quality of life which make Florida a desirable place to live are being lost.

The cities of Tampa and St. Petersburg waged a slowly escalating battle over water for about 40 years until 1971, when the worst drought in history struck southern Florida, the "most prosperous, the most populous, the fastest growing and most glamorous part of the state (48)." Over 750,000 acres of Big Cyprus Swamp and the Everglades, areas hydraulically linked to the aquifers of the most populous areas of southern Florida, dried out and caught fire.

Out of a governor's conference called to consider water management in south Florida grew a task force that eventually prepared a package of legislation and presented it to the 1972 legislature. In April of that year four bills were enacted: the Florida Land Conservation Act, the Florida Water Resources Act, the Comprehensive Planning Act, and the Environmental Land and Water Management Act (Act 380). The latter is of major concern because it deals directly with the regulation of land use. Florida, another state noted for its conservatism, thus moved to regulate the use of land in a progressive, if not radical manner. Florida had been one of the last states to permit counties and cities to zone. Twenty-eight of its 67 counties and a third of its 400 municipalities lacked minimum zoning or subdivision regulations when Act 380 was passed. However, not all local governments waited for state assistance.

Citizens of Dade County (includes Miami and Miami Beach) passed a referendum enabling residents of an area of the county to petition the county manager to place a moratorium on all building in their area until the capacity of public services could be examined. A dozen such moratoriums were enacted, affecting areas from 40 acres to 50 square miles. Addressing the cause of land misuse, the citiznes of Boca Raton passed a charter amendment providing that no more than 40,000 dwelling units could be constructed in the city.

In addition to the environmental concerns of Floridians

there were several additional factors that allowed fundamental change to take place. Citizens had lost faith in the ability or willingness of local government to carry out their wishes concerning community development. A number of land use scandals involving local government officials received wide attention in the press and on television (48). Reapportionment had altered the character of the legislature. For the first time there was strong representation of urban and suburban interests. Governor Reuben Askew introduced Act 380 personally to the legislature as his top priority and used his influence throughout the session. When the session ended with the bill stalled in the house, he extended the session for an additional week to allow passage (48).

Act 380 is modeled after a 1971 draft of the American Law Institute's Model Development Code, the first effort to review and revise the basis of land use zoning law since 1924. In the Florida act, state involvement in land use decision making is quite selective and is triggered by a specific type, size or location of development. The great majority of land use decisions are unaffected by the act.

The governor's task force had considered many alternative methods of land use control before proposing what became Act 380. A bill resembling Hawaii's statewide zoning system had been introduced in the previous session, but the task force decided against the Hawaiian approach for a number of policy and practical reasons. The task force felt that land regulation should remain as close to those affected as possible, that there should be recourse to convenient protection from delays and arbitrary action, and that a large centralized bureaucracy should be avoided. A state level effort centered in the capital city would satisfy none of these requirements.

How It Works

Under the Florida statute the state is involved only with Areas of Critical State Concern and Developments of Regional Impact (DRI). An area can be considered for designation as an Area of Critical State Concern for any of three reasons:

1. The area contains or has a significant impact on environmental, historical, natural, or archaeological resources of regional or statewide importance.
2. The area is significantly affected by, or has a significant effect on, an existing or proposed major public facility or other area of major public investment.
3. The area is designated on a state land development plan as possessing major development (such as a new town) potential.

The Division of State Planning identifies the critical areas, prepares a report on proposed selections, and recommends boundaries and guidelines for development within the boundaries. The governor and cabinet review the recommendations; if they approve them the local government having jurisdiction over the area involved has six months to prepare and implement regulations based on the principles. If the local government fails to act the state will prepare the regulations and local government can be forced to implement them by court order. (It should be noted that the Florida cabinet is a unique institution consisting of six independently elected state officials. Each has his or her own constituency and the governor cannot count on their support.) The statute limits the amount of the state that can be designated as critical areas to 5 percent or 1,670,000 acres and further limits to 500,000 acres the amount of land that can be designated in any year.

Developments of Regional Impact are any developments which because of character, size, or location have substantial effects beyond the boundaries of the county in which they are located. Criteria for defining DRIs based on county population and the size and projected impact (number of dwelling units, acreage, floor space, parking spaces) were prepared by the division of state planning and a special study committee, and approved by governor, the cabinet, and the legislature. The criteria are not all-inclusive, however, and a local government may designate a development as a DRI even though it does not fit the criteria exactly (49). Agricultural use of land, and highways and utilities on existing rights-of-way are exempted from all provisions of Act 380.

The DRI process begins when a developer files a permit application with a local government and copies are sent to the state and the appropriate regional planning agency. The regional agency then has 30 days to prepare an environmental assessment and recommendation which the local government must consider before deciding whether to deny, approve or conditionally approve the application. Three situations can occur:

1. The development is proposed in an Area of Critical State Concern, in which case it is subject to the regulations prepared for that area.
2. The development is proposed in an area with existing zoning or subdivision regulations. The regional planning agency has 30 days to prepare an environmental impact review which includes economic and social considerations. The local government must consider the recommendations of the regional agency when it reviews the application. The local government can approve, conditionally approve, or deny the developer's request.
3. The development is proposed in an area without local controls. The local government then has 90 days to enact controls, which produces the situation described in No. 2 above. If the local government takes no action the developer may proceed. The developer remains responsible for obtaining whatever state permits may be required by pollution and dredge-and-fill regulations.

Decisions regarding DRIs and development in Areas of Critical State Concern may be appealed to the governor and cabinet sitting as the Florida Land and Water Adjudicatory Commission by the property owner, the developer, the appropriate regional planning agency, and the division of state planning.

Effects and Problems

The implementation of Act 380 has been slow to build up momentum. The ability of the state planning agency to intervene in land use decisions with status equal to the developer had some immediate effects. But inadequate funding and the pervasive weakness of regional planning agencies has resulted in a generally slow beginning. In addition there were several stipulations written into the statute which guaranteed delay.

Areas of Critical State Concern could not be designated until the voters approved a $200 million bond issue to purchase endangered lands, even though the purchase of all critical areas was not the intent of the law. In most cases reasonable regulation would achieve the desired degree of protection. The bond issue passed in November 1972 by a 3 to 1 majority.

The act insured at least a year's delay in the DRI process by requiring the state definitions of DRIs to be approved by the legislature, the governor and the cabinet. Working our procedures for intergovernmental cooperation and naming the regional agencies to review DRIs added to the delay. Not until July 1, 1973, 15 months after Act 380 became law, did the DRI process begin to function.

When Act 380 was enacted there were only two fledgling regional planning councils and several loosely organized multi-jurisdictional bodies in Florida. Now there are 10 regional planning districts covering the state, and seven organized regional agencies responding to DRI applications. The size and capability of the agencies varies greatly and the inherent weakness of voluntary associations of "sovereign" counties plagues them all (48).

Lessons

Again it is much too soon to gauge all the effects of a fledgling land use law. Based on the experience of the first six months of operation of Act 380's DRI process, observers have reported an improvement in the quality of development, an increase in the cost of housing, and no noticeable effect on the rate of development. Proponents of subsidized housing claim the process has hurt their efforts without offering them any help. (Act 380 does not give the state authority to override local veto of projects of regional benefits, such as subsidized housing.) (48, 50)

State officials estimate that 10 to 50 percent of all the development in Florida comes under the DRI process — obviously, more a guess than an estimate (48). As is the case with Montana's subdivision regulations, the limited coverage of the DRI process has spurred developers to seek ways to avoid it. Until the 1974 Florida legislature prevented cities from annexing undeveloped areas, developers built in areas without local controls or induced receptive cities to annex them away from county regulations and thus from the DRI process. The DRI size criteria still allow developers to reduce the size of project proposals and escape controls.

Moreover, there are a number of technical problems with the law. The most significant is the lack of interim control. During the period between the passage of the law and its implementation, and now during the period between the designation of an Area of Critical State Concern and the implementation of the regulations, development activity increases to avoid the law (48).

The law also is limited in its application because it fails to consider three key problems of land use. First, a process oriented toward large development is inherently unresponsive to the cumulative effects of a number of small developments. Several projects under the DRI threshold may have a total effect substantially greater than a single DRI, yet they fall completely outside the purview of Act 380.

Second, providing special protection for a few critical areas in a large state where much of the area is environmentally sensitive is to some degree self-defeating. In Florida it has resulted in a great deal of bickering over boundaries of critical areas when the real issues are basic state policies regarding the use of land. This point may not seem to have valid application in Montana, yet the quality and style of life currently enjoyed by Montanans is vulnerable throughout the state.

Third, and perhaps most significant, Act 380 created a decision making process without defining policies to guide the decisions. The law stipulates the factors decision makers are to consider, but it does not address how they are to weigh them. It does not even make clear how much consideration a local government must give to the recommendations of the regional agency. Without stated policies, Floridians are losing the opportunity to guide their future, to try and direct growth to those areas where it is needed, and to make Florida into what its citizens would like it to be.

Like Montana, Florida is a large and complex state with a strong tradition sanctioning freedom for landowners to do what they will with their land with only minimal regard for the rights of society at large. Under the Florida system local government makes the decisions regarding the regulation of land. With Act 380, the state established guidelines that the local government must operate within, and provided an appeal process. But to expect land use decisions to be made fairly with due consideration, local government must have strong administration. The state must be willing to lend technical and fiscal support to local government.

The major lesson of the Florida experience is that a land regulation process in a policy vacuum is insufficient remedy for land use ills of a state. Any serious land use policy must consider growth policy. Florida learned this lesson. In October 1973 Governor Askew opened a conference on growth and the environment. The 1974 legislature enacted a broad state growth policy, but did not pass the package of legislation implementing the policy (51). Nonetheless, it was a beginning.

Florida also serves as an example of what can be accomplished with strong leadership. The passage of Act 380 is attributed by most observers to the pragmatic and skillful efforts of a select group of state senators and the unflagging support of the governor. A final lesson is provided by Jay

Landers, an aid to Governor Askew. "Don't study this thing to death," he says. "The thing to do is to do something. It's a big mistake to wait." (48)

MAINE

Proposals for four major oil ports and refineries along their beautiful coast in one year was the last straw for many residents of Maine. While the only real deepwater ports along the Atlantic coast of the United States attracted the oil men, the hills, the abundance of lakes and streams, the predictable snow, long having attracted the tourist, began to attract the second home buyer. The new interstate highways brought 70 million people within a 24-hour drive of Maine's relatively unspoiled and quite lovely landscape.

Maine's citizens, known for their reverence of unencumbered property rights, decided they had had enough. In 1970 and 1971 the Maine legislature passed a package of three strong land use laws. A Site Selection Act and a Wildlands Act were enacted in 1970 and amended in 1971, and a Mandatory Zoning and Subdivision Control for Shoreland Areas Act was enacted in 1971. The 1974 legislature added a Register of Critical Areas Act to the package.

Maine towns had consistently resisted land use regulation. Only 15 percent of the municipal corporations in the state were zoned in 1971 and, of 497 units of local government, over 400 had no planning organization (40, 52). The Maine Yankee's penchant for local government is indicated by noting that Maine, with a population of approximately one million, is organized into almost 500 unites of local government in a land are of about 10 million acres. (The state includes a little over 21 million acres but 51 percent of the state is without local government.) In Montana, a population of 700,000 is spread over 93 million acres and organized into 182 local government units.

By mid-1972 only 15 percent of Maine's coastal towns had adopted land use ordinances; in 1970 the figure had been even lower. Unwilling to act locally but knowing a lack of action would bring exploitation, the citizens turned to the state government for help. The Site Selection Act, which requires developers of all large industrial and commercial projects to obtain a permit from the Maine Environmental Improvement Commission, was the response. Passage of the bill was eased by deletion of a provision which would have explicitly included "residential" development, and inclusion of a liberal "grandfather clause" and exemptions for the powerful forest products and electric power industries (40, 52).

How It Works

The Site Selection Act is administered by the Department of Environmental Protection under the direction of the Board of Environmental Protection. The board and department also have been assigned the responsibility for the mechanics of Maine's anti-pollution laws including water quality permits, municipal storm and sanitary sewers approval, air quality standards, and permits for dredging, mining and development within wetlands.

The Site Selection Act requires the board to "control the location of . . . developments substantially affecting local environment in order to insure that such developments will be located in a manner which will have a minimal adverse impact on the natural environment of their surroundings." Developments controlled by the law include:

> **any commercial or industrial development, including subdivisions . . . which require [sic] a license from the [Board of Environmental Protection], or which occupies a land or water area in excess of 20 acres, or which contemplates drilling for or excavating natural resources, on land or under water, excluding . . . pits of less than 5 acres, or which occupies on a single parcel a structure or structures in excess of a ground area of 60,000 square feet.**

Early on, the board construed "commercial" development to include residential subdivisions larger than 20 acres. The board contended that the subdivision of land for the purpose of selling lots is obviously a "commercial" activity, and that the term "residential" had been dropped from the law because it was redundant. The act also has been extended to developments of public agencies, and the provisions applying the act to any development requiring a permit from the board under any law greatly expanded its reach. Additionally, small projects that might create unacceptable environmental impact have been reviewed on occasion (52).

A project under the act requires a special permit, in addition to any others required by law, and must satisfy four criteria specified in the law:

1. The developer must have the financial capacity and technical ability to meet state air and water pollution control standards. He must have made adequate provisions to dispose of solid waste, to control offensive odors, and to secure and maintain a sufficient and healthful water supply.
2. The developer must have made adequate provision for traffice movement out of or into the development area.
3. The developer must have harmoniously fitted the development into the existing natural environment to prevent adverse effect on existing uses, scenic character, natural resources and property values in the municipality or in adjoining municipalities.
4. The proposed development must be built on soil types suitable to the nature of the project.

The board may deny, approve, or approve with conditions the site choice of a developer. Extensive use has been made of the power to attach conditions to permits. Permit applications are circulated to all state agencies having useful expertise. Although many officials resent the additional work load, they appreciate the opportunity to make enforceable recommendations. For example, the soil conservationists have seen the preservation of topsoil on building sites, a long-term goal, made a requirement (40).

The act has been interpreted to require a hearing by the board on a permit denial, but not on an approval. However, the board holds hearings on all major and controversial permits. The law allows 30 days for appeal of a decision of the board to the Supreme Court of Maine. The court's review is limited to the record of the hearing and board order. In an early case the court affirmed the constitutionality of the Site Selection Act.

The Board of Environmental Protection comprises 10 private citizens appointed by the governor with the approval of the Executive Council (which may be controlled by the opposition party). The members serve three-year terms and receive modest per diem and travel expenses. The law stipulates that two board members are to be chosen from each of the following interest groups: manufacturing, conservation, local government, general public, and air pollution experts. The commissioner of the Department of Environmental Protection, an appointee of the governor, is chairman of the board but votes only in case of a tie.

The permit process is initiated by the developer when he files an application, called a Record of Intent, consisting of a 25-page form designed to elicit maximum information from the developer. The developer is encouraged to meet with the staff of the department before filing the application. He also is responsible for obtaining the comments of the local government. The Department of Environmental Protection coordinates the permit clearance and recommendations among state agencies.

The Wildlands Act as amended in 1971 established the Land Use Regulation Commission (LURC) to regulate land use throughout the approximately 50 percent of the state that lacks local government. Rougly 90 percent of this unorganized area is privately owned, primarily by large forest products companies.

The commission is an independent seven-member body within the Department of Environmental Protection. The law directs the commission to complete a comprehensive land use guidance plan, to delineate temporary land use guidance districts and adopt interim land use guidance standards by January, 1975. There are four types of land use guidance districts, or zones: protection, management, development and holding. Only harmonious land uses are permitted within each district, and specific rules, the land use guidance standards, control development in each. The act carefully outlines the district delineation process and makes quite clear that its purpose is the "preservation of the ecological balance" (53).

All development within the unorganized area of the state, excluding commercial forestry and agriculture occurring in management districts, requires a permit under the Wildlands Act (unless covered by the Site Selection Act). Review of permit applications is based on the four criteria of the Site Selection Act plus conformance with the land use guidance standards for the district.

The LURC acts as both state and local government for the unorganized areas. However, when a local government is formed development is regulated by the commission until that government prepares and adopts development regulations as restrictive as those of the state.

The Mandatory Zoning and Subdivision Control for Shorelands Act requires local governments to adopt subdivision regulations and zoning controls for areas within 250 feet of any navigable waters by July 1974. If a local government fails to adopt controls, or if enacted controls are found unacceptable, the Board of Environmental Protection and the LURC, after consultation with the State Planning Office, will adopt regulations to be enforced by the local government.

The Register of Critical Areas Act has just gone into effect. It initiates a statewide inventory of important scenic, scientific, and historic, and critical natural areas. Localities must develop plans for the protection of designated areas within six months afer listing in the register (54).

Effects and Problems

The Site Selection Act clearly established state level control over the siting of major industrial and commercial development. Even with an initial staff of two the board quickly became known for its effectiveness. In 1971, the retired president of the Maine Homebuilders Association called the board the most powerful instrumentality in the state (40).

Surveillance of development activity throughout the state is primarily through voluntary compliance and informal channels. A local conservationist might call the board when a new project appears imminent in his area; the field personnel of various state agencies report new activity. The board is plagued with permit enforcement problems and a system for issuing certificates of compliance to projects completed in accordance with the permit terms is being considered.

The decisions of the board have been criticized for aggravating Maine's housing shortage and for ignoring social and economic considerations. Unfortunately, the Site Selection Act does not include social or economic concerns in the criteria for considering a permit application. In an economically depressed state the lack of concern for social and economic considerations may lead to questions of whether the board is truly representative.

Maine natives are being caught between rising land taxes and inflated property costs with little opportunity for additional income. In the eyes of long-time residents who can no longer afford to build houses on the land, mobile homes are seen in distinctly different light than they are by recent immigrants from New York City. If the board continues to exercise its power without achieving a true planning perspective in decision making, it may lose its present wide support.

Probably the greatest single shortcoming of the Site Selection Act is the lack of criteria and performance standards against which the long-term and cumulative effects of developments can be judged. At some point, for some locales the board will have to decide that additional industrial or commercial development will not be allowed,

yet this decision will have to be expressed by repeated permit denials rather than by an open declaration of policy.

On the other hand, the Wildlands Act links regulation to a desired future. Landowners know the range of uses to which their land may be put and they have available to them a process for altering that range. The problem connected with this law pertains to the authority of the Land Use Regulation Commission over forest lands in management districts when the owners become more interested in recreational development than in commercial forestry.

In general, however, the Board of Environmental Protection has centralized and focused state authority, reduced state agency competition, and produced a symbol of state identity in the area of environmental protection. The agency has a significant influence on potential development simply through its existence.

Lessons

The highly centralized approach of the Site Selection Act seems very appropriate for a small state lacking a regionalized population and where a high value is placed on the protection of natural resources. Actions of the Board of Environmental Protection are closely covered by the news media and the average Maine citizen knows that its members are the key land use decision makers in the state. Of course, the success of the board, like that of all boards and commissions, depends on the quality of its members. So far the members have taken their responsibility seriously, have given thoughtful consideration to staff reports and appear to be sensitive to public concern (52).

But even in Maine the trend is away from decision making at the state level and toward increased decision making at the local level pursuant to guidelines and standards reviewed or prepared by the state. The Mandatory Zoning and Subdivision Control for Shoreland Areas Act is an example of this trend.

The Maine experience also demonstrates the limits of a purely regulatory approach. The board, acting under the Site Selection Act, cannot respond to the need for increased job opportunities and adequate housing, nor can it address the question of whether an area should continue to grow. The Land Use Regulation Commission, operating under the Wildlands Act, can respond to all three questions and substantially more.

OREGON

Well-known for their "visit but don't stay" advertising, Oregonians also felt strongly enough about the misuse of their state's land to enact a package of innovative and far-sighted land use laws.

In addition to a land use bill, the 1973 Oregon legislature enacted legislation protecting farmland from taxation at urban or suburban rates; protecting the buyers of subdivided land; modernizing subdivision regulations, and redefining the role of city and county planning commissions and providing for the representation of a variety of interests on the commissions.

The state previously had moved only slightly into the area of land use regulation. In 1969 the legislature declared that all cities and counties must zone their lands by December 31, 1971 or the state would step in and zone. However, the law did not provide a mechanism for reviewing or coordinating plans among localities, or appropriate money to carry out its intent. The 1971 legislature set an important precedent for direct state involvement in local planning when it established the Oregon Coastal Conservation and Development Commission to develop comprehensive plans for the coastline. Although the members of the commission are primarily coastal dwellers, the commission reports directly to the legislature.

During 1972 the public was made aware of many problems resulting from the misuse of Oregon's land. Along a short section of coastline the state health department found 34 sites where raw sewage flowed directly on to ocean beaches. A cursory check of subdivision activity east of the Cascade Mountains discovered about 160,000 acres of arid rangeland and desert subdivided into 43,000 parcels in connection with an estimated 1,000 illegal promotional schemes. Oregonians also began to fear that the Willamette Valley, the heart of the state and home to half its population, was fast becoming a continuous suburban sprawl from Portland to Eugene — just like California's Santa Clara and San Fernando Valleys (55).

The governor's fifth Conservation Congress in November of 1972 was devoted to land use. At the congress pleas were made for strong action; State Senator Hector MacPherson and a group of citizen volunteers completed preparation of what was to become Senate Bill 100, the land use bill.

After an extremely difficult passage, involving substantial revision and compromise, a land use package emerged from the legislature and was signed into law.

How It Works

The heart of the package, Senate Bill 100, created the Department of Land Conservation and Development operating under a Land Conservation and Development Commission (LCDC). The commission, consisting of seven citizens appointed by the governor with the consent of the senate, is charged with developing and adopting by January 1, 1975, goals and guidelines for the use of land in Oregon, assuring widespread citizen involvement in all phases of the land use decision making process, coordinating state and local land use planning, and inventorying land use throughout the state to identify areas of critical state concern for consideration by the legislature.

To accomplish the first two charges the commission has organized a large, well-planned, and well-financed public involvement effort. Initially, 28 public meetings were held throughout the state. The results of the meetings were analyzed and tentative goals were drafted. Another series of meetings took the goals back to the public for comment and revision. In addition, a state Citizen Involvement Advisory Committee representing a very broad range of interests has been established. Public participation at the local level is encouraged by requiring counties to submit a citizen involvement plan to the LCDC for review.

Commission coordination of state and local planning efforts is to be accomplished through two means. Local government units must adopt and submit land use plans to a regional coordinating body for review. The regional body may consist of the county, a voter-approved regional planning agency, an association of counties, or a voluntary association of governments. The regional body will review the plans for conformity with the statewide goals adopted by the LCDC. Any local government not in conformance has one year to revise its plan. After one year the LCDC may grant an extension of time, if progress is being made, or the commission may prepare and administer a plan for that localtiy until the local government prepares one consistent with the statewide goals. The cost to the LCDC of preparing a plan for a locality is borne by the local government.

State agency planning activities and actions that affect land use are directed by SB 100 to conform with the statewide goals and guidelines adopted by the LCDC, and the commission is directed to coordinate state agency planning to insure conformance. However, at this time, the coordinating role appears to be through permit authority for activities of statewide significance rather than direct involvement in the planning process of other state agencies. The bill authorizes the LCDC to issue and enforce permits for designated activities of statewide significance such as the planning and siting of public transportation facilities, public sewage, solid waste, and water supply facilities, and public schools. The commission also may suggest to the legislature additional categories of activities that should require permits.

Senate Bill 100 also directs the commission to hear appeals by state agencies, regional coordinating bodies, counties, cities, special districts, and groups and individuals affected by any plan, provision or ordinance which they feel is out of conformance with the statewide goals. A city or county may appeal a decision of the Department of Land Conservation and Development to the LCDC.

Senate Bill 100 also created the joint legislative committee on land use, to which the LCDC reports monthly and which acts as the commission's liaison with the legislature. The joint committee was charged with investigating and presenting recommendations to the 1975 legislature for methods to compensate landowners adversely affected by land use regulation.

Among the many innovative ideas incorporated into the other land use legislation passed by the 1973 Oregon legislature was a change in taxation of farmland that provides for an Exclusive Farm Use (EFU) zone, automatically assessed at its value for farming rather than for any other use. Farms outside the EFU zone may apply for a similar tax assessment. When land use is changed in areas receiving this special assessment, a penalty is paid up to 10 times the previous year's taxes, or the difference between what was paid and what could have been assessed, depending on whether the land is inside or outside of an EFU zone, respectively.

Senate Bill 487 requires local ordinances and regulations to comply with adopted comprehensive plans. House Bill 2548, pertaining to county planning commissions, and House Bill 2965, pertaining to city planning commissions, provide that not more than two commissioners may be engaged in the buying, selling or developing of real estate or engaged in the same kind of profession, business, or trade. Conflict of interest standards also are established for the commission members. Permits issued by the commissions must comply with the adopted comprehensive plan.

House Bill 2086 permits a local governing body to review substantially undeveloped subdivisions or portions of subdivisions which do not conform with current subdivision standards. The local governing body may require revision of the subdivision plat or it may vacate the plat if it cannot be revised to conform with current standards.

Effects, Problems and Lessons

Long term effects of Oregon's effort to regulate land use cannot be foretold. The legislative battles over the bills and the ensuing programs for public involvement have produced an unprecedented public awareness of land use issues. The hearings held throughout the state by the LCDC to formulate statewide goals and the meetings to take the draft goals back to the people can only lead to a general acceptance of the responsibility and obligation to direct the future of the state through the regulation of the use of land. Oregon is perhaps the first state in the nation to establish an institutionalized process to define statewide goals and guidelines on land use.

The Oregon experience also demonstrates the need for patience. Change requires time and efforts on many fronts, and moreover, it requires leadership. In Oregon the passage of strong land use legislation required the efforts of several senators and the unceasing support of the executive branch and Governor Thomas McCall (55).

In a recent interview, Governor McCall refuted the assertion that Oregon's land use laws are part of a no growth policy. He called it instead a "wise growth policy," one that produces enough jobs to take care of mild in-migration and Oregon's own young people. Years earlier he had argued that a little belt-tightening then would give Oregon the ability to pick and choose in the future — that is, now.

> **Now we Oregonians are at the point where we can look at some tremendously good firms and maybe we can let a limited number into the state . . . We are in a position to pick. We can go down to Los Angeles and say, 'If you want to become a member of our club we'd like to have you, but we don't like rattle and bang and smoke and dirt . . .' That's our whole philosophy. Instead of panting madly. (55)**

COLORADO

Many Coloradans are beginning to wonder what has happened to the Colorado that attracted them. Since 1950 the state's population has almost doubled to two and a quarter million persons, 80 percent living along the Front Range of the Rockies. Almost 90 percent of the Front Range is urbanized (56).

Denver, once a compact, attractive city known for its clean air and magnificent view of the mountains, today can be easily mistaken for Los Angeles: sprawling for as far as the eye can see, or lost in a blanket of smog. The future may hold an even more ignominious fate for the once fair city — being an indistinct blur in the center of a single urban megalopolis stretching from Fort Collins in the north to Pueblo in the south.

The Colorado Land Use Commission was established by the 1970 Colorado legislature to "guide the growth and settlement of the State and assure the best and wisest use of the State's land now and in the future." (56) At the commission's request the 1971 legislature increased from seven to nine the number of commission members and altered the mandate of the commission from the preparation of a statewide zoning map to the preparation of a state planning program involving all levels of government. The commission also was given temporary emergency power to issue cease and desist orders, with the approval of the governor, and to stop development activities constituting a significant danger to health, safety or welfare. The land use planning program report, *A Land Use Program for Colorado*, was delivered at the end of 1973.

The land use report represents three years of work and more than $1.5 million in research. The report identifies four areas of issues inseparable from the land use question: environment, economics and population, natural resources, and social concerns. Based on hearings and meetings with interest groups throughout the state the commission recommended goals in the four areas and a land use program to achieve the goals.

The commission asserts that there are really five Colorados, that is, five distinct regions, often with characteristics and problems having more in common with similar regions in adjoining states than with the rest of Colorado. The commission recommended programs for achieving goals in each of the broad areas for each region as well as for the state as a whole.

The report also lays out the legislation, organizational mechanisms, and actions needed over a five-year period to institute the land use program. Major premises of the programs are that land use decisions should be made at the lowest level of government that has the staff and budget capacity to carry them out (generally local and regional government) and that the program should focus on "enhancing the quality of life, not just on restraining the quantity of growth." (56)

The commission called for the establishment of a land use agency at the state level responsible for overseeing the entire land use program. Specific functions would include the designation of critical areas and activities of state concern and establishing and enforcing a development permit system for both. The state agency also would provide technical assistance to regions and local governments and set development standards. Within the agency there would be a permit review board to hear appeals on decisions regarding permits for activities of state concern or developments within critical areas.

Also at the state level there would be established a special land agency, constituted as a state-owned public corporation, to acquire land for specified public purposes including: protection of critical areas, providing recreational opportunity, control over highway-related commercial development, and public access to existing public lands. The agency powers also would be used to guide development by assembling areas currently under fragmented ownership and selling them to developers after attaching covenents sufficient to insure quality development. Such an approach is one of the few constructive alternatives available to government when a developer does not own the land most suited for his proposed development.

Within each of the five regions identified by the land use commission the report suggests establishing a regional planning office staffed by personnel from the state land use agency and other state departments. The regional offices are to act as communication and coordination channels between the state and local governments and to administer the development permit system for critical areas and activities of state concern. In addition the regions would provide technical assistance to local governments, coordinate federally required (A-95) project reviews, and prepare regional plans in cooperation with the state and local governments.

The recommendations of the commission would leave the responsibilities and prerogatives of local government largely unaffected; only when development had significant regional impact would the traditional authority of local governments be disturbed.

Many of the concepts contained in the report of the Colorado Land Use Commission were introduced as bills in the 1974 Colorado legislature. Out of legislative compromise arose House Bill 1041, weak beyond anything imagined by the commission or its staff, but acceptable to almost everyone.

House Bill 1041 declares that "the protection of the utility, value, and future of all lands within the state, including the public domain as well as privately owned land, is a matter of the public interest," and encourages local governments to designate and administer critical areas and activities of state interest pursuant to guidelines tendered in the act.

How It Works

The land use program outlined in the bill is completely voluntary. The legislature appropriated slightly over $2 million for the Department of Local Affairs (includes Division of Planning) to be distributed equally among those of Colorado's 23 counties that desire to participate in the designation program. Of the appropriation, $500,000 is to be retained by the department to assist local governments.

Critical areas may be designated by local governments from among mineral resource and natural hazard areas; areas containing or having a significant impact on historical, natural, or archaeological resources of statewide importance; and areas around key facilities when develop-

ment in such areas may affect the facility or the surrounding community.

The definitions of mineral resources and natural hazards are quite broad, although the former explicitly excludes goethermal resources. The administration of natural hazard areas is to be consistent with guidelines prepared by state agencies having expertise in relevant areas, such as the Water Conservation Board, Soil Conservation Board, State Forest Service, and the State Geological Survey.

Historical, natural, and archaeological resources are identified and administered by the state historical society or department of natural resources acting in conjunction with the appropriate local government.

Key facilities are defined as airports, major facilities of a public utility, interchanges of arterial highways, and mass transit terminals, stations, and fixed guideways. The law outlines in some detail how areas around such facilities are to be administered.

The bill allows local government to designate any of the following as activities of state interest: siting of new or additional water and sewer facilities, solid waste disposal facilities, airports, mass transit systems, highways, and public utilities; development of new communities; water projects; and nuclear detonations. Criteria for the administration of activities of state interest are outlined in the act.

Local governments are required to report their progress in implementing H. B. 1041 to the Land Use Commission six months after the passage of the act. The commission is to report to the legislature. Local governments also are required to submit to the commission, upon designation of a critical area or an activity of state interest, copies of the designation order and adopted administrative regulations. The commission must review the order and regulations and may recommend modifications to insure compliance with the act and with state guidelines. The local government is left the option, however, of complying with the recommendations of the commission, or rejecting them. Local governments are explicitly allowed by the act to adopt regulations more stringent than those outlined in H.B. 1041.

The Land Use Commission may request a local government to designate an area or activity within its jurisdiction and the local government must hold a designation hearing and issue a decision. If the local government fails to designate, or after designation fails to promulgate regulations, the commission may seek judicial review of its original request.

The act provides interim controls by requiring a moratorium on development in a designated critical area or a discontinuance of a designated activity of state interest from the time of designation until final adoption of development guidelines. If the Land Use Commission has taken a locality to court no development is permitted during the time the court is reviewing the case.

Once a local government has designated critical areas or activities of state interest then development within those areas or including those activities requires a special permit from that local government. A standard permit application form is provided by the commission for use throughout the state. The local government having jurisdiction over the development site is required to hold a hearing (the cost of which may be charged to the developer as part of a filing fee) and prepare a written decision based on its findings. Approval or denial of a permit is based on the local government's regulations, and the decision is subject to judicial review under the standards for the review of any other local government activity.

Effects, Problems and Lessons

House Bill 1041 has not been law long enough for knowledgeable discussion of its effects. The bill is, however, vague in numerous areas and leaves much to the interpretation of the administering agencies and the courts.

Obvious problems include a lack of standards for judicial review, a lack of guidelines for the required cooperation between local government and state agencies, and a lack of procedure for resolving conflicting decisions by counties on projects that cross county lines.

House Bill 1041 is the watered down version of what was once a strong land use bill. However, powerful legislators made it clear during the session that this bill offered local governments the opportunity to act voluntarily; if they failed to take advantage of the opportunity the legislature would enact mandatory legislation and give the state a much stronger role.

THE AMERICAN LAW INSTITUTE MODEL LAND DEVELOPMENT CODE

History

The scope and role of land use planning has changed greatly since the 1920s, yet the enabling legislation on which land use planning and decision making is based has changed little. Two model acts, the Standard State Zoning Enabling Act (SZEA) and Standard City Planning Enabling Act (SPEA), are the basis for zoning and planning enabling legislation in most of the 50 states, Montana included. The acts were prepared by the U.S. Department of Commerce; SZEA in 1922, SPEA in 1928 (57). These acts hardly can be applied to today's land use issues, let alone tomorrow's.

Since 1963 the American Law Institute (ALI), a highly respected professional organization well-known for legal research, model codes, laws and ordinances, and continuing legal education, has been preparing a Model Land Development Code which it intends to present as an alternative to SZEA and SPEA. Successive drafts of the code have been reviewed by the full ALI membership and a wide spectrum of other interested parties. The first official draft, covering six of the proposed 12 articles of the code, was approved by the full membership in May. The model code attempts to solve the basic weaknesses of SZEA and SPEA that have been pointed out repeatedly in major studies during the last 10 years.

Status Quo

State statutes modeled after SZEA and SPEA authorize local government involvement in land use decisions only to prohibit undesirable development. The ability to encourage desirable development, an essential planning tool, is absent. A dominant orientation toward short-term local interest has made attack on regional problems very difficult, if not impossible, and the lack of a specified procedure for making decisions has resulted in administrative processes contrary to accepted concepts of fairness and orderly procedure. From SZEA and SPEA comes the concept of the static comprehensive master plan, a map purporting to represent the desired distribution of land uses in an area at some future date. Yet neither SZEA nor SPEA attaches any legal significance to master plans, so it is unreasonable to expect the plans to be successful at guiding land development. In any event, the forces of growth, the shifts in the land market, the changes in peoples' expectations, and the inability to forecast the future with accuracy would seem to doom such a rigid approach to failure.

Premises

The basic premise of the ALI model code is that the great majority of government decisions regarding land use should be made at the local government level, but local government needs new machinery to handle today's land use issues. The decision making process proposed by the code would require explicit analysis and disclosure of social, economic and environmental consequences of decisions. The code hopes to reduce the impact of politics in decisions regarding the use of private land and substitute professional analysis based on general standards established by the state legislature. Under existing law local government officials need not justify their decisions to anyone and are under no obligation to explain the basis of their position concerning proposed development.

Moreover, the code asserts that there is a legitimate state interest in development that occurs in certain areas and in specified types of development that have social, economic, and environmental impacts beyond the boundaries of the local government. But even in these cases, the local government would retain review and enforcement powers. However, the code would require local government to act pursuant to state policies, and subject local decisions to appeal to a state board. Maintaining review authority at the local level, even with regard to the legitimate interests of the state, would reduce duplication of permits and hearings and would not introduce additional costs and time delays in the land development process.

The code also would recognize and clarify the interests of individual citizens, citizen groups, and other units of governments in local land use decisions and, very significantly, would make state and local government development projects subject to the same regulations as private developments.

The most pervasive feature of the code is its insistence on administrative and adjudicatory uniformity. Regardless of the policy chosen by local government, under the code all action would be in accordance with a statutory process identical, within a narrow range, to the process used by all other local governments within the state.

HOW IT WORKS

Local general purpose governments could choose to adopt a land development ordinance as modeled in the code and designate a Land Development Agency (LDA) under the ordinance. The land development ordinance would consolidate and reorganize the administration of zoning and subdivision law and the land development agency would replace planning boards, zoning boards of appeal and other similar functions. The local governing body would designate itself, or any committee, commission, board or officer of the local government as the LDA, but the agency would have to have final authority and responsibility for any decisions made within its jurisdiction under the land development ordinance. Part of the intent of the code is to reduce the number of agencies from which a developer would have to receive permission to proceed.

Although the code would leave to local discretion the organization of the LDA, it stipulates in great detail the disclosure and hearing procedures to be followed by the agency. Within the hearing and disclosure requirements lie the protections offered the developer and the general public from arbitrary and purely political decision making.

The local governing body also could designate any agency, committee, commission, department, or person to prepare a local land development plan, and under the code such a plan would be adopted by the local government and vested with legal significance. Plans would have to be based on a number of studies specified in the code and include an analysis of the probable economic and social consequences of adoption. The long range plan would have to be revised every five years, and include a short-term program of specific actions to achieve some facet of the long-range plan.

Adopted local land development plans would have to be submitted to the state for review and comment and checked for consistency with the state land development plan if there were one. To induce local governments to prepare and adopt plans the code would reserve to those governments with adopted plans certain additional powers that would allow the local government wider flexibility in responding to and guiding development.

The code also would restructure the ability of local government to acquire and dispose of land in the furtherance of the development objectives of the community. One objective would be to assist large scale developers in amassing land for their projects. Land could be acquired by a variety of means including purchase, gift, interagency transfer, exchange, and eminent domain but most of this section of the code is devoted to procedures for disposing of land. Most existing law is very weak in this area. The code provides for flexible disposal to insure that the land would be used for the intended purpose while providing protection for the public interest.

At the state level the code proposes a State Land Planning

Agency (SLPA) as part of a broad state planning agency in the governor's office. Although the code does not encompass social and economic planning, the drafters assumed that there exist state social and economic planning functions that could be combined with land planning in a single agency.

The SLPA would be directed to assist local governments, perform an informational role by preparing and distributing a weekly monitor of development activity in the state, appoint local land development agencies in specified circumstances when a local government fails to, maintain a register of permits required by land developers and, upon the request of a developer, organize and preside over multi-permit hearings. A multi-permit hearing would enable a developer to respond to all permit granting agencies at a single hearing.

The SLPA could prepare a state land development plan for all or part of the state. Such a plan would have to consider adopted local land development plans and the plans of other state agencies. The code specifically states that local governments having a plan would be encouraged by the state plan to pursue their development policies to the maximum extent feasible consistent with the general welfare of the people of the state. Like the local plan, the state land development would have to include a short-term program to achieve some facet of the long-range plan. If the program were not implemented the plan would become void.

To obtain legal significance the state plan would have to be adopted formally. The code suggests several alternatives: 1) approval by the governor and transmittal by him to the legislature with automatic enactment after failure of either house to pass a resolution of disapproval within a specified time period, 2) by the governor using his executive power, and 3) by the legislature in accordance with the procedures for the enactment of general legislation.

The code also identifies two categories of development, areas of critical state concern and developments of regional impact, where state and local conflict would likely occur over land use policy and proposes a procedure for conflict resolution on a case-by-case basis. When reviewing developments of regional impact or any development proposed in a designated area of critical state concern the local development agency would have to rule pursuant to state standards and guidelines.

Areas of Critical State Concern (ACSC) would be defined based on the characteristics of spatially delineated areas. The state land planning agency would designate ACSCs by rule after holding a hearing and publishing the reasons for designation, the dangers and loss if not designated, the advantages of designation, and general guidelines for development of the area. An Area of Critical State Concern could be designated only for four types of areas:

1. Areas significantly affected by, or having a significant effect upon, an existing or proposed major public facility or other area of major public investment.
2. Areas containing or having significant impact upon historical, natural or environmental resources of regional or statewide importance.
3. A proposed site of a new community designated in a state land development plan, together with a reasonable amount of surrounding land.
4. Any land not covered by a development ordinance within a specified number of years after the effective date of the code.

After designation, the local land development agency, or agencies, having jurisdiction over the area would be given a specified time to prepare and adopt regulations for the ACSC. The state land planning agency would review the regulations for compliance with the state guidelines. If the local regulations were found to be inadequate or were not prepared, the state agency would prepare and adopt them until adequate local regulations were adopted. However, even in this instance the initial decision on a development permit still would be made by the local land development agency.

The code provides for interim controls for Areas of Critical State Concern from initial notice of intent to designate, to the time of adoption of regulations. It also provides for the failure of a local governing body to adopt a land development ordinance or appoint a land development agency.

Developments of Regional Impact (DRI) would be defined by type or size of development based on the impact such development would have on its surroundings regardless of its location. The definition of a DRI, however, could vary among areas of the state to reflect local differences.

The state planning agency would designate categories of development as developments of regional impact based on consideration of air, water and noise pollution, traffic generation, forecasted population change, size of site, associated development and so on. The code attempts to insure that the DRI process would be limited to appropriate type and size developments to avoid developments of purely local impact. Categories of DRIs also would include a designation of development of regional benefit, available upon the request of any developer upon meeting criteria stipulated in the code. Developments of regional benefit would include projects of governmental, educational and charitable institutions, public utilities and housing developments for persons of low or moderate income.

When considering a proposed DRI the local land development agency would base its review on the standards of its own local development ordinance applied to the region affected by the DRI and would have to balance detriments against benefits in a manner stipulated in the code. The state land planning agency could submit a report presenting the state's position on any DRI, and would have to submit such a report when requested by a local land development agency. The local land development agency would have to set forth in writing its findings and decision regarding each DRI.

The code also proposes a state land adjudicatory board to hear appeals of the decisions of local land development

agencies. The board would be entirely separate from state planning and would comprise five members appointed by the governor or by the state's highest court. Standing to appeal would be granted all those who could appeal in court and the code provides for the delay of judicial proceedings until action could be taken by the board. The board would accept primarily written submissions and perform a purely appellate function. If additional evidence were needed the board would remand the question to the local land development agency. It is not intended that the board develop the administrative machinery needed to hold hearings and take evidence. The board would have to present its findings and decision in writing.

The state land planning agency could establish divisions of itself as regional planning agencies throughout the state. The agency would have to respond to the request of a number of local governments or the petition of a stipulated percentage of the included population to create a regional planning agency or change the boundary of an existing region. The drafters of the code feel that the present system of voluntary regions or councils of government is inherently ineffective (58, 59).

A regional division of the state planning agency would act as a communication channel between the local and state government, provide assistance to local government, could prepare regional land development plans, and could exercise all the other powers of the state planning agency.

Under the code long-range state planning would be carried on by a planning institute associated with the state university or organized as an independent entity within the state planning agency. Long-range planning would be isolated from immediate pressures and crisis intervention.

The code also has statutory language providing for procedures to enforce land development regulations, for public records of the regulations and for judicial review of orders, rules and ordinances. In addition the code proposes model legislation for establishing a state land bank. Land banking is a system by which a government entity acquires land to control an area's future growth.

COMMENTS ON THE CODE

During the more than 11 years of work on the code, five tentative drafts have been released for review and comment. Included in each draft has been a commentary by the writers explaining the choices they made and discussing alternatives. Much of the criticism of the code has concerned its scope. Questioning has led to changes in the code. However, some questions have endured through all the drafts and are included in the commentary on the official draft.

Many reviewers who see a need for a strong state role in land use decisions have questioned the likelihood that local people responsible to local government will administer state policy without an unacceptable local bias. The drafters respond that tight procedural requirements, the requirement for written findings and a decision after a formal hearing, and the availability of an appeal to a state level board insure an adequate record on which to decide if statewide concerns justify overriding local interests. On the other hand, the system insures that those wishing to override local decision makers must demonstrate that a compelling state interest is at stake.

Local people have obvious advantages in making land use decisions based on their familiarity with the land and the conditions of the community. The drafters also argue that establishing state machinery to hold hearings and make initial decisions would be costly, duplicative and unlikely to account for suble local problems (Past practices of highway location are said to be an example of a state level action that has lacked local approval and participation and has resulted in unfortunate alignments and unnecessary intergovernmental friction.) Parallel administrative systems could encourage the filing of development applications with the agency most likely to give a favorable result, or lead to confusion in project jurisdiction.

Reviewers of the land development code also ask whether the preparation and adoption of a plan should be mandatory. The code leaves the plan to the discretion of both the local and state governments, and tries to induce local governments to prepare plans by granting additional powers to those who do so. However, many reviewers think the inducements are inadequate and present several arguments to support their contention: 1. Local governments preferring unencumbered power to bargain with developers would be frightened by the idea of a plan and the limit it might impose on their discretion; 2. The powers that would be denied to non-planning governments are precisely those all governments should be encouraged to exercise (59, 60, 61). Another incentive could be the granting of the complete range of powers to all governments with the stipulation that actions of planning governments would be presumed constitutional by courts until proved arbitrary, while non-planning governments would have to prove reasonableness (60).

Others who favor mandatory planning have argued that land resource values are particularly vulnerable in areas where current residents are not yet conscious of the disadvantages of suburban sprawl or second home development and so will not see the need for land use regulations until the damage is done.

The drafters acknowledge these arguments and counter with several of their own. If the code and law based on the code were to state that local governments "shall" prepare and adopt plans, local governments that failed to plan could be taken to court. The drafters contend that it is difficult to imagine a court directing a board of county commissioners to prepare a plan.

The drafters also argue that for many small jurisdictions it is impossible to find and employ competent planners, and that in static or declining areas mandatory planning would simply be make-work. Regarding land resource values, the code establishes procedures allowing the state to exercise regulatory authority over areas and categories of development that present current problems. Otherwise, it is argued,

the state should not casually interfere with the prerogatives of local government.

Conclusion

The American Law Institute's Model Land Development Code proposes that each state establish a new framework for making land use decisions by consolidating zoning and subdivision law, and requiring administrative and adjudicatory uniformity and accountability at the local government level; and by acknowledging a state interest in certain land use decisions and establishing a procedure for state intervention in those decisions.

It should be noted that Florida's Environmental Land and Water Management Act (discussed above) implements in a slightly modified form the parts of the code dealing with Areas of Critical State Concern and Developments of Regional Impact.

III. A LAND USE POLICY FOR MONTANA'S FUTURE

ACCOMMODATING CHANGE WHILE PRESERVING OUR VALUES

Strong state and national pressures will force Montana to change. Growth is but one wave of an inevitable storm of changes that will buffet Montana in the course of evolving times, fashion and human affairs. The question is not "shall" we grow, but "how." In the minds of many, the "how" — the quality and opportunities of the future — will be determined in great measure by the uses to which we put our land; by the type and arrangement of man's activities over the face of the state.

Today, decisions significantly influencing the use of land in Montana are made in a fragmented, uncoordinated manner by 182 local governments, 19 state departments and assorted independent agencies, at least 18 federal agencies, seven Indian reservations and by about 700,000 residents and an undetermined number of non-residents. The system guiding these decisions is the same system that gave Los Angeles to California and Denver to Colorado. If history is any guide to the future, it is unlikely that this system will treat Montana much better. Are the specters of the past part of the future Montanans want for themselves and their children? The available evidence seems to indicate they are not.

A change in the land use decision making process clearly is called for, but the direction of that change is the subject of heated debate and controversy. There is, however, no debate over where the responsibility for change lies; it lies with state government. The power to regulate the use of land was not included among those powers constitutionally granted to the national government by the 10th Amendment, and thus is presumed to be a power reserved to the states. Most states have allowed this power to lie idle or have delegated it to local government. During the last five years, however, there has been a growing movement among states to recapture and exercise the power to regulate land use.

Local government has proved to be too easily dominated by special interests and too dependent on local taxes to consider the long-term and wide-ranging effects of land use decisions. What increases the tax base today is all too often desired regardless of the price that might have to be paid tomorrow. In addition, the ability of local governments to make decisions affecting significantly the lives of persons living outside their jurisdictions defies a basic tenet of our form of government. Representative democracy requires that officials govern only those that they represent.

The time has come for Montana to put its house in order, to lend rationality and accountability to its land use decision making processes. Montanans must prepare themselves to accommodate and guide growth and change while preserving the economic base that will sustain the state over the long term and preserve the values which make Montana the unique and desirable place it is.

THE LEGAL BASIS FOR STATE ACTION

The authority of government to regulate the use of land legally derives from the inherent police power of government — its authority to exercise reasonable control over persons and property in the interest of public security, health, safety, morals and welfare. Although the American ethos of land ownership holds that society will be served best if landowners have unbridled freedom to do as they please with the land, our law has long recognized that landowners' rights are subject to limitation through the police power.

As early as 1631 the colonists had enacted laws regulating the use of land. Overzealous planting of valuable and exportable crops, such as tobacco, was occurring at the expense of the community's food supply. In 1631 the Virginia House of Burgesses passed an act requiring each white adult male to grow two acres of corn, or forfeit an entire tobacco crop as penalty. In 1692 Boston enacted an ordinance similar to a present day zoning ordinance confining the location of slaughter houses, stills and other odoriferous uses to areas where they would least offend local citizens (62).

The exercise of the police power is limited by provisions of both the Montana and U.S. Constitutions. Article II, Sec. 17 of the Montana Constitution declares that "No person shall be deprived of life, liberty, or property without due process of law." Similarly, the 14th Amendment to the U.S. Constitution declares that "No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Moreover, the U.S. Supreme Court has held that the wording of the 14th Amendment makes the "compensation clause" of the 5th Amendment applicable to the states. The compensation clause declares that private property must not "be taken for public use without just compensation."

Because of the limitations on its use, the police power is now commonly defined as the inherent power of government to regulate human conduct, without a taking of property, in order to protect health, safety, morals, or the general welfare. An early decision of the Montana Supreme Court supplies an excellent discussion of the police power:

> **The police power is broad and comprehensive, and is exercised to promote the health, comfort, safety and welfare of society . . . Under it the conduct of an individual and the use of property may be regulated so as to interfere to some extent with the freedom of the one and the enjoyment of the other. All property is held under the general police power of the state to so regulate and control its use in a proper case as to secure the general safety and the public welfare** (*City of Helena v. Kent*, **32 Mont. 279, 80 P. 258 (1905).**

Laws enacted or actions taken in the exercise of the police power also must be reasonable, not arbitrary, and must be beneficial to the community as a whole. Many court actions challenging police power regulation of land hinge on the meaning of "reasonable" and on the question of what constitutes a taking of land.

The Montana Supreme Court has addressed these issues and provided some guidelines for judicial resolution of such actions:

> **In gauging the reasonableness of the statute in question, we must not look back solely to past precedents, but must also look ahead. In short, the police power as such is not confined within the narrow circumspection of precedents, resting upon past conditions which do not cover and control present day conditions obviously calling for revised regulations to promote the health, safety, morals, or general welfare of the public; that is to say, as a commonwealth develops politically, economically, and socially, the police power likewise develops, within reason, to meet the changed and changing conditions. What was at one time regarded as an improper exercise of the police power may now, because of changed living conditions, be recognized as a legitimate exercise of that power** (*Billings Properties, Inc. v. Yellowstone County*, **144 Mont. 25, 394 P. 2d. 182 (1964).**

In the case cited immediately above, the court held that the statutory requirement for park dedication prior to subdivision plat approval (Sec. 11-602, R.C.M., 1947) was constitutional. The plaintiff had argued that this requirement was really an unconstitutional exercise of the power of eminent domain without compensation rather than an exercise of the police power. The court explained that if a subdivision creates a specific public need for parks and playgrounds it is not unreasonable to place on the subdivider the burden of providing them.

The question of when regulation of private property becomes a "taking" that requires compensation is a continuing legal debate. The arguments are presented in judicial opinions, in law review articles and in studies such as *The Taking Issue: An Analysis of the Constitutional Limits of Land Use Control* (62). For most of this century the criterion used in resolving this question was one of balancing the public purpose served against the reduction in value of the land regulated, provided that the land was not rendered worthless.

The legal definitions of "reasonable" and of "taking" change with society's changing needs and wants. The authors of *The Taking Issue* analyzed federal Appellate Court decisions in which the taking issue was discussed and were able to see evidence that a "quiet revolution in judicial attitudes" concerning the right of government to regulate land use had occurred after 1970. The change in judicial awareness certainly was not spontaneous — 1970 also marked significant changes in social and political awareness of environmental concerns.

During the last 50 years, the Montana legislature has enacted measures designed to regulate the use of land to benefit the public health and welfare. Recent examples are the Montana Subdivision and Platting Act; the act providing for the review of sanitation and water supply in subdivisions; and the act providing for the regulation of land in the floodplains of rivers. (These laws are discussed in the state agency review earlier in this study.)

The authority of government to regulate land use has been tested in the Montana courts in cases centered on the delegation of zoning powers to local governments. In one of the earliest zoning cases, the court found that the authority of incorporated cities to enact zoning ordinances, so long as the ordinances have a "real and substantial bearing upon the public health, safety, morals, and general welfare of the community," is constitutional (*Freeman v. Board of Adjustment*, 97 Mont. 342, 34 P. 2d. 534 (1934)).

During the 1960s two additional Supreme Court cases addressed the constitutionality of Montana's zoning laws. In the first case the court held that, while zoning itself was a legitimate exercise of the police power, the manner in which this power had been delegated to counties was unconstitutional. The court said too much discretion had been granted to planning boards, and legislative power had been unconstitutionally delegated to counties (*Plath v. Hi-Ball Contractors*, 139 Mont. 263, 362 P. 2d. 1021 (1961). The law was repealed and replaced. The 1972 Constitution now allows granting of legislative powers to counties). In a

companion case, the court held that the grant of zoning power to counties made under a different law was constitutional in that the law set out guidelines sufficient to insure that county commissioners were acting in an administrative rather than legislative capacity (*City of Missoula* v. *Missoula County*, 139 Mont. 256, 362 P. 2d. 539 (1961)).

The Montana Supreme Court has found that the state has the authority to regulate the use of land for certain purposes and that the scope of those purposes necessarily changes over time. So in these times of increased awareness and concern over the impact of land use decisions on the public health and welfare, it seems evident that the court would find properly executed state action to regulate the use of land both reasonable and permissible.

The Growth Question

Inevitably linked to any discussion of land use is the question of growth, for feeding growth always has required large scale changes in the use and ownership of land. A thorough discussion of growth and Montana's future is beyond the scope of this work (later the study recommends that a commission be established to study the topic), but a discussion of land use would be incomplete without exploring the basic positions and arguments that surround the growth issue.

Growth, change and novelty long have been viewed by Americans with fascination and hope. Change meant more of everything for everyone. But times have changed, and so have some old assumptions. Certainly, there are many Montanans who no longer believe that more is always better and that growth is a panacea for economic and social ills.

The argument over growth is bounded on two extremes: by those favoring the maximum exploitation of the state's resources at the quickest possible rate, and by those favoring a return to prehistoric conditions, or at least to the good old days. Unfortunately, the good old days are much better in retrospect than they were in reality. Obviously, neither extreme would be acceptable to the great majority of Montanans, nor is either likely to occur.

Realistic bounds on the state's options are illuminated by the contrasting arguments on the role of the market in land use decisions. Some believe that the market provides the best regulation of land use because the "highest and best use" of land is defined as the use for which someone is willing to pay the most money. Others argue that the market does not and cannot work in the real world as it does in theory and that, in any event, the market, as presently constituted, is incapable of considering costs to future generations, degradation of environmental health and intangible and subtle social effects.

Accepted economic theory says that a competitive market must satisfy two primary conditions to operate efficiently. The first condition requires that there be sufficient buyers and sellers so that no one individual can cause a change in prices by increasing or decreasing the supply of a commodity. The second requires that all buyers and sellers have complete knowledge of the quality and prices of available goods and services. Rarely is either condition satisfied in any market. The land market is no exception.

Parcels of land in a given geographical area are unique with respect to a number of variables: water availability, soil type, scenic quality, distance to market and jobs, vegetation, neighborhood attractiveness, and so on. This uniqueness, or lack of substitutability among parcels, limits the availability of each particular kind of land.

Land buyers also are unique. Each has different preferences with respect to the characteristics of land. Since there may be only a handful of parcels meeting a buyer's needs available at a particular time, seliers often may be able to determine local land values. A market characterized by a lack of substitutability among products, few sellers, and many buyers is not competitive.

It is also practically impossible for land buyers to have complete knowledge of the quality and price of all land on the local market. Many landowners may not list their property for sale among real estate agencies although they might sell if asked. Agencies may not know about or choose to deal in certain kinds of land even though a likely buyer is at hand. In other words, competition suffers when buyers and sellers cannot communicate.

In addition, the value of a parcel of land is linked closely to the use and value of surrounding land. Likewise, the value of the surrounding land is dependent on the use and value of that parcel. This interdependency of land values interferes with the ability of a competitive market to assign prices efficiently. The proper functioning of markets requires that the value of a person's property be neither benefitted nor decreased by the economic decisions of others. We are all well aware that this is not the case with regard to land.

One landowner's decision to subdivide and develop a trailer court, for example, affects the market value of his neighbor's property. A homeowner's decision to make a duplex out of his house and rent apartments may lower the value of his neighbor's property. These uncompensated damages, or in some cases benefits, are known as externalities. Externalities are the effects of a decision which are not included in calculating the costs or benefits of that decision.

Market decisions are motivated by individual self-interest and the desire to maximize profit. This can easily exclude consideration of long-term public interest. Irreversible commitment of land may involve substantial future costs to society. The subdivision of prime farm and ranch land is but one example. Such division is rarely reversed and then only at great cost. Who will pay if today's decisions are wrong? Today's market does not represent future generations, even though they must pay the price of today's mistakes.

Those who argue against the market's ability to allocate land also contend that the use of land must be perceived in relation to biological processes and a humble philosophic conception of man's place in the universe. Only if the

world's natural processes continue to function in health and diversity will human society continue to develop. Hence, the slow- and no-growth advocates are attempting to protect complex processes they see as vital to the survival of civilization.

Another aspect of the growth issue characterized by sharply contrasting positions concerns the question of jobs, job diversity and the migration of the state's youth.

One side argues that Montana needs growth to provide more employment or more secure employment. During the 1950s and 1960s increases in jobs lagged behind growth in Montana's labor force. Many Montanans had to leave the state to seek opportunity and a livelihood. Even though jobs are being created more rapidly today than in the previous two decades, the state unemployment rate remains above the national average and the job market lacks diversity. The necessary diversity can come only if Montana eases its historical dependence on mining, agriculture, forestry and tourism. Of course these basic industries are crucial to Montana's future, but to satisfy an increasingly urban population wider occupational choice is needed.

Others who think about jobs and diversity wonder what toll a policy of headlong expansion of occupational choice would extract from the Montana way of life. Often cited is the facetious comment of a Colstrip rancher who pointed out that he did not feel compelled to create social problems in Rosebud County to provide employment for his son, a recently graduated sociologist (63). It is possible to have growth in limited areas of the economy; growth in service jobs, in jobs that require inventiveness and creativity and growth in jobs that consume a minimum of energy, natural resources and land.

Also questioned are the reasons cited for migration of the state's youth. There have been few studies of this question and the most recent declares that:

> **For the young, migration is seen as an expression of freedom and an opportunity to experience and consider life style alternatives . . . Therefore, it may be unrealistic to assume that local employment opportunities or other attractions will induce young people to remain near home. It is apparent in Upper Midwest communities that expanding employment opportunities tend to attract new people, rather than keep the young at home (64).**

The following sections of the study outline and recommend a land use policy and a land use decision making process for Montana. But a land use policy is only one tool of a growth policy. Somewhere between the extremes, the citizens of Montana must isolate a growth policy that will provide long term goals and priorities for government decision makers, including those who will be making decisions about the use of land.

A PROGRAM AND A POLICY FOR MONTANA

Something must be done if Montana is not to become another "Anyplace, U.S.A." State government has the authority and, many would argue, the responsibility to take action. But what should the role of state government be?

Earlier, this study discusses the efforts of other states to restructure their land use decision making processes. There is much to learn from such examples, but each state is unique and each must chart its own course. What is desirable in Georgia may be ridiculous in Nebraska, and what is radical and controversial in California may be old hat in Wyoming.

The Montana legislature has found that there are specific categories of resource systems and development impacts that are so wide ranging or of such importance that they must be regulated at the state level. Certainly the legislature will and must continue to identify similar systems and act to protect the public welfare. However, the traditions of this state and many theories of governmental structure do not favor an ever increasing state role in decision making.

For example, a system of statewide zoning (as done in Hawaii) has been mentioned from time to time as a solution to the land use problems of Montana. Such a suggestion ignores the vast cultural and traditional differences between the two states as well as the sheer difference in size. The practical problems of such a scheme are overwhelming.

How many man-hours would it require for an agency in Helena to develop what is essentially a zoning map for every county in the state, and then resolve all the disputes that are sure to arise over boundary line changes and other decisions? What public relations problems will result when a citizen of Baker realizes he must come to Helena for a seemingly minor decision?

Moreover, the Environmental Quality Council thinks it is undesirable to centralize all land use control at the state level. It finds that such a scheme would contradict Montana's strong local government tradition.

Assumptions

Three fundamental assumptions, therefore, underlie the recommendations presented in this study:

1. Governing should be done by that level of government which is the closest to the people yet capable of performing the desired function. In Montana, for most landuse issues, local government can meet this requirement.
2. There are land use issues in which the people of the state in general have sufficient interest to override occasionally the narrow interests of a locality.
3. Actions of government agencies should be subject to the same scrutiny and regulation as the actions of private individuals and organizations.

Adhering to these assumptions, a system of land use decision making is proposed which would allow Montanans to take control of their future without unnecessarily disrupting the traditions of the state or interfering with the legitimate expectations of its citizens.

Based on the three assumptions, the state would be free to work in eight land use decision making areas:

1. **Decisions affecting or affected by past or projected major public facilities or other projects representing a major public investment.**
2. **Decisions concerning areas containing or having a significant impact upon historical, natural, or environmental resources of regional or statewide importance.**
3. **Decisions concerning areas that embody a significant natural hazard.**
4. **Decisions concerning areas proposed as sites for new towns.**
5. **Decisions which have significant impacts beyond the jurisdictional boundaries of a local government.**
6. **Coordination of all levels of government including state agency actions.**
7. **Creation of an arena for resolving conflicts arising in the first six areas.**
8. **The formulation and articulation of growth and development policies.**

Consolidating the allowable areas of state intervention into administrative functions yields four activities in which the state should have at least a supervisory and sometimes a dominant role:

1. **The designation and regulation of areas of state concern.**
2. **The designation and regulation of developments of greater than local impact.**
3. **The provision of an appeals procedure and a Montana Land Use Commission to resolve conflicts and insure that statewide interests are considered by local decision makers and that local interests are considered by state decision makers.**
4. **The creation of a continuous statewide goals formulation process.**

The first two activities require the establishment of new administrative functions: decision making processes in which the state's role would be primarily one of supervision and assistance. Only after local government was given and had refused the opportunity to accept the responsibility of governing would state government assume an active role. The third activity would require an essentially passive state role; the state would provide an arena for resolving conflicts in the land use decision making process. The fourth activity, also a process, would include all levels of government and a wide spectrum of private interest groups in a comprehensive effort to construct goals. State government is the logical leader of such a program.

The Environmental Quality Council recommends that legislation be enacted to implement these functions.

Areas of State Concern

Areas of State Concern (ASC) are defined as localities or resource systems whose uncontrolled development would result in irreversible loss or damage to a significant resource of a region or of the state as a whole. Included are:

- Areas affected by or affecting substantial public investments such as educational, medical and penal institutions; convention, civic and sports complexes; state-owned game ranges, and major airports.
- Areas including or having significant impact on historical, aesthetic, natural or environmental resources such as proven mineral reserves, significant agricultural, grazing, and timber lands, shorelines, and essential ecological systems.
- Areas where development probably would endanger life and property because of natural or man-made hazards such as active fault zones, landslide and avalanche pathways, fire-prone areas and airport approach zones.
- Areas proposed by the state in conjunction with the federal government or private interests as sites for new town development.

Once categories of areas of state concern are established, it is necessary to decide who may suggest areas for designation and who will designate. There are several options in both cases.

DESIGNATION

Areas of State Concern could be suggested for designation by anyone: groups of citizens, local governments, state agencies. In the inerest of increasing public participation in government, it is recommended that the right to request review of an area for designation be extended to anyone. However, the criteria for reviewing requests should be sufficiently stringent to minimize the number of times government would have to respond to poorly considered or casual requests.

A request to designate an area of state concern should include the reasons for designation, the dangers and losses if the area were not designated, the advantages of designation and general guidelines for regulating development in the area.

In keeping with the principle that governing, if possible, should be done by the government closest to the people, all requests for designating an ASC should be submitted to the local government or governments having jurisdiction over

the area. The local government would review the request pursuant to state guidelines and decide whether the request merited furthher attention. In the affirmative case, the local government would issue a notice of intent to hold a hearing, notify the state planning agency (discussed below), accept statements concerning the area from all interested parties (including government agencies), hold a hearing, and recommend granting or denying the designation request. The recommendation, accompanied by written findings, the hearing record, and copies of all submissions pertaining to the area, would be transmitted to the state Land Use Commission (described more fully below) which would make a final determination.

If the local government found the request for a designation undeserving of further consideration, the parties or agency making the request could appeal to the state Land Use Commission which could concur with the local government or direct the local government to hold hearings and offer a recommendation. If a local government refused to comply with a decision of the commission, the commission could seek judicial remedy or direct the state planning agency to hold hearings and submit findings.

Alternatives for lodging the ASC designating authority include the local government (with automatic appeal to the Land Use Commission), the governor, the legislature, a state agency, or any combination of these. Each of the choices has significant drawbacks. If final determinations of local governments can be appealed to a state level commission then the state may be habitually overruling local governments, creating another source of intergovernmental friction. The governor and the legislature rarely would be able to devote full attention to land use issues; and their involvement would unnecessarily extend the time required for designation. The Montana legislature has tended to avoid charging a single administrator (such as the governor) with responsibility of the magnitude of designating an ASC. Traditionally this has been the type of task assigned to a quasi-judicial board.

The Environmental Quality Council recommends that the final designation of an Area of State Concern be made by the Land Use Commission.

The commission would consider the original request, material submitted to the local government, the record of the local hearing, and the recommendation of the local government. If additional evidence was required, or if the local government had violated established procedure, the matter would be returned to the local government for further hearings. The commission could be petitioned to reconsider its decision upon the presentation of new evidence or evidence of a procedural error on its or local government's part. Those who would be allowed to petition would include affected landowners, the party filing the request for ASC designation, the local government involved, and the state planning agency. The decision of the commission would be an order on designation accompanied by findings specifying the reasoning used in the order, the advantages and disadvantages of designation, the loss if not designated, and general criteria for the area's development regulations.

If an Area of State Concern were designated, the local government or governments having jurisdiction over it would be given (say) six months to prepare detailed development regulations based on the designation order and the guidelines promulgated for that category of area by the state planning agency. Financial and technical assistance would be provided by the state to help prepare the regulations. As an option, local governments could request the state planning agency to act as a consultant for the preparation of regulations.

After approval by the local governing body, the ASC development regulations would be circulated to state agencies and interested parties for comment. The regulations would either be approved by the Land Use Commission or returned to the local government for revision. Once the regulations were approved, the local government would administer and enforce them through a permit system.

If a local government refused to prepare development regulations, the Land Use Commission could direct the state planning agency to prepare them and direct the local government to enforce them. If a local government refused to enforce ASC development regulations, the Land Use Commission could either direct the state planning agency to enforce them or seek a court order requiring compliance.

To direct the state planning agency to enforce regulations in an area some distance from the capital city seems cumbersome, but the alternative of requiring a state government unit to take a local government to court is distasteful. Yet laws that are not enforced are worthless. A sure remedy must be provided.

Any process for designating Areas of State Concern must include provision for interim controls; it would be folly to delineate an area as an exceptional resource and then leave it unprotected for any length of time. It is recommended that interim controls be instituted at the time local government issues a notice of a hearing in response to a request for an ASC designation. The development regulations suggested in the request for designation could be used as interim controls, or the state planning agency could promulgate general controls for each category of ASC.

Provision must be made to rescind the order designating an Area of State Concern. It is recommended that this process be initiated by a request to the local government or governments involved for removal of the designation. Subsequent action would parallel that required following a designation request. Provision also must be made to drop laggard proceedings. If development regulations were not prepared and approved within (say) 18 months after the local government issued a notice of hearing in response to a request for designation, the process would be terminated and the request denied.

Developments of Greater Than Local Impact

Developments of Greater than Local Impact (DGLI) are defined as proposed developments which, regardless of

where they occur, have significant effects beyond the boundaries of the local government having jurisdiction over the development site. Major shopping centers, large subdivisions, industrial complexes, and public works projects are DGLI examples. Also included under this land management concept are procedures for insuring local input to state land use decisions.

Currently, this type of development is reviewed independently by state agencies for compliance with specific technical criteria and by local governments for weighing against unspecified value considerations. Usually, local government review occurs without benefit of a technical review. The Environmental Quality Council recommends a consolidation of these two complementary aspects of decision making — technical review and value assessment.

It is recommended that the legislature stipulate general guidelines for designating Developments of Greater than Local Impact and that the state planning agency be responsible for promulgating specific criteria. A DGLI would be determined by the number of persons likely to reside or be employed at the development, size of site, likelihood of associated development, traffic generation, and the environmental impacts of the development. These criteria would vary from one regional area to another. What might be a Development of Greater than Local Impact in Broadus might not be one in Missoula.

A developer whose project appears to have greater than local impact would be required to complete a permit application provided by the state planning agency. The local government having jurisdiction would review the application on the basis of state guidelines and decide for or against classification as a DGLI. However, these guidelines should not be all-inclusive and a local government should be allowed flexibility in classifying a development as a DGLI. The decision on the classification should be appealable to the Land Use Commission by any citizen.

DETERMINATION

After determining that a proposed development qualifies for DGLI classification, the local government would send a copy of the permit application to the state planning agency and issue a notice of intent to hold a hearing on a Development of Greater than Local Impact. Either the state or the developer would make copies of the permit application available publicly. State agencies and all other interested parties would be allowed to submit a review of the proposed project and participate in the hearing.

To insure that local government officials make their value decisions in light of the results of technical considerations, it is recommended that all state agencies with permit authority pertaining to the proposed development be required to complete their investigations and present their determinations at or before the local government's hearing. The Environmental Quality Council thinks that local officials making value determinations ought to have the final say in this area, subject to appeals based on whether procedures were reasonable and thorough.

Within (say) 30 days after the hearing, the local governing body would have to decide to deny, approve, or approve with conditions the development application. The local government would be required to issue an order stating its decision and the findings to substantiate it. In coming to its decision the local government would have to consider the impacts of the development beyond as well as within its territorial boundaries. Carefully considered criteria for implementing this requirement should be included in the law. There are at least two approaches to this task.

The legislature could stipulate a number of criteria that the local government would have to find adequately satisfied before a permit were issued. For example, local government could be required to determine that the proposed development:

1. Would not place unreasonable burden on existing public services, such as highways, schools, and police and fire protection.
2. Would have sufficient water available for its foreseeable needs.
3. Would not have significant adverse effects on the natural environment and would not cause undue air or water pollution.
4. Would not adversely affect existing land uses, scenic characteristics, natural resources or property values.
5. Would have adequate sewage and solid waste disposal facilities.

The Environmental Quality Council recommends, however, that local governing bodies be required to determine that the probable benefits of the project exceed the probable detriments. Presumably, this is the thought process employed now by county commissioners and city fathers, only it is done implicitly without step by step analysis and disclosure of the benefits and detriments. The legislature should require the local governing body at least verbally to define the benefits and detriments of a project in a number of areas, for example:

1. Favorable or adverse effects on other persons or property owners.
2. Immediate costs for additional local government services versus the expected long-term tax base increase.
3. Favorable or unfavorable impact on the human environment, including a recognition of intangibles: community character, beauty and ugliness, convenience and necessity.
4. The appropriateness of the development given alternative locations within the local jurisdiction and elsewhere.

A decision of local government on the DGLI could be appealed to the state Land Use Commission by the developer, the owner of the property to be developed, adjacent property owners, the local government, the state

planning agency, and any person or group that participated in the local government's review of the project. The Land Use Commission would review the permit application, material submitted to the local government, the record of the local hearing, and the order and findings of the local government. The commission could concur, overrule, or modify the decision of the local government based on its findings that the local government erred in procedure or in its assessment of benefits and detriments. The decision would be delivered in writing accompanied by an explicitly presented assessment and balancing of local and regional (or statewide) benefits and detriments accompanying the proposed project.

Reviewing State Agency Decisions

Much has been made during the last few years of the goal of decentralization and allowing local governments greater involvement in the exercise of state power. Yet in Montana today only District Councils offer an organized channel for local governments to influence state agency decision making — and there is only one officially certified district council. Certainly, there are many valid reasons for decisions to be made solely at the state level and there are certain federal regulations that legally may be administered only by a state agency. However, many decisions which significantly affect the use of land are being made without the involvement of the local government closest to the effects of the decision.

In keeping with the principle that state government actions should be subject to the same regulations as private actions, the EQC recommends that appropriate state agency projects be subject to the DGLI process. However, actions which the legislature has clearly determined to be of such magnitude and effect that only state government can adequately assess their consequences should be excluded. Projects regulated by the Utility Siting Act and the determination of the alignments of interstate and primary highways fall into this category.

In addition, the lack of coordination between the state and local levels of government forces private developers to make repeated, sometimes costly presentations of their projects. For example, current laws on water, sewage and solid waste disposal facilities in new subdivisions require a developer to submit much the same information to both the local government and the Department of Health and Environmental Sciences. The county commissioners, who should be making the final decision regarding a subdivision, often are legally bound to approve or disapprove a project without knowing the results of the health department's investigation. This process takes the decision making away from its rightful place in local government.

A similar situation probably will occur in the regulation of indirect sources of air pollution as required by the federal Clean Air Act. Under the proposed process for implementing this act, the Board and Department of Health will have the final say on major commitments of land areas for major shopping centers, large subdivisions, industrial complexes, airports and other developments. This decision will be made solely on the basis of air quality standards.

The Environmental Quality Council thinks that major commitments of land involve more than air or water quality, or the suitability of the site for reclamation Technical standards for these considerations must be satisfied, but major commitments of land involve value judgments that cannot be made equitably by bureaucrats. Value judgments should be made by elected officials or groups of citizens selected for that purpose.

Appeals Procedure and State Level Organization

LAND USE COMMISSION

The Environmental Quality Council recommends that a Montana Land Use Commission be created to hear appeals concerning Areas of State Concern and Developments of Greater than Local Impact. The commission would provide an arena where statewide interests could be presented and protected if local governments refuse the responsibility of governing or reach decisions based only on parochial interests.

In hearing appeals the commission would resolve conflicts among state agencies and between levels of government. In this capacity the commission could coordinate and lend consistency to major land use decisions throughout the state for the first time.

For example, the location of an interstate highway interchange probably would be a Development of Greater than Local Impact (although the highway alignment itself probably would be exempted from DGLI designation). The local government (say a county) having jurisdiction over an area where an interchange is proposed would hold a DGLI hearing at which the Department of Highways would present its plans, probably including alternative locations. Interested citizens, other (perhaps adjacent) local governments and other state departments would present their positions on the proposed interchange locations. The county planning staff or the state planning agency would organize the hearing testimony in a useful form for review by the county commissioners. The commissioners' decision would be presented in writing and substantiated by findings based on the local and regional benefits and detriments of the location actually chosen by the commissioners. The criteria for making this determination would be similar in scope to those in the Utility Siting Act (Sec. 70-801, *et seq.*, R.C.M. 1947) which directs the Board of Natural Resources and Conservation to make decisions on siting energy conversion facilities. Those holding that the county commissioners violated aestablished procedure or failed to make their decision pursuant to the statutory guidelines could appeal to the Land Use Commission.

If a preliminary review of the appeal found that it raised substantial issues then the Land Use Commission would determine, by review of all relevant testimony and advice, whether the county commissioners had reached a sustainable decision.

The Land Use Commission should comprise five citizens appointed by the governor with the consent of the senate. The commission's members should represent the geographic diversity of the state. The commission should be protected by law from domination by any interest group. Ideally, a commission resolving conflicts among state departments would be attached to the governor's office. However, Montana has had few functional agencies attached to a governor's office and such placement might violate the intent of executive reorganization. It is recommended, therefore, that the Land Use Commission be attached to the Department of Administration for administrative purposes only and provided that this placement be made only to satisfy the requirement that all boards and commissions be attached to a department (Article VI, Sec. 7, Montana Constitution). The commission would require a small staff to screen appeals, compile material for the consideration of the commission and generally perform housekeeping chores.

The primary responsibilities of the commission would be designating Areas of State Concern, reviewing development regulations for designated areas and hearing appeals of local government decisions. Appeals could be made concerning decisions on initiating the ASC review process, the designation of a particular project as a DGLI, the decision on a DGLI, the handling of permits within Areas of State Concern and the enforcement of the regulations developed for a DGLI.

The commission also could be directed to approve rules promulgated by the state planning agency concerning Areas of State Concer and DGLI. However, involvement of the commission in administrative action would violate the intent of executive reorganization and might compromise its role as an appellate body.

STATE PLANNING AGENCY

The Environmental Quality Council recommends that the role of the state planning division of the Department of Intergovernmental Relations be clarified and expanded. The planning agency envisioned in this study is unlike the majority of existing state agencies in that it would be analysis-oriented rather than mission-oriented. Its primary "mission" would be to provide analytical services at the request of local governments.

The state planning agency would have to be able to work closely with local governments in the compilation and preparation of material for the local governing body concerning Areas of State Concern and Development sof Greater than Local Impact. The agency also would have to act as a consultant and render assistance to local governments in the preparation of development regulations for ASCs and in the evaluation of DGLIs, and respond to directives from the Land Use Commission for the preparation of development regulations when a local government fails to do so. The state planning agency also might represent other state departments at local government hearings concerning Areas of State Concern and DGLIs.

The planning agency also would issue detailed rules for reviewing requests to designate Areas of State Concern, for classifying projects as Developments of Greater than Local Impact, and for evaluating benefits and detriments associated with DGLIs. Interim development control guidelines for categories of ASC also would be needed to encourage comparable regulation statewide.

The state planning agency would publish a newsletter detailing activities of local governments and the Land Use Commission on requests to designate ASCs and to classify projects as DGLI. But the newsletter would be only part of the state planning agency's expanded informational role. The agency also would be responsible for maintaining a land use planning information center. The center would allow access to the vast quantitities of information about Montana being gathered by the 19 state departments and would be available to all state agencies and local governments to help them make the complex land use decisions they would face.

Reviewing a request for designating an Area of State Concern would involve assessing the statewide or regional values of an area and its capability to support use while retaining those values. Determining and ranking values could be done equitably only by the people, their elected representatives or by citizen commissions. Analyzing the capability of an area to support a land use would require assessment of the natural and cultural systems, their interaction, and the changes that would result from the use.

The regulation of an Area of State Concern would entail a balancing of: values, the impacts of land uses, the capability of area's systems, and the expectations of property owners.

Similarly, the evaluation of Developments of Greater than Local Impact would require assessing statewide or regional values represented in local natural and cultural systems, and assessment of the requirements and impacts of land uses.

Cultural system values are embodied in the community's life-style, its cohesiveness, the protection of public health and the cost of providing public services such as roads, schools and police and fire protection. Natural system values include unquantifiable aesthetic factors and psychic needs, the ability to sustain a use over the long term and the work that nature does for man without charge, such as providing rainfall, breaking down wastes, and providing wild game. The complex web of cultural and natural system values present at a locality has only a certain capability to withstand the impacts of land use; exceed the capability and the values are lost.

For example, a locality that can withstand the impacts of economically viable agriculture and retain its cultural and natural values must at a minimum be accessible, reasonably close to markets and supply centers, include soils that can sustain cultivation or grazing without eroding or becoming saline, and be part of a hydrologic system that can withstand volume reductions and still dilute agricultural runoff without excessive damage to aquatic life.

On the other hand, each use that humans make of land has specific requirements for raw materials, labor force, waste

disposal, access and natural environmental support. Continuing the example, economically viable agriculture requires (at a minimum) markets, petroleum, fertilizer and machinery (from cultural systems), and productive soils, relatively flat topography, water and a certain climate from natural systems.

The DGLI process is intended to decide the siting of projects based on the best possible matching of natural and cultural capabilities of localities with the requirements and impacts of land uses. Some natural and cultural system values are protected now by minimum standards in laws concerning air and water pollution control. However, it is not possible to protect every value in all siting decisions. When deciding among values it is essential that decision makers have the best available information on capabilities, requirements, and impacts.

Unfortunately, the existing state personnel with the training and experience to work with local governments and to compile and interpret the data needed for these decisions are dispersed between two state agencies. The people with the necessary skills in natural science, sociology, economics, and land use planning are within the Energy Planning Division of the Department of Natural Resources and Conservation. As the name of the division implies, it is a planning agency. Those with skills in intergovernmental coordination and other aspects of the land planning are with the Planning Division of Department of Intergovernmental Relations.

In the interests of governmental efficiency the Environmental Quality Council recommends that the Energy Planning Division and the Planning Division be consolidated into a State Planning Division.

This consolidation would enable energy planning, which is involved in utility siting decisions that will affect significantly the future of the state, to be associated with a broad state planning effort hinged to the needs and desires of local government. In addition, the Montana Land Use Commission, because it would have specific responsibility in land use and would develop extensive expertise in the area, should assume administration of the Utility Siting Act now administered by the Board of Natural Resources and Conservation.

Since the primary mission of the proposed State Planning Division is to assist local government, the division logically belongs in the department with responsibility for liaison between state and local government. If local governments are given the responsibility of governing in an area as sophisticated and demanding as land use analysis, the state must be prepared to deliver substantial direct assistance to local government on request. With such expanded responsibility and mandate, the title Department of Planning and Local Affairs would best identify the role of the Department of Intergovernmental Relations.

A LEGISLATIVE COMMITTEE

To expedite legislative involvement in the state land use decision process, it is recommended that a joint legislative committee on land use be created. The Land Use Commission would report to the committee annually. To insure representation of the legislative groups with a major interest in land use while preventing domination by any one group, this committee should include the chairpersons and/or vice-chairpersons of the House and Senate committees on Fish and Game, Highways, and Natural Resources, and the Senate committee on Local Government.

Outlining A Policy Statement

Working together to form an interlinked decision making system, the functions of designating Areas of State Concern and Developments of Greater than Local Impact, and the activities of the Land Use Commission, would implement a state policy for making land use decisions. This policy would be consistent with the Montana Environmental Policy Act and would declare that:

1. **An individual's right to property is basic, guaranteed by the U.S. and Montana Constitutions and accompanied by certain responsibilities.**
2. **The state has a limited but legitimate interest and responsibility to intervene in land use decisions when interests and values of citizens in a region or throughout the state are significantly affected.**
3. **Elected local officials and citizen commissions are responsible for decisions determining and protecting the values of the people.**
4. **State government encourages, and supports with technical and financial assistance, the efforts of local officials to govern responsibly.**

Policy consistent with the Montana Environmental Policy Act must recognize that sustained economic productivity depends on the maintenance and enhancement of environmental integrity, that each person is entitled to a healthful environment, that today's citizens are the trustees of the environment for succeeding generations, and that an objective of government must be to strike a balance between population and resource use.

Statewide Goals and Priorities: Growth and Montana's Future

The Environmental Quality Council's Land Use Questionnaire found a compelling unanimity in the desire of local officials to preserve the agricultural values of the state. Recent statements by the governor and other officials, and editorials in the press, indicate that Montanans want control of the state's future. Governor Thomas L. Judge has summarized the need and the desire very well:

All of Montana's planning programs and related laws, significant as they are, cannot define the level of growth and subsequent quality of life that we desire. They cannot decide whether we want a population of 700,000 or several million. They cannot choose between an agricultural or an industrial society. Only Montanans can make such choices, but until our objectives are clearly articulated, our best planning efforts cannot but remain disjointed at best, and divergent at worst (65).

Montana stands today at a crossroads. Decisions made over the next few years on the use of land will commit the state irreversibly. Before too many of these decisions are made, Montanans must define, as best they can, their goals and values. More than half of the 50 states have such programs. A clear, unified articulation of our values and goals would offer policy guidance to local governments, the legislature and the governor. Incorporated in legislation, the articulated goals and priorities of values could resolve the inconsistencies and correct the impotence of the state's overall land use policy.

This study recommends a policy and process for making certain land use decisions, but these are just tools — guidance is needed from a broader perspective. A policy for making land use decisions can guide Montana to any of a number of futures; Montanans must choose their most desirable future and direct the process to achieve it.

Protecting regional and statewide interests in Areas of State Concern and in Developments of Greater than Local Impact can insure that Montana is not overwhelmed. But the firm guidance of a growth policy is needed to prevent the step-by-step disintegration of subtle and unique relationships that now exist between the state's citizens and the land. No case-by-case review process can accomplish this. To bend the future to their will the people of Montana must be willing to establish a priority of values and hold decision makers accountable for the difficult job of trading low priority values for high priority ones.

Montanans need an institutional forum for asking and exploring answers to two fundamental questions concerning growth and development: What do we want tomorrow's Montana to be like? and *What* kind of growth should occur *where?*

The Environmental Quality Council recommends the creation of a Commission on Growth and Montana's Future to provide this forum.

ADDITIONAL TOOLS TO GUIDE LAND USE

In addition to the land use decision making process recommended by this study, there are numerous tools the legislature could use or provide to local governments to guide land use.

Taxation

Taxation by itself cannot solve Montana's land use problems, but recognition of the land use implications of the taxing power and its deliberate use can assist in guiding land use decisions. The equalization of assessment procedures throughout the state was a significant step, and directing that assessments be coordinated with local planning efforts would be another step. The greenbelt law (Secs. 84-437.1 to 84-437.17, R.C.M. 1947) is also an example of the use of taxing power to influence land use decisions.

USE VALUE ASSESSMENTS FOR FARMLANDS

Montana's greenbelt law provides statutory authority for the "use value" assessment of agricultural land. This law is intended to keep farmland in production by reducing the property tax burden from what it would be if the agricultural land were taxed at market value. This burden is particularly heavy near growth areas where land is in demand for suburban purposes. The legislature has assumed that decreasing the tax burden on farmland decreases the incentive to place agricultural land in non-agricultural uses. However, there are serious questions whether the greenbelt law is influencing land use decisions in the way the legislature intended. Major problems appear to be:

1. Lack of prohibitions against the application of the bill to areas planned by local governments for the extension of urban services and uses. This failure encourages speculation and induces conflict between local planning and state tax policy.

2. The three statutory requirements for agricultural land classification, only one of which must be met to receive the classification and a tax reduction, are too loose. One requirement is that the land must have been assessed as agricultural land for the previous three years, and currently must be used for agriculture. But the requirement does not consider acreage put to use or gross farm income. Thus a small parcel of land historically devoted to agriculture but sold for a building site can receive agricultural classification if a single horse is grazed there. A second requirement holds that the owner must have a minimum annual gross income of $1,000 from the agricultural use of the land, regardless of acreage, to qualify for the greenbelt tax break. Under this criterion most of a 100-acre parcel could be sold or used non-agriculturally while still retaining the tax break. The third requirement allows agricultural classification if at least 15 percent of the owner's income is derived from farming. This provision discriminates against farmland owners who need non-farm income to survive.

3. The rollback tax penalty, assessed when greenbelt land is put to non-agricultural use, is insufficient to discourage the removal of land from agricultural

production. The following two examples demonstrate this:

Example 1

A farmer owning 100 acres of irrigated land in Missoula County considers selling 500 acres to a developer for $350 per acre. The land originally cost the farmer $50 per acre.

Based on the 1972 average tax per acre of irrigated land in Missoula County and the 1972 Missoula County mill levy the tax on the 500 acres in agricultural and residential use can be calculated (20). From this calculation the penalty under the greenbelt law for converting the land from agriculture to residential use can be determined.

County Mill Levy: 164.96

Average tax per acre on irrigated land: $1.71

The tax on 500 acres of average irrigated land in Missoula County in 1972 was 500 times $1.71, or $855.

When sold for residential use at $350 an acre, the market value of 500 acres is $175,000. To determine what the 1972 tax on this land would have been it is necessary to calculate the assessed value (40 percent of the market value), the taxable value (30 percent of the assessed value) and multiply the taxable value by the mill levy.

$175,000 times .4: $70,000 assessed value

$ 70,000 times .3: $21,000 taxable value

$ 21,000 times .16496: $3464 in taxes

The difference in the tax for the two uses equals $3464 minus $855, or $2609. Based on the penalty provision of the greenbelt law a four-year rollback penalty for the 500 acres would be $2609 times 4, or $10,436.

Subtracting the original cost of the land ($25,000) from the selling price ($175,000) leaves the farmer a capital gain of $150,000. *Would a penalty of $10,436 affect the farmer's decision to sell out and realize a $150,000 capital gain?*

Example 2

A rancher owning 1,000 acres of non-irrigated land in Yellowstone County considers selling 500 acres to a developer for an average of $250 per acre. Original purchase price of the land averaged $30 per acre.

Based on the 1972 average tax per acre on non-irrigated land in Yellowstone County and the 1972 Yellowstone County mill levy, taxes on the 500 acres in agricultural and residential use can be calculated (20). From this calculation the penalty under the greenbelt law for converting the land from agriculture to residential use can be determined.

County Mill Levy: 145.12

Average tax per acre on non-irrigated land: $ .81

The tax on 500 acres of average non-irrigated land in Yellowstone County in 1972 was 500 times $ .81, or $405.

When sold for residential use at $250 per acre the market value of the 500 acres is $125,000. The 1972 tax on this land is determined as in Example 1:

$125,000 times .4: $50,000 assessed value

$ 50,000 times .3: $15,000 taxable value

$ 15,000 times .14512: $2176 in taxes

The difference in tax for the two uses equals $2176 minus $405, or $1771. Based on the penalty provision of the greenbelt law a four-year rollback penalty for the 500 acres would be $1771 times 4, or $7084.

Subtracting the original cost of the land ($15,000) from the selling price ($125,000) leaves the rancher a capital gain of $110,000. Would a penalty of $7084 affect the rancher's decision to sell out and realize a $110,000 capital gain?

Correcting Greenbelt Law Deficiencies

Some specific suggestions for correcting defects in the law are:

1. Increase the allowed minimum acreage figure from 5 to 10 acres.

2. Do away with the percent-of-income option to qualify and tie the historical use option to a minimum gross income figure related to land classification and number of acres. The more productive and expansive the land the higher the minimum income figure.

3. Tighten other criteria for determining who is a bona fide farmer. The following can serve as indicators to guide reform of the greenbelt law requirements:

- If the property is sold at a per acre price substantially higher than the market price for similar agricultural land, this may suggest a purchase for other than agricultural use.

- Can the property qualify if it is being leased? If so, should there be a minimum number of years that the current owner must have owned the land?

4. Revise the penalty provision to comply with one of the following options:

- Extend the current rollback period from four years to at least eight or 10 and add an interest payment on the amount owned plus a flat charge for each acre transferred out of agricultural use.

- Require the owner applying for agricultural classification to enter into an agreement that the property will remain in agricultural use for a period of (say) 10 years. At the end of the period the owner could change classification if he intends to change the use of his land. If the use were changed before the end of the agreement, there would be substantial penalties, perhaps a 15-year rollback plus interest and a penalty.

- Relate the penalty fee to the productivity of the land. The more valuable the agricultural land the tougher the penalty fee to encourage the retention of productive agricultural properties.

It must be remembered that a "use value" assessment procedure will not, by itself, preserve agricultural land. Experience in other states has been that land given special tax treatment will be sold or converted to another use when the price is right.

There are other uses of the taxing power to guide land use decisions:

TAXING JURISDICTIONS

Even after equalization of assessments, property tax burdens still could be significantly different between a $25,000 residence outside the city and a similar residence inside the city limits. This is due to the differing tax jurisdictions: one being the county with a school district; the other comprising the county, a school district and the city. The city is able to levy taxes in addition to the amount already levied by the county and school districts. Boundaries between taxing jursidictions are arbitrary and usually bear little resemblance to the geographical boundary of the area served by public facilities. Today, there is a real need for authority to tax on the basis of services received. Exercising the authority would require delineation of "service areas" in which all residents would be taxed equally to support equal public services.

LAND VALUE TAXATION

Land value taxation would shift the tax burden from buildings and improvements to land. Property owners would be encouraged to build on vacant lots where there is a bona fide demand for office space and housing. Property taxes would rise very little once the structures were put up. This would improve the financial health of building projects in general. A second effect would be to make the speculative holding of land for future development extremely costly and thereby decrease the economic incentive for "leap frog" sprawl caused by the holding of developable land for capital gains.

Land values for tax purposes would be influenced heavily by the property's location and the public facilities and services available to it. Land value taxation is an equitable way to return to the public some of the publicly financed benefits normally accruing only to the private landowner. This taxing system would have to be complemented by an assessment policy giving deference to agricultural land so that farmers near population centers would not be burdened with unrealistic property taxes on large land holdings. Tax zones could be drawn around population centers with the ratio of tax on the land to the tax on improvements approaching equality the farther the distance from the city center.

DEVELOPMENT IMPACT TAX

A development impact tax would be levied on new construction to ease the burden on local governments trying to provide services demanded by new residents. The tax could be related to variables such as number of units, floor area, number of acres, projected capital investment, and employment. The guiding principle would not be to discourage building but to shift the financial burden of growth to the chief economic beneficiaries of that growth, namely the developers. However, the ability of developers to pass additional costs along to consumers raises a question concerning fairness of requiring new residents to pay costs not charged to older residents.

In addition, this tax may not be appropriate or desired in many Montana communities. It could raise building costs during a period of already rapidly increasing building and mortgage costs. However, the tax could be offered as an option available to local communities as part of their existing permit procedures. If a community were to determine that additional growth would mean an increase in the costs of local government, it could levy the development impact tax.

A SEVERANCE TAX ON TIMBER

Montana's private forest lands currently are taxed on the basis of market value of the standing timber, and the market value of the land. This tax system is an incentive to harvest timber in order to reduce property taxes. Good forestry practices may be discouraged when owners realize that taxes may increase as the quality of timber improves.

Considering the value of well-managed forest land for Montana's water resources, wildlife, recreational opportunities, and wood products industry, a severance tax based upon the value of the wood at the time of the harvest in lieu of the present market value tax would mitigate the adverse economic, social and environmental impacts of the current system. By applying the severance tax to timber harvested from federal lands as well, additional revenue would arise from timber cuts that are currently escaping state taxation altogether. The timberland tax system also would become simpler to administer — there would not be need to determine market values for standing timber.

A problem would remain of how to mitigate the effects of reduced local taxable valuations on school district budgets. The receipts from harvested timber could be returned to the counties and school districts to offset tax revenue lost by removing standing timber from the property tax rolls. However, bonding capacities, bond repayment schedules, and voted levies still are dependent upon local taxable valuations. A careful analysis of these relationships would be required before a severance tax on timber would be prudent.

TAXES ON MOBILE HOUSING

Currently, trailer houses are taxed as personal property on a sliding scale which reduces the assessed value gradually to reflect depreciation in the structure's market value: a six-year-old mobile house is assessed at about 25 percent of its original cost. A new one is assessed at 40 percent of its cost. Although this scale represents one reality of the marketplace (that trailers depreciate), single- and multiple-family dwellings and apartment units (permanent housing) normally appreciate with age. Thus, while permanent

housing increases local taxable valuation over a period of time, mobile houses tend to decrease local taxable valuation over time. All housing types, however, demand similar public services.

During periods of increasing costs to maintain a given level of public services, communities in which mobile homes constitute a large share of the housing will experience a widening gap between taxable valuations and public service costs. As the gap grows, so will the tax burden on owners of permanent housing.

Today, trailer houses represent a greater percentage of new housing than ever before in Montana's history. Continued high rates of inflation probably will exacerbate this trend as permanent housing remains out of the reach of a growing percentage of young families.

A taxation system for mobile housing based on market value may result in financial problems for local governments in the long run. This fact should be acknowledged today, and an effort begun to determine how best to tax mobile housing in order to prevent its long-term subsidization by owners of permanent housing.

LAND GAINS TAX

Individuals whose primary income is from sources other than the sale or development of real estate are provided an incentive to speculate in real estate by the capital gains provisions of the federal income tax code. For these individuals the maximum tax levied on the actual financial gains from the sale of real estate is 25 percent. For individuals whose normal income might be taxed at rates above 25 percent, these tax provisions make land an attractive investment. Encouraging investment in real estate also inflates land values in areas where property is already in demand.

Montana tax laws treat capital gains realized from the sale of land as federal codes do. In 1973, Vermont enacted a land gains tax to discourage the rapid turnover of land. Under the Vermont system, an additional tax above others is imposed on gains from the sale of land (excluding parcels of less than 1 acre to be used by the taxpayer as his principal residence). The rate of taxation depends on the amount of time the land is held, and is scaled upward as the gain increases.

A land gains tax makes speculation in real estate less attractive as a tax shelter while preserving the freedom to buy and sell land for a profit. The tax could be designed so that homeowners residing on less than 1 or 2 acres of land are not subject to the tax; the first 20 percent of capital gain is not subject to tax; and anyone holding land for more than seven years is not subject to tax.

What follows is a suggested scale for a Montana land gains tax:

Tax Rate on Capital Gains as a Function of Holding Period and Percent Gain

	Gain		
Time held by Seller (years)	**First 20-99%**	**Next 100-199%**	**Over 200%**
		Tax Rate (%)	
Less than 6 mos.	55	70	85
6 mos. - 1 yr.	47.5	60	72.5
1-2	40	50	60
2-3	32.5	40	47.5
3-4	25	30	35
4-5	17.5	20	22.5
5-6	10	10	10
6-7	5	5	5

Other Tools

Zoning, long a process used to guide the growth of cities, has been the subject of increasing criticism in recent years. In rural areas, zoning has never proved satisfactory and is particularly unpopular with agricultural people. Several other tools for guiding land use and for the equitable protection of agricultural land have been developed and are being tested throughout the United States.

TRANSFERABLE DEVELOPMENT RIGHTS

Transferable development rights is an innovative technique to guide land use by creating a market in "development potential" that can be transferred from one locality to another.

In legal theory, the right of property ownership is made up of a number of constituent rights. One of the constituent rights is the right to develop or change the use of land. Like mineral and surface rights, development rights can be separated from land ownership. This severability has long been recognized in certain cases and has been demonstrated by the purchase or condemnation of particular property rights by government to secure scenic easements, and in the private sector when one individual obtains a right of way for a private road across another's property.

Numerous planning and legal authorities have suggested that a market be created for the transfer of development rights by the normal market mechanisms. For example, a local government might designate an area for open space or agriculture and prohibit other types of development. Landowners in the area designated would continue to own their land but would be compensated for the loss of development potential by being allowed to sell their unusable development rights to other landowners who might wish to develop in areas where development is allowed. By purchasing additional development rights, a developer could increase the degree of development allowed on his property.

New York City adopted in 1968 a resolution allowing the transfer of an historic landmark's air rights to non-

contiguous lots. In vertically oriented downtown Manhattan the air space over an historic landmark includes a very valuable development right. The object of the resolution was to encourage preservation of landmarks by allowing their owners to transfer their unused air rights to another lot and thereby build higher than would otherwise have been allowed.

The town of Southhampton in Suffolk County, New York has adopted a local zoning ordinance permitting transfer of development rights to preserve prime agricultural land. In certain areas farmers are allowed to transfer the development potential of their entire farm to a small portion of their acreage and then sell the portion with the increased development rights. The remainder of the farm must be dedicated in perpetuity to a public land trust. The farmer and his heirs have the first option to lease the dedicated land at nominal fees for agricultural purposes. The program is entirely voluntary and allows several farmers to cooperate in preserving their farms for large-scale farming operations. At the same time, agglomerating the development rights from several farms produces clustered development areas with low public service costs.

In 1971 Illinois enacted a law permitting the use of development rights transfer to aid historic preservation. The legislatures of Maryland, New Jersey and Colorado have considered bills providing authority and procedures to establishing transferable development rights, but all were killed or postponed in committee.

The 1974 Michigan legislature enacted a law providing for farmland development rights agreements and open space development rights easements (Act No. 116, Public Acts of 1974).

Transferable developments rights is a new and relatively untried concept, still to be tested in court, but deserving of further consideration. (A report on transferable development rights can be found elsewhere in this book. It was prepared by Dave Kinnard, EQC Legal Assistant.)

LAND BANKING

Land banking is a general term applied to programs in which a government entity acquires and holds land to influence and direct the future growth of a region. Land banking provides government with a flexible and abolute control over land that cannot be achieved through regulation.

Land baning has been used to insure an adequate supply of land at a reasonable price for future use, to facilitate the efficient and economic extension of public services into an area before it is developed and to capture for the public the increase in land value which results from providing public services. Land held in the bank can be pre-planned and resold to developers to achieve specific purposes. Buy-Lease Back is a variation of land banking used primarily to protect agricultural land from development. Farms threatened by suburban sprawl are purchased by the government and rented back to farmers under long-term, low-cost leases.

Although of limited use so far in the United States, land banking is an important land use tool in several European countries and in Canada.

Prominent among efforts at land banking has been the development and expansion of Stockholm, Sweden. Eighteen well-planned new cities, each with a population of 250,000, have been built on land acquired by the city's land bank. The Netherlands also has a public land acquisition program dating back to the beginning of this century. Nearly every municipality in the Netherlands has developed an active land banking program which is administered by an independent government agency. Denmark, the United Kingdom, and Israel have initiated programs to guide urban growth through the large-scale public acquisition of land.

Canada, however, provides persuasive evidence close to home that land banking can give order to urban growth. Since the 1930s, a substantial number of Canadian municipalities have guided their growth by large-scale land banks. The land banking program in Saskatoon, Saskatchewan, has been so successful that approximately 80 percent of the city's residential development and 95 percent of the industrial expansion has been on land bank land.

In 1972 the Province of Saskatchewan established a provincial land bank to accomplish two goals. The first goal was to provide a continuous opportunity to sell land at average market prices regardless of local market conditions and provide an effective method of transferring land from generation to generation. Second, and probably the most important goal, a new system of land tenure was to be established enabling farmers to hold land securely throughout their farming lives without having to invest large amounts of scarce capital in land. Rent for 1974 on banked land has been set at 5.75 percent of land value. Buildings and improvements are sold to the lessee, and after five years the lessee has the opportunity to purchase the land as well.

Land banking is not entirely alien to the United States. About a third of U.S. cities over 50,000 inhabitants have programs to acquire land for schools and parks long before the land is needed. This is a form of land banking. Acquisition of industrial land by municipalities attempting to attract industry is another example. The major U.S. effort at land banking to date has been the urban renewal program.

Some states have enacted legislation allowing the use of land banking for urban development. Foremost is the New York Urban Development Corporation Act of 1968 (amended in 1973). The Urban Development Corporation is a public corporation directed to deal with a broad range of urban problems including lack of civic facilities, shortage of housing, physical deterioration, and a lack of industrial or commercial development. The corporation has been authorized to initiate and carry out its programs through the issuance of up to $1 billion in bonds and notes.

A highly innovative program adopted by the town of Southhampton, Suffolk County, New York combines land banking with transferable development rights to protect agricultural land in one of the last actively farmed areas on

Long Island. This program is described earlier under the heading of transferable development rights.

Although most land banking experience has been in directing urban growth and development, the same approach could be used to protect agricultural land around urban areas and recreational resources in Montana. (A report on land banking can be found elsewhere in this book. It was prepared by Dave Kinnard, EQC Legal Assistant.)

CONSERVATION EASEMENTS

Easements are well-established means to acquire certain rights over land. Conservation easements are voluntary legal agreements between landowners and state government or between landowners and private organizations to prevent certain land uses. Under conservation easements the landowner gives up rights to do certain things with his land.

Conservation easements usually reduce the market value of land but provide landowners with a way to protect the future of their land. In addition, land with a conservation easement usually is allowed a tax break — recognizing its reduced market value. Conservation easements are used in several states to protect open space and acres of special natural and educational value.

DISCLOSURE

No matter how good the decision making process, the public interest still requires protection from unrepresentative influence by interest groups. To build this protection into Montana's governmental process, a strong public officials' financial disclosure law is vital. Only through disclosure can the public know when decision making boards, such as the Land Use Commission recommended in this study, become dominated by a single interest group or persons of similar interest.

Other Needs

In preparing the *Montana Land Use Policy Study*, issues came to the attention of the study team that do not fit neatly into the recommendations of this report. Some needs for action are identified in this section:

1. Controlling erosion, sedimentation, and the filling and dredging of lakes and streams was ranked as the third most pressing land management issue by local officials responding to the environmental Quality Council's Land Use Questionnaire. Yet Montana's laws sorely lack provisions to accomplish these goals.

2. The location of public schools can have significant impact on the use of surrounding lands. Yet local governing bodies do not have statutory authority to review these decisions. Even in areas where land use plans have been legally adopted, school districts are not required to locate new facilities in accordance with those plans.

3. Given the increasing price of gold and the likelihood that gold dredging (hydraulic mining) may occur again in Montana, the laws regulating these activities need to be updated. Currently, dredge mining is regulated under the hard rock mining act (Sec. 50-1201 *et seq*, R.C.M. 1947)which does not include specific consideration of the effects of dredge mining.

4. Recent controversies over the allocation of water in the Yellowstone River raise the specter of the construction of new reservoirs. The primary consideration of existing Montana law concerning dams is the safety of the structure. Dams proposed by state agencies, counties, municipalities, or other subdivisions of the state must submit their plans to the Fish and Game Commission to be analyzed for impact on fish habitat. Possible actions resulting from this analysis are described under the state agency review of the Fish and Game Commission in this study. Montana's laws regulating the construction of private dams need to be revised in light of today's concerns over stream and river preservation.

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MONTANA LAND USE POLICY STUDY

APPENDIX A

Statewide Subdivision Inventory: Summary of Methodology and Recommendations

(Prepared by Rodd Hamman, Research Assistant,
Environmental Information Center)

During the summer of 1974, an extensive research project focusing on Montana subdivision trends was undertaken by the Environmental Information Center, a Helena-based, environmental information and education group. The Environmental Quality Council has reviewed the data assembled by the EIC and relied upon the results of the research.

Using definitions and recording procedures established in the Montana Subdivision and Platting Act, researchers examined subdivision data in 35 of Montana's 56 counties. Official subdivision plats and certificates of survey indicated that as of September 1974, a total of 334,017 acres statewide were subdivided into 114,085 lots. Inconsistencies in recording practices and the fact that land sales currently under contracts for deed are often not recorded, led the EIC researchers to estimate that as many as 500,000 acres might be subdivided in Montana.

The standard procedure for each county inventory was to examine the subdivision plats on file in the Clerk and Recorder's Office and list the number of subdivisions per county, the filing dates of the plats, the number of lots, and the total acreage.

Next, certificates of survey were examined for the same information. Not all certificates represent residential development so additional factors were considered. First a 40-acre maximum lot size was designated to eliminate most agricultural land transactions. This limitation was ignored where a county had a separate subdivision file which included developments with 40-acre plus lot sizes. Any certificate obviously not representing residential development was eliminated. Examples of these were surveys of electrical substations, boundary redefinitions, and right of way surveys. But it should be noted that in most cases it was very difficult to determine what the certificate of survey actually represented. If a short statement of purpose were required by law this problem could be eliminated. Even with these precautions, some certificates of survey representing items other than residential development may have been tallied. But any such errors are far outweighed by the number of unrecorded subdivisions. These recording deficiencies mean that the actual development acreage greatly exceeds the recorded amount.

In an effort to obtain some information on non-recorded development, the final step in the inventory was to consult the assessor, reclassification officer or the county planning staff. These officers sometimes have additional information

from tax records or personal knowledge; in fact, several significant developments were discovered which would have been missed without their help.

A major gap in the inventory process was caused by the nature of the contract for deed sale. The use of this contract buries many land transactions for years and makes information concerning contract for deed land transactions almost impossible to find. A law requiring a notice of deed to be filed at the Clerk and Recorder's Office within some specified time after initiation of the transaction would allow up-to-date information to be compiled.

A lesser problem could be solved by eliminating the acreage limitations on the legal definition of subdivision. Instead, subdivisions should be defined as divisions of land for residential use. This would clear up the present confusion concerning certificates of survey. If this recommendation were adopted residential development could be represented by subdivision plats — leaving certificates of survey to represent other kinds of development. A statement of purpose for the survey should be included.

Four other ideas were generated during the survey. First, interest was shown by the county assessment and reclassification officials in requiring land price information to be recorded on subdivision plats and certificates of survey. This information would reduce greatly the appraisal problems involved in rapid land use changes. Tax assessment information could be provided with the application for development.

Second, the Stillwater County Planning Board requires a Soil Conservation Service soil profile to be included with the development application. The SCS soil profile is a valuable information source. The profile is available only for areas where the Soil Conservation Service has completed surveys, but at some point soils information will be available for any development in the state.

Third, a running count should be kept at the county level on subdivision activity. Once primary information is compiled, a periodic updating would be relatively simple. This information could provide data on cumulative impacts of subdivisions for the Department of Health, among other state agencies.

Fourth, standardization of the filing instrument would help greatly in keeping information current. Data on acreage, soils, living units and other items could be handled more easily if a common format were required at the county level. Plat size could be standardized thus easing filing and handling of these instruments.

Public Land Banking

A Solution for Montana's Land Use Problems?

by
David Kinnard
Legal Assistant

Introduction

One of the most tenacious ideas in American history was that every free person should be entitled to become a landowner or farmer. The concept of land ownership was steeped in the Jeffersonian belief that society would be served best if individual landowners had unbridled freedom to do as they pleased with the land. The fundamentally laissez-faire policy of land use which characterized the nation's historical development still predominates today. With it has come an artificial shortage of land and a resulting leapfrog pattern of urban growth termed "urban sprawl."

Traditional land use management tools, particularly zoning (the real workhorse of such tools), have proven inadequate — often resulting in more problems than solutions for ordering urban growth. Planning for orderly development requires that management tools be flexible enough to take into account the forces operating in the land market. Zoning has not provided the needed flexibility. A variety of alternate methods of land use control have been proposed, among them a system called public land banks.

The Land Bank: Not a New Idea

In land banking, a governmental entity, which can be an agency of the state, county, or metropolitan government or an independent public corporation, is endowed with the authority to acquire, hold, develop, and dispose of developable land to control the future growth of the region and possibly exercise indirect control over the development of nearby regions. Land banking is not a new concept. A number of foreign governments have used land banking techniques since the beginning of the 20th century, and the concept was advocated extensively in the United States during the 1930s (1). If the idea of land banking is not new, neither is the problem it is intended to solve. An excellent law journal article published in 1943, for example, sounds hauntingly familiar:

> **Wildcat speculation has resulted in either premature and poorly planned subdivisions or the overdevelopments of land in concentrated areas. Costly traffic congestion has been occasioned by streets lacking differential widths and arranged in a gridiron pattern to facilitate intensive land uses. Fluid transportation and crowded urban living conditions have caused a rapid flight of population to attractive outlying districts (2).**

There are three distinct types of land banking. One is the advance acquisition by governmental agencies of land for traditional public uses such as parks, schools, and airports.

The basic intent here is to secure land for public needs and to save tax money by averting eleventh hour attempts to buy land from speculators. A second kind of land banking is the public acquisition of areas of critical environmental concern to preclude private development. Lastly, public agencies can acquire developable land in or near urban areas.

Land banking is intended to achieve several specific goals. The first is to supplement existing land use regulatory programs by enabling the government to achieve specific and flexible control over the use of land to a degree impossible through regulations. In addition, land banking can enable the government to preserve important environmental qualities for the benefit of the people.

A second goal is a guarantee that there will be adequate land at reasonable prices for use when needed.

And finally, land banking can benefit the taxpayers in two ways: extending public services to an area before it is developed can result in high efficiency and economy consistent with planned growth; and government ownership and resale allows the return of the appreciation in land value from the public's investment in services. A simple measurement of the cost and benefits of advance land acquisition reveals what these goals can achieve as the thrust of a well-planned land banking system. The costs include the original capital used in the land purchase and the subsequent costs of management and administration. Costs also include lost taxes, even accounting for the increase in public services that would have been provided had the land been developed. Also, land banking undoubtedly affects the land market by the withholding land from the market — simply an offshoot of the goal to reduce land speculation.

The benefits side of the coin reveals what can be accrued by a well-managed land banking system. The value of the lands in the bank can appreciate during the holding period while returning a profit on the interim use of land. The land bank also can produce some beneficial effects for adjacent lands during the holding period, both public and private. Another primary consideration is the circumvention of any costs of delay if an area could not be obtained when needed because of political or economic opposition, or if the area was developed in the interim for purposes incompatible with the planned public use. Foremost among the benefits, however, is that a land banking system can provide a mechanism for encouraging rational patterns of development while preserving environmental values.

Experience with Land Banking

Preeminent among efforts in public land banking has been the development and expansion of Stockholm, Sweden. Eighteen superbly planned new cities, each with a population of 250,000, have been built on land acquired by the land bank. Some of the land was held as long as 25 years and then developed only after mass transportation and other public facilities were available. Land banking in Sweden began in 1904 when the city inaugurated a policy of buying large areas of farm and forest land within a nine mile radius of the city center. The land bank is administered by a city-owned real estate company that operates like a private company but has the power of condemnation. When land is designated for acquisition, private owners are required to sell at market value. Legislation was passed allowing the corporation to acquire land needed for development before it had adopted specific plans for the area, thus aiding in keeping land prices reasonable. In most cases the land has been leased for farming until needed for development; the rent on the leases is used to pay off the interest on the borrowed capital. Rather than actually selling the land to be developed, the city leases the land under long-term contracts. As a result, almost 70 per cent of the dwellings on the outskirts of the city are built on leased land owned by the city.

The Netherlands also has an advance land acquisition program dating back to the beginning of the century. Since then, the Netherlands has tried to anticipate the need for land and obtain it for the land bank. Nearly every municipality in the Netherlands has developed an active land banking program, which is in turn administered by an independent government department. The municipalities of The Hague and Amsterdam alone own more than 11,000 acres. The success of Dutch municipalities in fostering orderly urban growth can be attributed to strict covenants or lease restrictions attached to land sold by the land banks, which specify intricate details of development that must be followed by the private developers of each parcel.

Denmark, the United Kingdom, and Israel also have initiated programs to guide urban growth by the large-scale advance acquisition of land. However, the most persuasive evidence that land banking can work to shape orderly urban growth is provided by Canada's program, active since the 1930s.

A substantial number of municipalities in Canada have used a system of large-scale land ownership as a prime component of programs designed to control urban development. During the past two decades, Canada, like the United States, has experienced rapid escalation of urban land values and a scarcity of well-serviced developable land. Yet, beginning in the 1950s the federal agency involved in housing affairs began federal assistance programs for municipal land acquisitions under the National Housing Act. Inadequate funding and strong opposition by private developers prevented all but a limited implementation of the program. Canada's land banking program relies heavily on the interest and cooperation of the federal, provincial, and municipal governments. No national program of land banking is possible because planning in Canada essentially is a function of the nation's 10 provinces. All provinces except one have participated in some form of land banking. A general program to shape urban development is found in the midwestern provincial cities (3).

Municipal land banking has been practiced in Alberta and Saskatchewan since the 1930s, when municipalities in the two provinces acquired a substantial amount of tax-delinquent land during the depression. The land was subdivided and developed under programs similar to the Works Progress Administration and Civilian Conservation Corps in the U.S. during the depression. From this history evolved a strong municipal role in public land ownership

and development. Providing partially developed land at lower than market prices and encouraging orderly, low-cost land development reduced land inflation and has achieved a relatively high quality urban development process. Growth policies are directed toward integrated urban development by combined programs of land banking, staged development, annexation, and extensive transportation development. The legal basis of planning in the Province of Alberta has been the Planning Act of 1913, which provided for regional planning commissions to develop regional plans for their areas, within a 50 mile radius of all major communities. A significant feature of the provincial legislation is its emphasis on orderly and economic land development. The Alberta Planning Act mandates that municipal plans must include:

> **a schedule setting out the sequence in which specified areas of land may be developed or redeveloped and in which public services and facilities . . . should be provided in specified areas and proposals relating to the financing and programming of public development projects and capital works . . . be undertaken (4).**

The act's emphasis on comprehensive planning and staged development in addition to its provision for municipal involvement in the planning process has thus provided a firm basis for development planning by the muncipalities.

The planning system in Saskatchewan is less developed than that in Alberta, possibly because until the last 15 years, urbanization in Saskatchewan has been substantially less intense than in Alberta. The planning system of the provincial government of Saskatchewan is in the community planning branch of the Department of Municipal Affairs, which is essentially advisory. Saskatoon, Saskatchewan is the only municipality of either Alberta or Saskatchewan which acquired tax-delinquent land during the depression and initiated a land banking program which has continued to supply land for urban development. The land banking program has renewed itself over the years, as money from the sale of the original lands was used to purchase new land for development. Saskatoon's program has been so successful that approximately 80 percent of the residential development and 95 percent of the industrial development has taken place on city-owned land. The city's strong position in land development activities strengthens its ability to follow a long-range comprehensive master plan, which is administered as law. An important aspect of the land banking program in Saskatoon requires that land sold for development be sold to builders under a lease option agreement that requires construction within a year; hence, because the city retains title until the completion of construction, the land cannot be resold during this time. This device has served to prevent quick resale of developable land for speculation.

The problems associated with the inefficient use of public services resulting from leapfrogging development, the long delays in providing public services to new residential areas, and the rising costs of residential land are similar problems in both Canada and the United States. The problem with application of land banking in the United States is that her cities are severely restrained in the range of allowable action; however, it might be possible for county or regional governments to carry out a land banking program similar to that practiced by Canadian municipalities. State organizations like New York's Urban Development Corporation or North Carolina's land assembly organization could supplement localized levels of government.

Local governments in the United States lack a strong tradition of acquiring and reserving land as a means of guiding and controlling urban growth. Two factors have hindered the development of comprehensive land use policies in this country. First, governments have been reluctant to acquire land other than for specialized "public" purposes because of entrenched views on private landowner rights. Second, governments have traditionally been unwilling to bear the cost of acquisition when the police power has been available for regulating land at minimal cost. The leading study of advance land acquisition in the United States indicates that about a third of the cities of over 50,000 inhabitants carry on some kind of advance land acquisition (5). However, the programs are small and mostly concerned with school and parkland. A major precedent for land banking is in urban renewal programs, where large-scale land acquisition authority is based on the corrective purpose of eliminating urban blight rather than the creative purpose of encouraging a high quality environment. Another rather limited United States approach to land banking has been in acquisition of industrial land reserves. Confronted with the flight of industry and its workers to the suburbs, and the resultant weakening of the tax base, several cities have sought to curtail the exodus by providing cheap sites for industry.

A good illustration of this approach is the Philadelphia Industrial Development Corporation, a nonprofit partnership of the city of Philadelphia and the Chamber of Commerce. The program, begun in 1959, now has a $19 million development fund, and has enabled the city to replenish its industrial reserves while ensuring a constant supply of new industrial sites at reasonable cost, thereby attracting and holding industry. A similar program began in Milwaukee in 1964. To date, nearly three-fourths of the industrial reserve there is occupied by firms from the suburbs. In addition, while not yet having disposed of one-quarter of the acquired land, the city has regained half the costs of the program.

Perhaps the most relevant United States experience with land banking has been the Puerto Rican program begun in 1962. The Puerto Rican Land Administration Act established a public corporation empowered, among other things:

> **To acquire real property, urban or rural, which may be kept in reserve towards facilitating . . . developments of public work and social and economic welfare programs . . . which may be undertaken by the Administration itself, by the Commonwealth of Puerto Rico or its agencies, and by private persons for the benefit of the above mentioned public entities or of the community, including, but not limited to, housing and industrial development programs (6).**

In enacting this innovative legislation, the legislative assembly was concerned with wasteful urban land uses and their disorganizing impact on government programs. The land administration created under the act is authorized to acquire any real or personal property in any lawful manner, including purchase, purchase by option, or acquisition by lease, exchange, gift or eminent domain. The property so acquired may be kept in reserve to facilitate public works, including housing and industrial development programs, recreational and open space programs, and irrigation and reclamation programs. The only restriction on the maintenance of the land reserve is that lands acquired by condemnation for public works must be used within 15 years. In disposing of its property, the land administration is authorized to establish any conditions and limitations regarding its use as it may deem necessary to ensure the fulfillment of the purposes of the act. As of June, 1970, the administration had acquired almost 24,000 acres, 6,100 sold for development under one or more public purposes. The land administration has been taken to court on the question of the constitutionality of the advance acquisition of land reserves for unspecified uses [*Commonwealth of Puerto Rico v. Rosso* 95 P.R.R. 488 (1967), app. dismissed 393 U.S. 14 (1968)], and won. (This case will be discussed later in this report.)

Some of the states also have begun to develop programs and entities to promote urban development associated with land banking. [See *Ill. Revised Stat.* Ch. 67 1/2, Sec. 307.12 (1971); *Ky. Acts*, Ch. 125 (1972); *La. Revised Stat. Ann.* Title 33, Ch. 21 (1973); *N.Y. Unconsol. Laws*, Sec. 6251 (1973); and *Ohio Rev. Code Ann.*, Ch. 349 (1972)]. Foremost among these is the New York Urban Development Corporation Act of 1968, as amended in 1973. The Urban Development Corporation (UDC) is a public benefit corporation with the legislated purpose of dealing with a broad range of urban problems — lack of civic facilities, shortage of housing, physical deterioration, and a lack of urban industrial and commercial development. The corporation has been given the power to acquire real estate by purchase, lease or condemnation. Unlike other development agencies, the UDC has the power both to initiate and to carry out its own programs, all of which can be accomplished through its powers to create subsidiary corporations, issue notes and bonds up to a billion dollars, and exempt its projects from local real estate taxes. The corporation has formulated plans for the acquisition of land and construction of three new communities, apparently believing that the development of new towns and the orderly expansion of existing communities is necessary to encourage orderly urban growth.

A variation on the land banking system has been adopted by the Southampton Town Planning Board of Long Island, New York, for preservation of agricultural land on the island. The board saw the critical need for some means to turn back the steady decrease in Long Island's actively farmed land. Studies by the planning board led to the designation of an agricultural land reserve area on the local master plan. In order to implement this new program, two new planning concepts, an agricultural overlay district and the community land trust, were offered as tools to implement the program. The system allows a farmer to transfer the development potential to a limited portion of his total acreage if he transfers the remaining land to a public land trust. It is then possible for him to sell the limited acreage together with the increased development rights or keep them in existing use. The farmer and his heirs have the first option to lease the dedicated acreage for farming operations. The program is entirely voluntary on the farmer's part and is based on the cluster subdivision, transfer of development rights, and the community commons. The transfer of development rights is particularly noteworthy in that it permits several farmers to cooperate in preserving their farms and make large-scale farming operations possible. At the same time, agglomerating the development rights from several farms makes large and unified development possible. Southampton, N.Y., hopes that this modified system of land banking will serve to preserve agricultural lands in the face of the intense demand for development.

Because of the political, social, and economic institutions and traditions, which are the primary factor in determining a land use policy for a country, state or locality, not all systems of land use control are universally applicable. Certain similarities in the examples of experience with land banking, both in foreign countries and in the U.S. on a smaller scale, reveal the policy objectives that land banks can accomplish and the means for achieving them.

Legal Restraints on Land Banking

Many legal questions surround the implementation of land banking in the United States. The legal problems can be divided in two groups: first are those concerned with the acquisition of land for the program, and second are those concerning disposition of land for development under the program.

One of the primary reasons for advance land acquisition for public projects derives partially from project enhanced values. In cases where a public project increases the value of adjacent lands which are subsequently taken for the expansion of the project, the property owner is entitled to receive compensation for any increases in the value of his property, particularly those relative to the proximity of the public project [U.S. v. 172.80 Acres, 350 F.2d 957 (1965)]. Thus, it is less expensive in the long run for the public agency to have possession of the lands it might need for any project before it begins. Some of the earliest authority for advance land acquisition by the government is provided in *State of Washington v. Clausen*, 110 Wash. 525., 188 Pac. 538 (1920), where the court sustained a land settlement act empowering the state to purchase, improve, and resell agricultural lands to homeowning farmers. Whether the government can engage in advance land acquisition for public projects not yet authorized is a subject of some debate, but the trend is in favor of such action; in *New Windsor v. Ronan*, 329 F. Supp. 1286 (1971), for example. In its decision the court stated:

> **The state may take more than it is positive it will need; it may, given the limits of human foresight,**

take land for which a need is reasonably predicted but which eventually proves unnecessary for its project purpose (p. 1292).

The only case thus far concerning a broad system of land banking is *Commonwealth v. Rosso*, discussed earlier, in which the Supreme Court of Puerto Rico unanimously upheld legislation providing for land banking to promote efficient use of land. The court held that the Land Administration Act was constitutional in all respects, and was "legitimate use of public power in protection of that which a community of 2,712,808 human beings existing in a territory of 3,435 square miles sees as a most precious value for survival: vital space." The court made an elaborate enumeration of the social, economic, and moral justifications for its decision. It made reference to the legislative finding that only a publicly constituted body with broad powers of land acqusition and regulation could assist the commonwealth in providing an orderly pattern of development and in meeting its responsibility to preserve the health, safety, and welfare of its citizens. In the discussion of legal issues, the court emphasized that strict limitations on governmental authority would unnecessarily and unwisely exalt private property in the face of common needs. The court found no reason to distinguish between the concepts of public use and public or social benefit. Believing that the legislature might have reasonably considered the reservation of land until some unspecified time in the future and uses for it to be of social benefit, the court refused to interfere with the decision of the legislature in establishing the land banking system. The decision was appealed to the U.S. Supreme Court, but was dismissed without dissent on the grounds that the case did not present a substantial federal question (393 U.S. 14).

In most cases, a land banking system would acquire needed lands by purchase from the landowner. Proponents of land banking believe that the authority to acquire land by the exercise of the power of eminent domain would be crucial to the operation of a land bank in cases where private owners either refused to sell their lands or demanded unjustifiably high prices for the land. The proponents feel that the mere existence of the power of condemnation would minimize the number of such cases. The question of the legality of condemnation for land banking systems is untested in the courts and therefore deserves some careful study.

The doctrine of "public use," which is subject to conflicting interpretations from state to state, is the major legal obstacle in land banking. The most important limitation on the condemnation power is the requirement that private property be taken only for a public use. While the public use requirement is well established in the law, its meaning is not. Rather than laying out general definitions of the term the courts have, for the most part, attempted to determine the meaning on a case-by-case basis. Before the turn of the century, the power of eminent domain was limited by the requirement that the property be put to use within a very few traditional functions such as the public roads, schools, and buildings. Soon however, came a willingness on the part of the courts to reshape the public use doctrine to make it more responsive to the changing scope of governmental authority. A portion of this change is noticeable in the court's treatment of a modified form of land banking, urban redevelopment. Perhaps the most noteworthy case in this respect is the Supreme Court's 1954 decision in the case of *Berman v. Parker*, 348 U.S. 26, which upheld the constitutionality of the District of Columbia Redevelopment Act of 1945. The act authorized condemnation for the purpose of "redevelopment of blighted territory . . . and the prevention, reduction, or elimination of blighting factors or causes of blight." The court upheld the condemnation of land to be transferred to a private developer for the implementation of the urban development project by saying:

> **The means of executing the project are for Congress and Conress alone to determine, once the public purpose has been established. The public end may be as well or better served through an agency of private enterprise than through a department of government — or so the Congress might conclude. We cannot say that public ownership is the sole method of promoting the public purpose of community redevelopment projects. (At p. 33-34).**

Redevelopment of non-blighted areas has also been upheld. In *Cannata v. New York*, 182 N.E.2d 395 (1962), condemnation was authorized for the purpose of reclaiming and redeveloping economically deficient areas which impaired the sound growth of the community. The use of eminent domain for a land banking system was upheld specifically in the case discussed earlier, *Commonwealth v. Rosso*. The Puerto Rican Land Administration Act allowed for acquiring of land by purchase and eminent domain to be held in reserve for an unspecified time for an unspecified future use. The Supeme Court of Puerto Rico held that the condemnation of private property without a particular plan for the land and a clear public necessity for doing so did not conflict with the public use doctrine of the Puerto Rican or the U.S. Constitutions. The court stated that public use is synonymous with social benefit, social interest and the common good, which were the ultimate purposes of the act.

Whether the Montana courts would take this view of governmental authority and social benefit is unclear. Historically, the legislature has prescribed a list of public uses under which the right of eminent domain can be exercised (Sec. 93-9902 R.C.M., 1947). Subsection 2 of that section permits, among others, "all other public uses authorized by the legislative assembly of the state." It can be hypothesized that if the legislature established a system of land banking which inluded the power to use eminent domain as a public use, that such power might then be upheld by the Montana courts. Ultimately, whether the taking of property for the stated goals of a land banking system constitutes a public use will depend largely whether the courts would concur with a legislative finding that such activity is beneficial to the community.

The second area of legal question relating to land banking concerns the ultimate disposition of the banked lands for development. Two major problems surrounding land bank

dispositions are: dispositions that are inconsistent with land bank goals as defined by statute, and dispositions that exclude certain uses or groups from an area in conflict with general governmental policies. When considering a land banking program, the effectiveness of judicial review is important, both in determining the desirability of land banking and the actual form of that system (7).

Administration and Finance Of a Land Banking System

To accomplish its objectives, a public land bank must have the financial resources and legal authority to purchase or condemn land in a broad geographic area. It also must be relatively autonomous, and largely insulated from state and local politics and pressure groups, in order to make public decisions on land use.

Legal, political, and fiscal considerations would limit severely the proper functioning of municipal or county level land banking systems. Few cities or counties in Montana would be in a financial situation sound enough to attempt land banking except on the most limited scale. Moreover, because many land use decisions tend to affect regions rather than localities, a broad system of land banking by counties and municipalities would be inherently unrepresentative.

It also seems questionable whether state goverment would be any better qualified to operate a public land bank. In Montana, few state agencies possess the autonomy and financial capability to manage a land banking system. The creation of a special agency to manage a land bank appears to be ruled out by the political history of similar proposals. It also would seem unwise to place the land bank within the jurisdiction of an existing state agency such as the Department of Intergovernmental Relations. In fact, any agency where the director serves at the pleasure of the governor could be hindered by political pressure. In addition, because coordinated, long-term planning is crucial to the success of a land bank, the possibility that entirely new agency heads would be appointed with each change in administration weighs against the practicality of a state agency form of land bank.

Perhaps the most frequently utilized and successful approach to problems with interjurisdictional ramifications has been the creation of special purpose public corporations. Operating on a regional basis, they are often more able to meet area-wide problems successfully. While public corporations are agents of the state, they are not necessarily state agencies. Public corporations are able to act independently in personnel, accounting, financial management, and legal services mattters. In addition, because the corporation is not elected or responsible to the voters, it is relatively untied to partisan politics and tends to be more autonomous than any state or local agency. A public corporation also can gain access to a greater variety of financing alternatives than a state agency. Finally, a public corporation also can be authorized to form subsidiaries and affiliated nonprofit corporations to carry out specific projects such as developing land for future use, generating revenue for future acquisition and encouraging desirable development. The concept of public corporation is quite novel in Montana.

To serve effectively, a land bank must have a considerable land inventory at its disposal. In view of the long-term goals involved and the amount of money required, it is unlikely that a bank could begin with all of the land necessary to realize its objectives. The initial funding for the land bank might come from a legislatively appropriated special fund that would be replenished as land is leased or sold. The capability to borrow against an assured future source of revenue also would be essential if the land bank were to begin an effective program of advance land acquisition to meet immediate land use objectives. Eventually a land bank would become self-sustaining.

Proposals for Land Banking In the United States

Many proposals recommending that state governments enact legislation allowing governmental entities to engage in advance land acquisition are cited in the American Law Institute Model Land Development Code. On land banking, the code proposes:

> **The acquisition of interests in land for the purpose of facilitating future planning to maintain a public land reserve, and the holding and disposition thereof in accordance with the purpose of this Code, are hereby declared to be for the public purpose of achieving the land policy and land planning objectives of this State whether or not at the time of acquisition or expenditure of funds for acquisition or maintenance any particular future use, public or private, is contemplated for the land. Appropriations for, issuance of bonds for, taxation for a land reserve system, acquisition of land for a reserve by gift, purchase or condemnation, management of land so acquired, and disposition of land so acquired, are hereby declared to be for a valid public purpose (8).**

The Colorado Land Use Commission, in its 1973 report titled, *A Land Use Program For Colorado*, recommended the establishment of a land banking system in Colorado to coordinate land use control. The proposal recommended the creation of a public corporation with all the powers and authority necessary for a well-managed system of land banking. A bill intended to establish the system failed to pass Colorado's 1974 legislative session.

Conclusion

The land of Montana should be seen as a resource to be conserved and developed for its value in supporting the basic social and economic well-being of her citizens. To this end, government could assert primary responsibility, as it does in education and other services, for controlling the mechanisms of the land market and for ensuring its maximum public utility as it relates to public services and

community development. The public ownership of land, by a land banking system, could be one facet of a solution for Montana's current land use problems. Yet, land banking is not without its own problems. A land banking program requires an institution with historical perspective beyond partisan political reach and influence peddling. It could be one component of a total system of land use planning and regulation, but so far, Montana has demonstrated little desire for these things. Most land banking experience has been in controlling urban growth and development. As is true with other untried techniques of controlling development, land banking will probably have quite different effects than either its proponents or opponents have forecast. A valid evaluation of the actual effects of a land banking system can result only from experimentation.

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Development Rights Transfer

An Analysis

by
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Introduction

Land use control generally has relied on established systems such as zoning, subdivision regulations, and building codes. Recently, however, these systems have come under increasing criticism, not only from the landowners affected, but from concerned citizens feeling that established techniques do not meet many present and emerging needs, particularly, the protection of the environment. Therefore, a search has been going on for ways to achieve land use control while permitting effective organization of relationships between men and women and their land that will be acceptable to the majority of citizens.

In order to solve some of these difficult problems, a system of Transferable Development Rights (TDRs) has been suggested. To its proponents, the TDR system seems to be regarded as an instant solution to complex land use problems and policies. In fact, the system is not simple and more importantly has not yet been tried or tested in the courts.

The Severable Nature of Development Rights

"Development rights" are the rights of landowners to change the uses of their property, usually by building structures or allowing certain activities. Development rights are severable, that is, capable of being divided into legally independent rights and obligations, analogous to the historical treatment of mineral and surface rights. As a concept, the term development right is applied two different ways. The first, involving the purchase or condemnation of particular property rights by government (such as scenic easements), already has been utilized. The second, involving a system for the transfer of development rights in an administratively created market, is new and relatively untested.

The TDR system is based on the premise that the right to develop a tract of land is not inherent in the land or in its ownership, but actually is created by and derived from societal or legislative authority. The proponents of this system believe that TDRs can be based on the same conepts and legal precedents as zoning. Yet to be utilized as planning tools, development rights must be distinguished from the traditional conceptions of land and development values. A recent essay describes the inherent differences between the TDR system and traditional land use management tools:

1) **The right to develop land is quantifiable and a transferable incident of land ownership (much like mineral or sub-surface rights) and separable from the normal ownership-property right, the latter largely defined in terms of present uses.**

2) **This development right may be severed or separated from the residual rights of present use, in the same fashion that mineral or sub-surface rights may be severed.**

3) **Under governmentally established guidelines, development rights may be transferred in specific quantities, from one parcel of land to another parcel not necessarily contiguous, but in the same development rights district or zone (1).**

The proposed TDR system would require the preparation of a master plan for the concerned area, involving much more rigorous research and analysis than present master plans under the zoning system, and the setting of reasonable community development goals. The boundaries of a TDR district would be based on a mixture of natural factors (floodways, geologic hazard areas, groundwater recharge) and planning considerations (transportation linkages, public works extensions). Ultimately, the final master plan would reflect the development capacity, potential, and rationale for every land parcel in the district. Zoing and planning would continue in effect.

A very simplified TDR district could comprise three tracts of 100 acres each, owned by A, B, and C. Zoning and planning considerations might determine that the tract owned by A should support no more than 25 residential units, B's land could support 100 units, and C's tract could support 175 units. With permissible density thus determined, the TDRs must be allocated to each property owner. Various formulas might be used for the allocation. Here are two:

FORMULA 1 (2)

The decision could be made to allocate total development rights evenly over the district, so many per acre. On the 300 total acres owned by A, B, and C, 300 development units are possible, although the densities vary between the tracts. Here are the results of an allocation on a per acre basis:

Owner	Acres	Devel. Rights	Density Allowed (units)	Comments
A	100	100	25	A holds 75 unusable or surplus rights
B	100	100	100	B holds rights necessary for allowable development density
C	100	100	175	C lacks 75 rights needed for development to allowable density
		300	300	

After the allocation of development rights, the owners can do as they wish, within the allowable density. Owner A could develop at any density up to 25 units and sell his surplus rights, or he might retain all 100 rights although he could use only 25. The other owners also could decide among several courses of action depending on their allocation of rights.

FORMULA 2 (2)

The decision could be made that a per acre allocation is inequitable because of differences in the nature of the land. A's 100 acres might be largely swamp; he perhaps never has had the development expectations of C, who owns 100 acres well-suited to development on a variety of grounds. If it were decided that this situation should be reflected in the allocation of the 300 development rights, (say) 70 percent of them — or 210 — could be allocated on a per capita basis. The remaining 30 percent — or 90 rights — could be allocated on the basis of amenability of the land to development.

Many procedures are possible to allocate the 90 amenability development rights among A, B, and C. A's land, for instance, could be ranked 2 on a 10-point scale of development amenability. B's land could be ranked 5, and C's ranked 8. The sum of the ratings 15, can be made into the denominator of a weighted share fraction over which would be placed each individual rating, thus: A, 2/15 (weighted share) times 90 (available rights keyed to amenability) equals 12 rights; B, 5/15 times 90 equals 30 rights; C, 8/15 times 90 equals 48 rights. Other formulas are possible. Allocation of all 300 development rights would proceed as follows under the foregoing approach:

Owner	Acres	General D.R.*	Amenability D.R.	Total D.R.	Allowed Density	Comments
A.	100	70	12	82	25	A holds 57 surplus rights
B.	100	70	30	100	100	B holds sufficient rights
C.	100	70	48	118	175	C lacks 57 rights to achieve allowable density
TOTALS		210	90	300	300	

*D.R. means development rights

Obviously, the impact of amenability as a factor in the allocation of rights could be lessened by making it applicable to only 10 percent of the available rights instead of 30 percent. Rights also might be established to mature over a period of time; some could be useable presently, or in 5, 10 or 15 years. Thus property owners whose lands were scheduled for belated development could be allocated a larger share of early maturing rights so that they could sell them and receive early remuneration. Commercial and industrial rights might also receive special treatment based on their direct link to neighboring residential development.

The Applications of TDR

The actual use of the TDR system has been very limited. In 1968, the City of New York adopted a zoning resolution (Art. VII, Ch. 4, Ss: 74-79, 791-793) which permits the transfer of a landmark's air rights to a non-contiguous lot (3). Air rights are one form of a development right; an historic landmark in downtown Manhattan, for instance, may be on a lot that is zoned for 50 stories, yet, to encourage the preservation of the landmark the property owner is allowed by the resolution to transfer his unused air rights to another lot elsewhere in the area and thereby build a higher building than he would have otherwise been allowed. Yet, the program has not figured in any transaction (4).

The town of Southampton in Suffolk County, New York has adopted a local zoning ordinance (#26, Sec. 2-40-30) which permits an optional transfer of development rights to preserve prime agricultural lands. In certain cases farmers are allowed to transfer the development potential of their lands to another tract in a different district which permits a higher density. The farmland can then become part of a municipal land trust into perpetuity. The farmer can continue to farm on the land for a nominal rent, while benefiting from the development taking place on the second tract.

State legislatures also have shown an interest in the TDR program. In 1971, the Illinois legislature approved an extensive revision of that state's historical preservation act to permit the use of development rights transfer (Ill. Rev. Stat. Ch. 24, S 11-48.2-1A). In 1972, the Maryland Senate considered a bill authorizing local governments to create transfer districts in which the development rights could be sold. The New Jersey legislature also considered a development rights transfer bill in 1973 to preserve prime agricultural land. The latter two bills eventually were killed. Early this year the Colorado legislature considered HB 1,116, a bill providing the authority and procedures for a TDR program, but it was postponed in committee. More recently, a report from the Oregon Executive Department to the Joint Interim Legislative Committee on Land Use suggested using the transfer or acquisition of development rights to solve Oregon's land development problems.

The fact that no state has enacted significant transferable development rights legislation can be ascribed to the numerous problems inherent in the still-theoretical system of TDRs.

The Taking Issue

The legal questions concerning TDRs are substantially the same as those concerning traditional land use zoning and subdivision regulations.

The first question is the constitutional doctrine involving the "taking issue." The Fifth Amendment declares that ". . . nor shall private property be taken for public use without just compensation." It has been the trend in many courts to assume that "just compensation" means fair market value even when it includes speculative values and the impact of publicly financed facilities such as highways. As often interpreted, zoning or other regulations which prevent a reasonable economic return from land, or which benefit the community rather than the property owner, have been considered a so-called taking requiring public compensation.

A second legal question arises from the doctrine of the Fourteenth Amendment which states that ". . . No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." In order to achieve equal protection of the laws, owners of similar tracts of land must be treated similarly, or at least, not be subject to unreasonable and arbitrary discrimination.

Because there is a serious question of the legal validity of a TDR system, legal precedents have been studied and cited to form a strong justification for the legality of a TDR system (2). Bulwark of this particular argument lies in the historical legal treatment of the erection of mill dams, the formation of drainage and irrigation districts, and the regulation of oil and gas production in recent times.

The mill dam acts early in U.S. history provided that a private landowner along a stream could erect a dam for water power, with certain special rights arising. The pond behind the dam was allowed to flood adjacent landowners without compensation to them. The state justified this "taking" since the water power was for grain mills, which were required by state regulation to grind the grain of all comers, with a statutory share as a fee. This was the granting of the power of eminent domain to a private individual to further a resource use, with regulated participation guaranteed to the public. It appears that the multiplier effect of water power on the employment and industrial base of the state served to advance the public use concept enough to justify eminent domain in the hands of individuals. The courts developed the doctrine that this was a reasonable police power for the adjustment and protection of correlative rights of individual owners that arose from a shared relation to a common resource.

The legislative acts establishing major drainage and irrigation districts were linked by the premise that a majority of property owners could vote, under statutory authorization and court supervision, to impose land use goals on a possibly objecting minority. Within the districts individual properties sharing a common resource were joined in a unit. Individual landowner rights in the tracts involved were

diminished radically in the furtherance of resource development. The courts upheld this common resource theory; perhaps the best judicial interpretation was presented by the Supreme Court in *Fallbrook Irrigation District v. Bradley*. 162 U.S. 112:

> **If it be essential or material for the prosperity of the community, and if the improvement be one in which all the landowners have to a certain extent a common interest, and the improvement cannot be accomplished without the concurrence of all or nearly all of such owners by reason of the peculiar natural condition of the tract sought to be reclaimed, then such reclamation may be made and the land rendered useful to all and at their joint expense. In such case the absolute right of each individual owner of land must yield to a certain extent or be modified by corresponding rights on the part of other owners for what is declared upon the whole to be for the public benefit. (p. 163).**

It is noteworthy in this case that ownership and the use of the affected land remained with the respective owners. Land under a TDR system likewise would reamin in the hands of its owners.

In connection with the TDR system, perhaps the most analogous precedent in law arose from the development of oil and gas resources. Oil and gas commonly are found together in an extensive pool or field that can underlie numerous surface property holdings. Early production practices in this country were cutthroat, each property owner attempting to drain as much oil and gas from his neighbors' property as possible. Unfortunately, the courts encouraged this practice by characterizing oil and gas as fugitive resources — practically asking for hasty and wasteful production methods. About 1900 states began regulating oil and gas production with controls that included compulsory pooling and unitization. In pooling, the number and spacing of wells, and the rates of production, are controlled. Unitization is the operation of the entire field or pool as an entity, without regard to patterns of surface ownership. Obviously, such police power regulation directly confronted individual economic motivations for resource development. Yet public interest of the highest form was involved in the prevention of massive wastes and of the destruction of valuable resources, and thus, the courts upheld most of the state-imposed oil exploitation controls as a valid exercise of the police power (5). Some believe that these legal precedents could defend againt any challenge that would be brought against a TDR system. But the intricacies of the system might bring it under different body of judicial precedent.

Owners of protected land in a TDR system would have more development rights than they would be permitted to use under the community plan. Conversely, owners in areas designated for intensive development would have to purchase additional rights if they wished to develop. With the sale of unused rights the owners of protected land would receive compensation. It is impossible to know whether the amount received for the sale of development rights would equal the returns on unrestricted development. Nor is it clear that the resulting redistribution of development rights and profits would be equitable. Whether constitutional challenges based on any inequity would be upheld in the courts depends on the magnitude of the reduction in economic return that the courts would deem confiscatory.

Challenges to the TDR system also might arise from the constitutional doctrine of equal protection. Developers and landowners within transfer districts could claim that they were denied equal protection if densities permitted outside the district were more liberal than those within the district. In *Associated Home Builders of the Greater East Bay v. City of Walnut Creek*, 94 Cal. Rptr. 630, the court declared that a legislative classification (in this case, a park dedication requirement) meets equal protection requirements if it is rational. If the TDR district were delineated by documented economic and planning studies demonstrating that the area selected as a transfer district could reasonably be expected to become a focal point of future development, the district might be upheld as a rational distinction. Landowners and developers also could claim a denial of equal protection if the price paid by the builders for the development rights were ultimately passed on to the purchasers. Defending this challenge would require careful consideration of the magnitude of the community's land use problems. The legal and economic consequences of these redistributions in the TDR system are deserving of further study.

Perhaps the most severe constitutional test for development rights transfer would be a challenge that the coordination between the transfer program and the community plan was unreasonable and arbitrary. Too often, comprehensive plans are little more than mixtures of prevailing land uses, representing more of the economic assumptions of development process than a rigorous analysis of need and potential and a statement of strategies to achieve community land use goals. It appears obvious that the key element in the effective operation of a TDR system is its integration with a truly comprehensive plan.

TDR and The Market

It is critical to determine whether there is sufficient demand for development in an area proposed as a transfer district to create an adequate market for development rights. To do this, market studies must addressing past and projected land absorption rates, existing or proposed public improvements within the area, and demographic patterns. Then, when an area is established as a likely target for intensive development, a transfer program must be deigned to permit developers to build profitably under its controls. Excessively stringent densities or development controls offering little financial advantage to the developer probably would be self-defeating. Secondly, the quantification of development rights in non-urban areas requires not only the measurement of density-height relationships (as in the case of cities), but also intensity and use. For example, pasture land not only must be assessed for its capability for non-agricultural uses, it must also be analyzed for its animal carrying capacity and other factors related to its non-urban uses.

The central argument of the TDR proponents is that the development potential of private property is partially a community asset which should serve the needs of the community. Transferable development rights would vastly expand the economic and planning leverage of the government over private land use decisions. The goals of a TDR program are the prevention of resource wastes, the protection of values by wise land use management, and the protection of the traditional and highly prized property rights of landowners. In its emphasis for the free trading of development rights, the TDR system would extend the individualism of the market, as well as compensating those for whom development was restricted. Yet, it must be stressed that TDRs are experimental; untested in the marketplace and the courts. To date, the few applications of development rights transfer actually attempted have dealt with localized problems in specialized areas. Thoroughly researched, analyzed and debated, however, a system of TDR could do much to solve some of the land use problems facing Montana with equitable regard for the rights of property owners.

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Public Participation and Environmental Quality*

by
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"As the planet we live on becomes more and more crowded, more wrinkled by worries and complexities, more pressed by needs, the earth's valuables increasingly have to be shared. The work of government as manager of the public's resources becomes one of its major tasks . . . . But the people have lost effective control over these decisions to the professional management of bureaucracies. These structures, so largely independent of Congress, the President, and the courts, have a natural tendency to believe that they can decide for themselves. This attitude, that the experts 'know best,' is held by sincere and well-intentioned men . . . . The great danger is that an entrenched professional bureaucracy will be shortsighted in its perception of the public good. It may see only the needs of the next decade when planning for a century is essential. It may see only local demands when national needs demand consideration. It may see where immediate economic gain lies but fail to see the values of 'non-economic' uses. It may prove unable to adapt to changes, to innovate, to create."

— Charles A. Reich (1)

Introduction

Citizen participation in decisions affecting environmental quality*** has a history perhaps nearly as long as the ancient traditions of communal assembly credited to prehistoric people of India and Africa and later institutionalized by the Greeks. Examples from the American past include a 1691 town meeting in Lynn, Massachusetts, where concern was expressed about cutting "or carrying away any wood or any part of the town's Commons," and about the proper restraint of pigs (2).

Especially since the 1960s, however, citizen participation in environmental decisions has become a point of major political concern. For many reasons, citizens are expressing redoubled insistence that they be included in the decisions that affect the quality of their environment and that of their children — a demand only slightly diminished during the early 1970s and one that may be renewed as a byproduct of the Watergate affair.

Here available and promising avenues for public participation in Montana are explored and some important future directions for increasing its effectiveness are suggested. The private sector, apart from but in addition to the three branches of state government and local government, is considered on the theory that many private decisions have powerful impacts on the public today and tomorrow — decisions as enormous as many made by government. Citizen access to the news media also is discussed for its importance in expressing public concerns.

The literature on citizen participation in environmental decisions already is substantial (3). Fruitful avenues are being suggested for a greater public role in environmental quality decisions. Even with the substantial amount that has been written and accomplished concerning citizen participation, however, it is not clear whether it is yet a fully effective force in environmental policies and decisions (4).

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***Used here to mean the natural, social and economic environments.

Timely public participation and involvement in the Montana legislative branch is crucial. The most obvious citizen involvement comes during elections. To increase voter turnout, many groups conduct registration and get-out-the-vote campaigns. Serious consideration has been given to allowing poll-booth registration on election day. Residency requirements have been changed to decrease the number of persons disenfranchised by their own mobility — students are permitted to vote either at their home or university address — although during the last general election some county clerks reportedly discouraged students trying to register.

However important the election may be in forming the body of legislative opinion and guiding the content of legislation, many other aspects of public participation need the serious attention of those concerned with full citizen participation. These include the rules of legislative operation (adequate and timely notice of legislative proceedings, the frequency of sessions, the duration of sessions); the structure of committee meetings (the form of committee reports, the time frame for action on committee reports); the publicity given legislative resolutions; the openness of pre-filed legislative bills; and the disclosure of potential conflicts of interest.

Legislative Operation

Bills and Rules

Immediately after — if not before — the election results are tallied, several events occur that have a direct bearing on the amount and kind of citizen participation in the legislature. For example, there is a scramble among legislators-elect to line up leadership positions (floor leaders, committee chairmanships); legislative drafting requests are received by the Legislative Council; and the rules governing the coming session begin to take shape.

The publicity given draft bills and bill drafting requests has been the subject of some controversy. The Legislative Council routinely receives many such requests from legislators asking the staff to draft specific pieces of legislation. The drafting requests do not mean the legislator will introduce the drafted bill, or even any version of it. For this reason, most legislators do not oppose opening these individual request files (5). Because materials are involved that are clearly in draft form, some arguments also can be drawn against the opening of the files. Cataloging the requests and keeping the files open seems most appropriate, however.

The legislative rules, usually adopted in the early hours of the legislative session, generally are not subject to formal public scrutiny. Notice is not given and public hearings are not held. Yet the rules can have a substantial impact on the pace and openness of the session. For example, in the 43rd Legislative Assembly there was a three-day public notice requirement for committee hearings on specific bills. However, the requirement was not construed to mean three full 24-hour periods, so a committee could comply with the rule by posting an 8:00 a.m., Friday meeting notice at 4:30 p.m. the preceding Wednesday. In other words, the actual meeting notice could be — and often was — as little as 40 hours. The result of such short notice was the hasty preparation of committee testimony, if not the outright circumscription of some testimony.

Rules for the 44th Legislative Assembly, written for annual sessions, were thrown into some chaos by the electorate's decision in November, 1974, to limit the assemblies to every other year. A subcommittee assigned to the original task of rewriting the rules solicited and circulated comment on the proposed rules among legislators but failed to involve the public in the debate.

Frequency of Sessions

The frequency of legislative sessions has been a concern since territorial days in Montana. Montana's Organic Act provided for annual sessions of 40 days, but the Congress required in 1868 that all territorial legislatures were to meet only once every two years (biennially). The 1889 Montana Constitution specified that the legislature was to meet for no more than 60 days, every odd-numbered year (6).

The 1972 Montana Constitutional Convention devoted considerable time to questions concerning both the structure and frequency of the legislature and its sessions. After much debate the delegates voted to abandon biennial sessions in favor of annual 60-day sessions. A controversial question whether the Montana legislature should be bicameral or unicameral was submitted to the voters and the traditional bicameral structure was retained. In the same election, the new Constitution — with its provision for annual legislative sessions — was approved.

However, in 1974, several groups used the Constitution's revised initiative provisions (see below) to place the question on the ballot again. By a Constitutional amendment vote of 110,587 to 104,581, Montanans rejected annual sessions and reinstated biennial assemblies.

The issue may come up again. A recent poll in Missoula indicated that as many as 16 percent of the voters may have cast their ballots mistakenly (7). The original vote margin was only 2.8 percent. If a substantial voting error can be substantiated there are indications that some legislators will try to place the question on the ballot again for a clearer expression of public opinion.

Duration of Sessions

The length of time available for legislative deliberation is an important aspect of public participation in environmental decisions. Typically, during legislative sessions, committee hearings, floor debates, and other activities are not patient. Some citizens wishing to testify about proposed legislation are bewildered when they are allotted 5 or 10 minutes to

speak — or perhaps none at all. The final weeks of the session can be a virtual endurance race.

The Constitutional Convention tried to ensure flexibility in the length of sessions by providing that sessions could be called anytime (presumably even the day after the end of the regular session), and that the assembly could extend the length of any session held after the regular session.

The biennial session amendment did not change those provisions, but it did extend the duration of the regular session (now every two years) from 60 to 90 days. Whether the legislature will employ the available 90 days remains to be seen. It also is unclear whether the 90-day biennial session will provide th same deliberation and public participation opportunities of short annual sessions.

Biennial sessions encourage a lengthy lame duck period for legislators. The time available for pre-session work — about two months from election day to early January for the preparation of bills and handling of committee assignments — is critically short compared with the length of the post-session period: 19 months until the next session. Except for the demands of crises that might require a special session, legislators will have little incentive to lend much attention to their work. Hence citizens may discover that biennial sessions discourage efforts to make government anticipate as well as respond to the complex problems facing Montana.

Interim Legislative Activity

When the legislature met annually, bills could be held over in the interim between sessions. The interim period was a good opportunity for careful discussion of pending legislation by citizens and legislators. With biennial legislative meetings, there are no hold-over bills. However, the period between sessions still may be important.

Single-member legislative districts present novel opportunities for small scale district meetings with citizens. Some legislators already have scheuled district meetings to get help and advice.

Whether the period between legislative sessions will be utilized for deliberation and debate or wasted is up to the legislature. The 19 month post-session period during which legislators are serving their elected terms seems too important to be allowed to remain idle.

Committee Activity

The 1972 Montana Constitution required government to adopt a new openness in legislative deliberations. Prior to the new Constitution, legislative committees would hear public testimony and then dismiss the press and the public, debate the bills, and vote in secret. Thus, a key segment of legislative deliberation was not on public record or open to public scrutiny. It was a classic case of government in darkness. Article V, Sec. 10 (3) of the 1972 Constitution charges that: "The sessions of the legislature and of the committee of the whole, all committee meetings, and all hearings shall be open to the public."

The new Constitution also requires that legislative votes be made public. Article V, Sec. 11 (2) provides: "Every vote of each member of the legislature on each substantive question in the legislature, in any committee, or in committee of the whole shall be recorded and made public. On final passage, the vote shall be taken by ayes and noes and the names entered on the journal."

The mechanics of a typical committee meeting can make the new openness rule somewhat less effective than theory promises. Sometimes committees use all the meeting time to hear testimony on the scheduled bills, and wait to take action on the bills until as much as several days later. Citizen groups that desire to have their presence felt may miss important committee deliberations on the testimony.

One way to help resolve this difficulty could be to restructure legislative and committee sessions. The current practice is that committees meet in the morning and the legislature is in full session in the afternoons. Some committees then meet again on adjournment — which could be any time from 1:30 p.m. to 9 p.m. Perhaps having the committees and the sessions meet on alternative days would allow more time for testimony. Deliberations could be conducted immediately following public testimony (or could be postponed intentionally rather than for lack of time), and the committees even could take breaks.

After the committee has heard testimony, a variety of actions can be taken on a bill. Under 1974 session joint rules, a committee-approved bill had to be on the members' desks for one full day before it could be debated. In the House, under its rules, a committee-approved bill automatically was placed on second reading for debate. A bill killed by committee was posted for 24 hours, during which time any member could indicate in writing his desire to debate the bill. If a house member desired to debate it, the bill would be placed on second reading; if not, some time would be saved by voting on the committee report without debate. If this rule is adopted again, a careful watch on these postings is an important part of public participation in the legislature. A less visible procedure could make it next to impossible to follow a bill.

Resolutions

There are two types of legislative resolutions — both basically legislative expressions of intent and sentiment. Joint Resolutions have to be approved by both houses. They must be introduced by the bill introduction deadline and must be transmitted to the opposite house by the transmittal deadline. In the 43rd legislature these deadlines were 18 days and 40 days respectively. Joint resolutions also can be used to amend or repeal executive agency administrative rules.

Simple resolutions can be introduced anytime and need be adopted only by one house to become effective. Because they are handled very informally, the progress of a simple resolution through the legislature frequently eludes citizen attention. Simple resolutions have not been subject to mandatory public notice and hearing requirements. If adopted, a simple resolution can operate as a significant policy club over an agency. At least one legislator has urged that the use of resolutions be limited. Unless simple

resolutions are subject to strict public notice and hearing requirements, their use should be abandoned.

Disclosure and Conflicts of Interest

Financial disclosure and conflict of interest are two of the most complex questions facing the legislature. In addition, both questions have an important bearing on the effectiveness of public participation in environmental decision making because environmental concerns often involve large economic effects with serious potential for conflicts of interest.

Disclosure laws can deter unethical conduct, enable the public to more closely examine the affairs of candidates and officials, and enable the assessment of conflicts of interest. The states use various approaches to disclosure and conflicts of interest (8). Fewer than half of the states have disclosure laws. Montana has no disclosure law, a weak statute on conflict of interest, and a rule requiring legislators to declare a conflict and subsequently abstain from voting on the matter in question. The rule is rarely used, however. The Montana Constitution requires: "The legislature shall provide a code of ethics prohibiting conflict between public duty and private interest for members of the legislature and all state and local officers and employees" (9). The provision has not been implemented fully as of this writing.

All states with disclosure laws require legislators to make disclosures — many also cover elected officials and appointees whose salaries exceed a specified amount. Some disclosure laws cover the spouse and minor children and one state law covers principal employers.

Among the state laws disclosure usually pertains to income, accounts, trusts, business interests, directorships, fees for services, honoraria, gifts, real estate, stocks, bonds, commercial paper and capital gains. Debtors and creditors typically are not disclosed under the existing state laws.

Although the business of disclosure is difficult — often involving thorny questions of privacy — it is an important way to stimulate openness and public confidence in government. Disclosure laws can be and are enforced in the states, but conflict of interest requirements present very difficult problems when applied to specific cases of alleged conflict. They will probably remain unenforceable without the evolution of even stricter disclosure laws.

Referendum

One form of what has been called citizen legislation is the referendum. A referendum question is placed on the ballot by vote of the legislature. Use of the process usually indicates that the legislature wants a reading of public sentiment. However, citizens also can undertake referenda to review legislative enactments — except on appropriation bills — by acquiring signatures of 5 percent of the people in a third of the legislative districts with a total number representing at least 5 percent of the qualified voters statewide (10). This must be accomplished within six months of adjournment.

Electors can suspend the effect of a legislative enactment by submitting petitions signed by at least 15 percent of the qualified electors in a majority of the state's legislative districts. The disputed act then would not take effect unless and until approved at the election.

State constitutional amendments also are ratified or defeated by this procedure (11). Amendments are placed on the ballot by a two-thirds vote of the legislature and can be adopted or killed by majority vote. Two constitutional amendments adopted in the most recent general election had some direct relation to environmental quality issues. The first converted a legislatively created trust fund — fueled by a tax of one-half percent on the gross value of certain non-renewable resources — to an "irrevocable" trust. The trust fund now can be accumulated without the danger of a raid on the fund by some future session of the legislature.

The environmental connection of the second amendment is more tenuous. The 1972 Constitutional Convention completely abolished "sovereign immunity" — a doctrine that protects state and local government from suit in cases of negligence or other wrong. The adopted amendment will allow the legislature to reinstate the immunity in specific cases by 2/3 vote. In other jurisdictions, there have been efforts to block citizen lawsuits against agencies based on the doctrine of sovereign immunity. They have been largely unsuccessful (12). Careful attention to legislative efforts of reinstatement of the doctrine is essential because blanket reinstatement could remove some existing citizen remedies for wrongful governmental conduct.

Whether these referenda were adequately explained to the public before the election is unclear. Perhaps increasing the level of public debate and insisting on full press coverage would help assure that the people understand the full implications of proposed constitutional amendments and other issues placed on the ballot.

Initiative

The initiative is a form of direct citizen lawmaking. The 1972 Constitution made it easier for initiatives to be enacted by popular vote. Article 3, Sec. 4 provides that an initiative must be signed by 5 percent of the qualified electors in one-third or more of the state house districts, a total including 5 percent of all qualified electors in the state; and cannot be challenged as to sufficiency after the election is held (13).

The state Constitution itself can be amended by initiative, but the requirements are more stringent than for enacting a statute by initiative. Petitions containing the full text of the amendment must be submitted with the signatures of 10 percent of the qualified electors of the state. That number must include 10 percent of the electors in each of 2/5 of the state legislative districts. The signatures are checked by the Secretary of State and the amendment is then published for two months before the regular statewide election (14).

There have been two attempts at constitutional amendment initiatives since the passage of the 1972 Constitution. The successful initiative amended the Constitution to create a 90 day biennial session. The other initiative effort — to express displeasure with the legislature's ratification of the proposed Equal Rights Amendment — was stricken from the ballot by the state Supreme Court because it failed to present a question that properly could be resolved by public vote (15).

Conclusion

Reform of the legislative process to increase the scope and effectiveness of citizen participation could entail some slow down in the lawmaking procedure. Although legislative efficiency always can be improved, the worthwhile goals of legislative speed and careful deliberation probably are mutually exclusive. Volumes of legislation — and who can say which bills are unnecessary or unneeded without full consideration — must be disposed of in 90 days. On a mere $4.6 million budget,* the legislature is supposed to maintain itself as the source and overseer of executive power and policy. Alternative legislative structures and procedures increasingly may become necessary to insure effective citizen participation in the Montana legislature.

*Less than 1 percent of the executive branch budget.

GOVERNMENT — THE JUDICIAL BRANCH

The judicial branch is often overlooked as an important arena for citizen participation. However, the jury was historically an effort to establish some degree of citizen participation in judicial proceedings. Juries in medieval times were "panels of neighbors — knowing busybodies, who perhaps had personal knowledge of the case" (16). Even when the role of the jury changed to a largely impartial one and the rules of evidence expanded, the primary effort was to include a panel of representative and reasonable citizens to weigh the evidence and render the verdict.

Recently a number of proposals have been advanced for greater citizen involvement in the judicial branch. These include easing citizen access to the courts; tightening standards for judicial review of agency action; allowing alternatives for lawyer fees and costs; and even creating special environmental courts.

The Importance and Extent of Citizen Environmental Litigation

Citizen lawsuits, especially those concerning environmental protection, are rarely without controversy. Challenging agency and private decision making in the courts (17) is a relatively new approach for Montana citizen groups, which generally have confined their environmental advocacy to the legislative and executive branches.

Montana citizens undertook a variety of lawsuits on environmental issues in 1973-'74. Two subdivisions and a National Park Service road were enjoined; the Federal Bureau of Reclamation's industrial water marketing program, a coal strip mine, a weather modification program, and a major rail spur were challenged; and the Gallatin River was declared navigable — all the result of citizen action in the judiciary.

These cases raised important questions about federal and state agency compliance with environmental laws. For example, Department of Health noncompliance with the state Water Quality Act and its own departmental regulations was alleged in a suit against Karst Village subdivision in Gallatin County. The court compelled the department to complete certain studies before taking action on the subdivision.

Subdividers usually are required to furnish land for public parks. An attempt by the Karst developer to dedicate the Gallatin River channel as a public park was turned aside (after the county commissioners went so far as to accept the deal) when citizen groups convinced the court that the river is legally navigable and therefore already public land. In essence, the Karst decisions illustrate the value of citizen group vigilance in correcting erroneous and incomplete decisions by state and county government. Another action, again pending against the State Department of the Health, raises points of law similar to those in Karst.

This type of litigation serves a number of important purposes. It puts agencies on notice that they are not free to avoid compliance with applicable laws and regulations. It helps assure full implementation of legislative enactments. It keeps the incessant developer and private interest pressure from overwhelming agency decision making. It serves an educational function too, clarifying and creating awareness of environmental requirements and deficiencies in state law.

Access to the Courts

By now, there seems little doubt that public interest groups and individual citizens are finding it easier to win "standing" in federal courts (18). This nationwide trend toward liberalized standing, however is yet to be felt in Montana state case law.

The judicial determination of standing basically concerns determination of the proper parties in a legal dispute. In reaching conclusions on standing the courts typically try to

assure the adversity of the parties and the adequacy of their ability to represent the issues in a case.

The most recent federal case on standing was the first direct U.S. Supreme Court ruling on this issue in an environmental lawsuit (19). In the case, *Sierra Club v. Morton*, the court held 4 to 3 that the Sierra Club had failed to show that the interests of its members would be damaged by the governmental action sought to be enjoined. The court siad:

> **petitioner did not allege that the challenged development would affect the club or its members in their activities, or that they used [the area], but maintained that the project would adversely change the area's aesthetics and ecology . . . . A person has standing to seek judicial review under the Administrative Procedures Act only if he can show that he himself has suffered or will suffer injury, whether economic or otherwise. In this case, where petitioner asserted no individualized harm to itself or its members, it lacked standing to maintain the action (20).**

Thus the court, by a slim majority, refused to expand the typical requirements for standing: personal stake in the outcome (21) and injury in fact (22) affecting an interest that "may reflect aesthetic, conservational, and recreational values" (23). In so doing, the court rejected the club's contention that it should be allowed to sue on behalf of the public based solely on its long-standing commitment to conservation and environmental quality (24).

Three members of the court disagreed, as have a number of recent law review comments (25). The minority would have granted standing to parties who have a "meaningful relation" to the values they are seeking to defend; who will "adequately represent" those values; and who can "speak knowingly" concerning them (26).

Access to the courts was considered by the Montana legislature in 1971 and 1973. Each time, a bill to grant increased standing has passed one house only to be killed in the other. Yet another bill will probably be introduced in 1974 and, if so, some important points should be kept in mind. Legal standing basically concerns who has a right to be heard in court (27). The law should assure a genuine case or controversy; genuinely adversary parties; and that the parties will speak knowledgeably on the matters at issue. To accomplish these objectives, however, it is not clear whether it is necessary that one who has a history of principled stands on related environmental issues must demonstrate a personal interest in the controversy as well. The Supreme Court, in its recent decision, did not attempt to establish that the Sierra Club would be an ineffective plaintiff.

Class Action Suits

Class action lawsuits are not new, but they are undergoing some new difficulties in the federal courts. These difficulties, including stricter class pre-suit notification requirements in federal cases, probably will lead to increasing use of state courts for class action suits.

Class action typically is taken to obtain relief on behalf of a large group of similarly affected persons who could not afford individually to seek judicial resolution. Each individual member of the class may be subject to a relatively small injury — too small to justify individual legal action; but the damage may be widespread and quite costly overall. The only really effective remedy in such case is to permit a small group to sue on behalf of the large group. Montana law provides for class actions in the Rules of Civil Procedure (28).

There are four requisite characteristics of a class action: (1) the parties are too numerous to be joined; (2) there exists a reasonably defineable class; (3) there is a common, justiciable interest within the class; and (4) the plaintiffs adequately would represent the class. Having met these prerequisites, a small group can sue for an award that is to be made to the large class of affected individuals.

Adverse impacts may not be sufficient to permit the hiring of lawyers and the pursuit of legal action — say, where there is widespread air pollution damage to home gardens, vegetation, or housing fixtures. In that case, maintaining a viable class action remedy is essential if there is to be any remedy at all. Reviewing the sufficiency of Montana law on class actions should be a high priority (29).

Intervention

When plaintiffs and defendants have been accepted by the court, there is always the chance that someone else who has an interest in the outcome may want to participate. He may not wish to leave it to the court-accepted parties to argue the issues. One way to accomplish this is the motion for intervention.

Typically, intervention is made difficult because the judicial process functions best when small groups present and defend their cases in an adversary setting. Control of the lawsuit also must be maintained by each party. However, where clear interests and injuries to property rights may not be represented, there is a means for additional parties to join the action.

In general, public interest intervention is being liberalized by court interpretation along lines similar to the evolution of standing. This process could be expedited by legislative enactment (30).

Amicus Curiae

Another way to participate in court action without accruing all the expenses charged to a full party is the submission of an *amicus curiae* (friend of the court) brief (31). Lawyers and sometimes, laymen can assist the court at its discretion by submitting information or conducting studies. Typically, when asked, the court will consider whether the proposed submission of information would be timely, helpful, and relevant. Consent of the parties to the pending legal action often helps. Through *amicus*, citizen groups can help assure that relevant opinions on matters of law are placed before courts hearing cases having public interest implications.

For example, the Chemehuevi Tribe in Arizona recently argued before the U.S. Supreme Court that the Federal Power Act requires a Federal Power Commission license for

coal-fired generating plants using federal water. Several Montana groups felt that the court should have information on the northern plains coal situation in addition to the data on the southwest submitted by the tribe. Accordingly, the groups hired a lawyer, secured the consent of the parties in the case, and submitted an *amicus* brief.

The chief limitation of *amicus* intervention is that the friend of the court must take the case as is. Suggesting additional causes of action or remedies usually is not permitted. And ordinarily, a friend of the court does not qualify for compensation for court costs, and is not allowed to petition for a rehearing or appeal.

Judicial Review of Agency Action

Standing to sue or intervene is a threshold determination only. Once the public interest group or citizen is admitted to court, a host of other questions arise. One of the most important is the extent of judicial review of the agency action. How rigorously will a court scrutinize an agency decision and what will lead the court to overturn or remand a decision?

Standards for judicial review of rules and contested cases in Montana are found in the state Administrative Procedures Act. Basically, in contested cases, these standards require the exhaustion of administrative remedies and commencement of the action within 30 days of the decision. They also provide for submission of the hearing record, additional evidence, a non-jury trial, and a restricted scope of judicial review:

> **The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) affected by other error of law; (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or (g) because findings of fact, upon issues essential to the decision, were not made although requested (32).**

The judicial review provisions for rules allow a declaratory judgment petition, the decision on which is reviewable in the same manner as decisions on contested cases (33). Of course, the Administrative Procedures Act is not and should not be the only route for a party to seek judicial review of agency action. Nonetheless, where the act does apply, it does not encourage — and may unduly limit — public interest lawsuits.

The typical federal judicial review asks whether agency action is arbitrary or capricious. For decisions based on adjudicatory hearings, the standard of substantial evidence sometimes is applied; that is, the agency's decision will not be overturned if it is supported by substantial evidence. Neither of these typical approaches involves a searching review of the agency's deliberations.

A standard of judicial review stricter and more substantive than any that preceded it, was announced in the *Calvert Cliffs* case (34). It combined the arbitrariness determination with the announcement that a court could reverse the agency's decision if it "clearly gave insufficient weight to environmental values." Under *Sierra Club v. Froehlke*, an even more probing standard was announced(35). In that case, the court examined the agency decision under what has come to be known as the "substantial inquiry" or "hard look" standard. Under this standard, the court asks whether the agency acted within its statutory authority; whether the decision was arbitrary, capricious, abusive of discretion, or otherwise not in accordance with the law; whether the decision was based on consideration of all relevant factors; and whether there was an error of judgment. Probing standards of review should be an important part of public scrutiny of agency actions (36).

Burden of Proof

The burden of proof in public interest litigation is as important as the judicial review standard. In fact, the two mesh in critical respects. Traditionally, the burden of proof rests with the plaintiffs. This makes sense in most typical litigation. But, a recent federal district court case in Texas offers a persuasive rationale for shifting the traditional burden of proof — even though the decision was reversed recently by the Fifth Circuit Court of Appeals (37).

The district court took notice of the substantial resources available to federal agencies — expert staff, time, files, reports, etc. — and contrasted these to the very limited resources available to the public interest plaintiffs. Recognizing this, the court required of the plaintiffs only a *prima facie* showing that a statute — in this case, the National Environmental Policy Act — was being, or was in danger of being, violated. At that point, the burden of proof would be shifted to the agency and, using all the resources only it could muster, the agency would be required to establish its substantial compliance with the pertinent act:

> **Once a *prima facie* showing has been made that the federal agency has failed to adhere to the requirements of NEPA, the burden must, as a general rule, be laid upon this same agency which has the labor and public resources to make the proper environmental assessment and support it by a preponderance of the evidence contained in the impact statement (38).**

This shift in the burden of proof has yet to be widely accepted; however, it has been advocated elsewhere and for solid reasons. There is simply no way that public interest groups will be able, by themselves, to stay effectively involved in the increasing number of agency decisions unless the agency is bound by some action forcing require-

ments. The National Environmental Policy Act, and the nearly identical Montana Environmental Policy Act, were adopted to force certain kinds of action in the administrative realm — detailed studies and public justifications on major actions with significant environmental effects (39). Now the same principle needs to be backed up by a similar requirement in the judicial branch. Enacting a statute prescribing the district court approach to burden of proof would fill this need.

Lawyer's Fees and Court Costs

Lawsuits will remain extremely expensive for public interest groups regardless of changes in standing, intervention and judicial review. The cost of a typical federal district court case, from temporary restraining order through the full hearing on the merits, can run easily to five figures. Thus, citizen litigation can be carried out in only a few of even the most important cases which arise.

As a general rule, state and federal courts will not award lawyer's fees to the prevailing party. There are exceptions to this general rule, including overriding circumstances, when required by the interests of justice, or when the defendant has acted in bad faith. An important exception for public interest litigation is that which allows a private attorney general to receive a fee award. Generally, this exception operates when a citizen is bringing a non-monetary action seeking to enforce a statute that does not explicitly prohibit the award of lawyer's fees. Formalizing this exception in Montana law would help encourage judicial review of public interest issues.

Recently, in a federal district court, public interest groups were awarded lawyer's fees in a case which they lost (40). The court noted that the citizen groups had provided an important public service by calling attention to the significant resource problems occasioned by hasty development near San Antonio, Texas. The suit was brought under the National Environmental Policy Act to enjoin construction of a new town partially funded by the Department of Housing and Urban Development (HUD). Spurred by the injunction, HUD prepared impact statements, held numerous meetings with public agencies, including a local water quality advisory board, ironed out some difficulties in the project — including water conflicts with an adjacent city — and approved the new town. After the proper procedure had been followed, the court dismissed the injunction.

The dispute with HUD in Texas was a typical environmental case. It was an expensive but necessary way to enforce statutes that otherwise would be ignored or violated. A strong argument can be made that citizen groups expending considerable time, effort, and money for action-forcing environmental litigation should have some chance to recover costs (41).

Under the new Montana Constitution, the person whose land is being condemned in an eminent domain action is awarded lawyer's fees and costs when he or she is the prevailing party. This provision indicates a legislative policy of protecting the rights of individual property owners. The same concern could be demonstrated for the important function of public interest groups seeking to enforce state statutes.

The new federal Water Pollution Control Act contains language that should be considered for enactment into law in Montana: "The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate . . ." (42). Alternatively, the legislature could specify the types of public interest enforcement actions for which lawyer's fees and costs will be awarded.

Citizen Enforcement

The Refuse Act of 1899 suggests an additional incentive for citizen involvement in the enforcement of environmental laws (43). Section 13 of the act provides that it is illegal to discharge refuse matter into navigable waters or their tributaries without a permit. Upon conviction for violation, the section stipulates that the fine is set between $500 and $2,500, "one half of the said fine to be paid to the person or persons giving information which shall lead to conviction."

Although it is an incentive to enlist the help of citizenry in enforcement of pollution laws, this kind of statute has not been very popular lately among legislatures.

Environmental Courts

Some have argued that many of the issues raised in environmental lawsuits are beyond the grasp of the judiciary. The argument is that the courts have small budgets and staffs, and are generally unfamiliar with the complex and sometimes technical issues found in pollution suits. Special courts with interdisciplinary staffs of researchers have been proposed to deal with technical questions. Alternatively, a second-level administrative review procedure, such as a quasi-judicial oversight board, has been recommended.

Such environmental courts have yet to be utilized to any great extent. Whether their general use would be beneficial is open to question. Courts have a number of avenues open to recruit information and opinion including the experts testifying on behalf of the parties, *amicus curiae* brief, etc. If available remedies prove insufficient, perhaps some grappling with alternatives would help.

The Federal Water Pollution Control Act required the President to study the feasibility of an environmental court or court system having jurisdiction over environmental matters (44). The report, which considers various alternatives including environmental courts, has been completed and referred to Congress. It opposes additions to the court system because of the jurisdictional, procedural and caseload difficulties they would entail.

New Avenues for Citizen Litigation

Recently, a number of novel legal theories have been argued in environmental litigation. Without analyzing them in detail, it may be sufficient to say that *quo warranto* (45),

the public trust (46), Ninth Amendment unenumerated rights (47), the rights of ecosystems (48), primary jurisdiction (49), and substantive environmental policy act requirements (50) should receive attention in Montana state courts as they have in federal courts. Citizen litigation is here to stay. The real question is whether it can become an effective tool for increased public participation. Stronger legal briefs on novel environmental concepts is one way to strengthen this possibility.

GOVERNMENT — THE EXECUTIVE BRANCH

Most discussion of citizen participation has focused on the burgeoning administrative agencies. And, by any measure, executive branch agencies have come in for some harsh criticism (5). It was this criticism, in part, that led the 1972 Montana Constitutional Convention to adopt a constitutional provision on the right of public participation in government. Although it is not a self-executing provision, it provides the legislature and the executive branch an opportunity to reassess citizen participation possibilities. Courts, too, can use the provision as guidance for interpreting legislative implementation efforts: "The public has the right to expect governmental agencies to afford such reasonable opportunities for citizen participation in the operation of the agencies prior to the final decision as may be provided by law" (52).

There have been two statutory efforts in recent years to reorganize and standardize the procedures of the executive branch agencies in Montana. They are the Executive Reorganization Act and the Administrative Procedures Act, both passed in 1971.

Executive Reorganization

In a number of ways, executive reorganization promised more than it delivered (53). It sorted the existing agencies "not more than 20 principal departments" as required by constitutional amendment and abolished a number of long-unused boards and councils. But, its effect on citizen participation in environmental quality decisions is unclear. During deliberations on the Executive Reorganization Act, the reorganization commission staff argued that advisory councils would permit full citizen participation, but it equated citizen participation with the recruitment of technical expertise to assist agencies. The staff also successfully opposed amendments suggested by Common Cause to increase the level of citizen participation (54).

One of the cornerstones of executive reorganization was the focus of responsibility on the Office of the Governor. To a certain extent, this has occurred. Through the layers of administration, fairly clear lines lead upward to the governor. A phone-complaint system — to be clearly distinguished from the ombudsman that was proposed — has been established. The governor and his staff have toured the state on two occasions to hear expressions of local sentiment at public meetings. But the governor has not met personally, on a regular basis, with public interest groups. To be sure, much of a governor's effectiveness depends on the actions of his staff members in hearing, ranking, and passing on the citizen opinions they encounter. Much of the blame for the lack of personal dialogue rests with public interest groups who have not demanded in public what they wish for in private. However, since the governor's staff can be an insulating as well as an expediting force, some regularized gubernatorial contact with citizen groups is desirable.

Beyond this, there is some concern about the activities of the governor's representative in Washington, D.C.: the federal-state coordinator. The operations of that office apparently are not covered by public activity reports, impact statements, or public hearing requirements, even though it has played an advocacy role in major resource development decisions within the state, including highway construction and coal export.

Under executive reorganization, existing Boards of Health, Natural Resources, and the Fish and Game Commission provide opportunities for citizen participation. However, governors — who are responsible for appointing board members — have not often been sure to include representatives of active public interest groups on the boards. Some legislative action on this point might help, because part of the reason for this appointment policy apparently is the potentially controversial nature of such appointments.

This is not to say that reorganization of the executive branch is unimportant — only that the task probably is not done. Public participation cannot be considered apart from its institutional setting (55). Proposals for reorganizing the environmental quality agencies in Montana have lurked under the surface, alternately rising and falling depending on the personalities, issues, and policy decisions of the minute.

In the face of increasing land use and energy planning needs, some further systematic investigation of institutional alternatives should be undertaken.

Administrative Procedures Act

Administrative procedures acts (APA) are designed to standardize the day-to-day operations of administrative agencies. The Montana act does not reflect much concern for citizen participation in agency proceedings and does not allow leeway for a searching judicial review of agency action (56). The act was rewritten in the 1971 special session, after a

regular session bill had been vetoed. Basically, the act provides notice, publication, hearing, appeal, and judicial review requirements for administrative agencies.

It is unclear why public works projects are exempted from the procedural requirements of the act. The definition of "party," meaning those entitled by the act to participate in agency proceedings and judicial review of such proceedings, does not expressly include public interest groups. The expressed relationship between remedies available under the act and those available under other statutes, such as the Montana Environmental Policy Act, should be more specific. The APA fails to specify that legal injunction is a remedy available to counter an agency's failure to comply with APA. More generally, the act fails to specify what rights of legal intervention are available to citizens. Standards governing the commencement of judicial review of agency action may be too restrictive.

Other questions should be raised about the act: Should judicially reviewable findings be required as part of rule-making or contested case action by agencies? How does the act's provision allowing the appointment of "committees of experts or interested persons or representatives of the general public" for advice mesh with the advisory council provision of executive reorganization?

These and a number of other questions suggest that the state Administrative Procedures Act should be reviewed comprehensively by the legislature. Contrasting the act with its federal counterpart may be a good place to start because the federal act contains a broader grant of standing (57).

The Right to Know

Open Records

Although access to information is not the same thing as participation in decision making, it is clearly a prerequisite of effective participation. The 1972 Montana Constitutional Convention adopted a strong right to know clause, the implications of which are still being debated. Article II, Sec. 9 provides:

> **No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.**

In essence, the only secret records contemplated by the provision are those that involve personal privacy. Even then, the demands of individual privacy must *clearly* outweigh the benefits of public disclosure.

During the 1974 session, a package of right to know legislation was introduced. One of the measures dealt with access to documents (58). Basically, it provided that an agency head would determine which documents could be released. This determination could be reviewed by the courts.

If the agency head decided to release a document involving the privacy of an individual, he was required first to notify the affected individual of his intention. That individual could seek to have the document withheld. After considerable debate and amendment, the bill passed the House and was killed in the Senate.* Hence Montana has no statute implementing the documents provisions of the state Constitution. Those provisions are self-executing anyway; but legislative embellishment could save many difficult problems.

When legislation on the right to examine documents is considered again, it should contain a number of key provisions. Agency "draft" writings present one problem, for example, by providing a colossal loophole for agency secrecy. Draft documents and draft memoranda including contracted studies used to prepare draft and final environmental impact statements should be available publicly.**

Procedures also should be established for the release of portions of privileged documents to avoid the situation of withholding an entire document simply because one portion contains a matter of privacy. Otherwise, detecting patterns of administrative agency abuse can be made very difficult by allowing concealment of documents by attaching or including private information.

Further, an access to documents statute should clarify the openness of documents passing between departmental directors and supervisory boards. At least one state agency is hesitant about releasing this type of communication. Clearly, all intra- and inter-agency memoranda not involving individual privacy should be public.

Structuring open information systems — such as those being used in Pittsburgh and Puerto Rico — also is a good possibility. Basically, these are neighborhood data centers where citizens can go for many kinds of information (59).

Notice and Open Meetings

The right to know clause of the 1972 Constitution also pertains to the deliberations of public bodies and concerns open meetings. However, two bills introduced in the 1974 legislative session to implement the constitutional rights to attend and participate were defeated (60).

One bill would have required agencies — including those of local government — to "encourage and assist public participation to the fullest extent practicable" before rendering decisions or adopting rules or policies of public significance. In so doing, the act would have required agencies to give reasonable notice and the opportunity to submit data, views or arguments before reaching a final decision. The act also would have required all agencies to adopt guidelines to facilitate public participation and implement the act. One additional and important provision would have invalidated any agency action

*This legislation and other bills in the right to know package were opposed by the Montana Press Association on the grounds that they could be used to withhold information and that they would give too much discretion to agency administrators. The press opposition indicates the complexity of implementing the constitutional right to know.

**The Montana Environmental Policy Act requires preparation and public release of environmental impact statements on certain state agency actions.

adopted without following the act's requirements. The action then could be set aside by a court on petition within 90 days.

The other bill was designed to add life to the right to observe the deliberations of public bodies by requiring the issuance of notice. It would have required officials to give reasonable notice and furnish an agenda before any meeting of two or more members of a public body at which formal action was to be taken. The act did not apply to juries, legislative caucus, or meetings of judicial and quasi-judicial bodies that had held hearings. Any citizen could petition a district court to set aside an agency decision not in compliance with the act. Injunctive relief also was provided and public officials knowingly violating the act were subject to fine or imprisonment.

Enacting similar legislation should be a high priority. In reconsidering such legislation, the legislature might want to consider whether an individual's right of recourse should have to be limited to matters prejudicing his rights. Important environmental decisions and policies are not always considered judicially to be matters affecting the rights of public interest groups. Until they are, such a limitation is ill-advised.

Finally, a central registry of agency decisions on requests for access to meetings and documents should be maintained, perhaps in the office of the Secretary of State. In this way, the overall performance of right to know legislation could be assessed. Without a central filing agency, policies cannot be coordinated or scrutinized easily.

Confidentiality Provisions

At least four Montana environmental statutes have confidentiality provisions, notwithstanding the constitutional right to know provisions. The act regulating hard rock mining reclamation contains the most open-ended statement:

> **Any and all information obtained by the board or the director of the staff by virtue of applications for licenses or permits is confidential between the board and the applicant. Any information obtained by the board or by the director or his staff by virtue of applications for licenses or permits is, however, properly admissable in any hearing conducted by the director, the board, appeals board or in any judicial proceeding to which the director and the applicant are parties. Failure to comply with the secrecy provisions of this act shall be punishable by a fine of up to ten thousand dollars ($10,000) or one (1) year in jail (61).**

The provision, of course, has the effect of totally closing Department of State Lands files and mouths on the extent of hard rock mining in the state — other than for information on leasing activity on state lands. (The penalty for releasing confidential information is 10 times higher than for other violations of the act.)

The state's Clean Air and Water Quality Acts contain confidentiality provisions somewhat more narrow in scope. First, the Clean Air Act:

> **(1) Records or other information concerning air contaminant sources which are furnished to or obtained by the board or department, and which, as certified by the owner or operator, relate to production or sales figures or to processes or production unique to the owner or operator or which would tend to affect adversely his competitive position, are only for the confidential use of the board or department in the administration of this act, unless the owner expressly agrees to their publicaiton or availability to the general public.**
>
> **(2) This section does not prevent the use of records or information by the board or department in compiling or publishing analyses or summaries relating to the general condition of the outdoor atmosphere, if the analyses or summaries do not identify an owner or operator or reveal information made otherwise confidential by this section (62).**

The Water Quality Act similarly veils information said to endanger the "competitive position" of industrial polluters:

> **Any information concerning sources of pollution which is furnished to the board or department or which is obtained by either of them is a matter of public record and open to public use. However, any information unique to the owner or operator of a source of pollution which would, if disclosed, tend to weaken his competitive position shall be confidential unless he expressly agrees to its publication or availability to the general public or unless such information is introduced as evidence in a hearing before the board. Any information not intended to be public when submitted to the board or department shall be submitted in writing and clearly marked as confidential. The data describing physical and chemical characteristics of a waste discharged to state waters shall not be considered confidential; except that the party supplying the information to the board may apply to the board for confidential status for the information so supplied, and the board shall determine that the disclosure of said information is in the public interest prior to the disclosure to the public of said information. The board may use any information in compiling or publishing analyses or summaries relating to water pollution if such analyses or summaries do not identify any owner or operator of a source of pollution or reveal any information which is otherwise made confidential by this section. (63).**

All three of these examples of government secrecy are in apparent conflict with the right to know provision of the Constitution. However, the attorney general has ruled that the hard rock mining act provision also is constitutional and that it precludes the public release of information submitted

by miners for any environmental impact statement. In his opinion, the attorney general held that a corporation could be considered an individual within the individual privacy exception of the right to know provision (64). However, the opinion does not explicitly consider the stated intent of the Constitutional Convention. In three specific instances, delegates on the floor of the convention stated that the word individual in "individual privacy" does not include corporations. It seems that judicial resolution of this difficulty is the only answer, since the confidentiality provisions are being enforced and the records remain secret.

Citizen Participation Alternatives

There are a number of available alternatives which could enhance citizen participation in administrative decisions. They include federal and state statutes and efforts to delineate boundaries of citizen participation in the administration of government.

Federal Freedom of Information Act

The Federal Freedom of Information Act is one example that could be considered for statutory implementation of the Montana Constitution's right to know provision. The act is brief and requires that documents be open to the public with the following exceptions: matters of national defense or foreign policy is provided by Executive Order; internal personnel rules and practices; matters specifically exempted by other statutes; trade secrets; inter- and intra-agency memoranda; personnel and medical files; law enforcement investigatory files; financial institution records; and geological and geophysical information (65).

The key provisions in the act are the exclusions, a number of which probably would be unconstitutional if incorporated into Montana law. Additionally, the implementation of the act and the interpretation of the exclusions have been reviewed and have been found wanting (66). For example, one commentator has suggested that agencies and the courts have construed the exemptions in a manner that turns the act into a withholding rather than a disclosure statute (67).

One major limitation of the Freedom of Information Act is its failure to address the storage of agency records. An agency's filing method can facilitate or hinder the review efforts of interested citizens. Typically, a citizen or public interest group is not looking for one or several particular documents. Most often of interest is the broad base of information about a specific decision or policy. Of course, all the documents bearing on the decision or policy are important, because discovering a key memorandum may reveal more than a pound of correspondence. But the point is that the citizen reviewer rarely will be able to identify the key documents in advance. Whole files must be available, in addition to requested documents.

Specific statutory language requiring agencies to organize their files so as to facilitate reviews of policy and decision making would be helpful. Filing uniformity does not exist among Montana state agencies.

The federal act does have a number of good points. For example, the agency must prove that a document falls within one of the specific exemptions. Officials can be held responsible for noncompliance and can be cited for contempt. The loophole allowing an agency to declare that a person is not "properly or directly concerned" and entitled to inspect documents has been plugged.

Recently, Congress amended the Freedom of Information Act. But President Ford vetoed the amendments, saying they could jeopardize diplomatic relations and national security. The amendments tightened up some of the exemptions, put a ceiling on the time allowed for agency response to requests for documents and reduced the price of government-furnished photocopies (for citizen use) to actual cost only.

New York Freedom of Information Act

In September of 1974, the State of New York enacted a new freedom of information statute. It is patterned after the federal act, sharing many of its strengths and weaknesses. A novel twist in the statute is its creation of a Committee on Public Access to Records. The committee has three agency and four public members — two of whom are representatives of the news media. The committee can issue guidelines, advisory opinions, and regulations to help state and local governments implement the law. The law also requires agencies to keep a detailed index of records, organized by subject matter(68). Establishing a similar committee in Montana could help with the initial difficulties of legislation implementing the right to know — one of the chief worries that defeated right to know legislation in the 1974 session.

Federal Water Pollution Control Act

The 1972 amendments to the federal Water Pollution Control Act were quite explicit on matters of citizen participation. The policy provisions announce that "public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this Act shall be provided for, encouraged, and assisted by the Administrator and the States" (69). The administrator has issued, as required, guidelines for increasing public participation. Montana has no comparable set of participation guidelines.

Maximum Feasible Participation

One of the first federal statutory provisions on participation presents an interesting case study. The Economic Opportunity Act, enacted in the mid-1960s, required "maximum feasible participation" by the poor in community action programs. At least one commentator has written that the effectiveness of this participation resulted is less encouragement of participation by the poor in later legislation such as the Model Cities Act (70). When Model Cities legislation was passed, it called for "widespread participation" and, unlike the Economic Opportunity Act, the choice of terminology received special attention.

Notwithstanding this difficulty, the "maximum feasible

participation" provision was a laudable effort to insure the participation of those who are least likely to demand a voice. Establishing a similar concept in Montana law would be helpful.

U.S. Forest Service and "Codinvolve"

The U.S. Forest Service (USFS) is perhaps most notable of federal agencies in efforts to increase public involvement — although the effect of that involvement has yet to become clear (71). Recently, USFS research social scientists have developed a methodology for analyzing and evaluating received citizen input (72). Basically, its "Codinvolve" process is used to condense and compile public input before it is evaluated. This process was employed recently in a USFS environmental statement for its Little Missouri National Grasslands planning unit (73). Although the method helpfully categorizes input, it also can remove the flavor of the public expression along with the excesses and redundancies. In the Little Missouri case, the full text of letters and comments were printed in an appendix of the impact statement, so the reviewing officials at least had the original materials available.

Perhaps a statute requiring agencies to develop guidelines for evaluating citizen input would be helpful in Montana. To date, the Department of Natural Resources is the only state agency actively undertaking such an effort as a part of its decision on Colstrip Units No. 3 and No. 4.

Office of Technology Assessment

The federal Office of Technology Assessment (OTA) is another example of an important opportunity for public participation in major decisions. OTA was created by Congress to:

> **(1) identify existing or probable impacts of technology or technological programs;**
>
> **(2) where possible ascertain cause-and-effect relationships;**
>
> **(3) identify alternative technological methods of implementing specific programs;**
>
> **(4) identify alternative programs for achieving requisite goals;**
>
> **(5) make estimates and comparisons of the impacts of alternative methods and programs;**
>
> **(6) present findings of completed analyses to the appropriate legislative authorities;**
>
> **(7) identify areas where additional research or data collection is required . . . (74).**

Technology assessment is not as confounding as the jargon might suggest. It is simply a recognition of the need to assess the human and environmental impacts of new technologies *before* they are adopted for use in the society at large.

A public interest group clearly recognizing the political and societal aspects of TA has been established in Washington, D.C. More than anything else, the recognition that technology is a branch of moral philosophy indicates the need to encourage public participation before major technological choices are made (75).

Montana does not have formal, comprehensive technology assessment legislation. (However, the state's Utility Siting Act and the Water Quality Act are technology assessment statutes.) Neither does Montana participate consistently in activities of the federal OTA as it does, for example, in review of federal environmental impact statements. Steps should be taken to insure that full technology assessment is a part of Montana's major resource decisions.

Utility Siting Act

The 1973 Montana Utility Siting Act contains important provisions for citizen participation. It is missing a few too.

The siting act specifically includes public interest groups in its definition of affected parties:

> **Any nonprofit organization, formed in whole or in part to promote conservation of natural beauty, to protect the environment, personal health or other biological values, to preserve historical sites, to promote consumer interests, to represent commercial and industrial groups, or to promote the orderly development of the areas in which the facility is to be located . . . (76).**

The act also contains specific hearing procedures, notice requirements (77), and formal findings (78), requiremens important not only for utility facilities, but for assessment of other major developments.

The act also has a citizen enforcement procedure. Any resident of the state who believes the act is being violated can petition the state to enforce the provisions of the act (79). Should the petitioned public official fail to enforce the act, a writ ordering action can be sought in Lewis and Clark County District Court. This is a helpful, but incomplete remedy. The act should provide for immediate injunctive relief so the issues of a controversy over some official action can be preserved for judicial review.

The state Board of Natural Resources and Conservation considers the siting of utilities and transmission lines in quasi-judicial proceedings. Before making a decision in any given case, the board conducts a hearing under the contested case provisions of the Montana Administrative Procedures Act (80). (A contested case procedure is used when an agency decision will affect the right of a single party to such an extent that additional administrative safeguards are needed — the right of cross-examination, representation by counsel, and adherence to the rules of evidence.)

However, as indicated in its provision for citizen participation, the siting act intends that members of the public be free to present their opinions for the hearing record. Because opinions unsubstantiated by qualified expertise are not admissible under typical rules of evidence, and because the typical hearing record would be confined to matters of law and fact, the legislature stipulated that:

> **a record shall be made of the hearing and of all testimony taken; and the contested case procedures of the Montana Administrative Procedures Act shall apply to the hearing,** *except that neither common law nor statutory rules of evidence need apply,* **but the board may make rules designed to exclude repetitive, redundant or irrelevant testimony (emphasis added) (81).**

Although the Board of Natural Resources has not acted to preclude public interest testimony on matters of opinion, propriety, and policy, it has not clearly accepted the proposition that these constitute a valid basis for the ultimate decision. The siting act, however, seems quite clear on this point. After stating that public interest testimony is admissible and is not subject to the common law rules of evidence, the act provides:

> **The board shall make complete findings, issue an opinion, and render a decision upon the record, either granting or denying the application as filed, or granting it upon such terms, conditions, or modifications of the construction, operation or maintenance of the utility facility as the board may deem appropriate (82).**

This and other language in the act clearly indicates that statements of opinion, policy, and propriety can form the basis of the decision on any proposed utility facility.

To the extent that the Board of Natural Resources follows the typical adjudicatory hearing procedures, this important and clear legislative intent to increase citizen participation is thwarted.

Right of Intervention

The right of public interest intervention in agency proceedings is still developing. However, the standards are emerging along lines similar to those described in the discussion of standing and judicial intervention (83). Montana law does not clearly grant public interest groups any rights of intervention in administrative proceedings, and to that extent is deficient.

Montana Environmental Policy Act Requirements

The most important Montana statute to involve citizens in decisions affecting environmental quality is the Montana Environmental Policy Act (MEPA). By forcing agencies publicly to justify their major decisions and programs in advance, MEPA helps assure citizen opportunity to review and influence decisions. The act's effectiveness depends in part on the guidelines promulgated by the state Environmental Quality Council. The guidelines specify requirements for content and circulation of environmental impact statements. The act by itself is only a skeletal framework for administrative action, especially regarding decision making time frames.

Several questions have arisen concerning the act and guidelines, including the enforceability of the guidelines. There also is question whether MEPA does or should cover units of local government. If so, local governments would have to prepare impact statements, for example, under the state subdivision law. If local government is not covered by MEPA, perhaps the subdivision act — and other sources of local government authority — should be amended to require local officials to publicize written, detailed and judicially reviewable findings when they approve or deny a subdivision, or take other major actions. In this way, the grounds for decision at least would be explicit and reviewable.

Beyond questions on MEPA's jurisdiction, its current requirements for economic analysis may be insufficient. The guidelines call for economic analysis in several places, but a specific type of analysis — *dialectical* cost benefit analysis (84) — should be recommended. Use of dialectical analysis would help insure active and complete analysis of costs and benefits of the best decision with respect to environmental quality, usually the least quantifiable among alternatives. Agencies would be required to weigh all available project alternatives fully.

Another MEPA weakness concerns the 30-day "cooling off" period after a final environmental impact statement has been issued. (This period allows those who commented on an impact statement to assess whether their comments were taken seriously by the agency. At the end of the time, an agency can formally announce its decision.) But the decision should not take effect for a short period thereafter, at least five days. This delay would allow citizen groups to assess the possibility of litigation in light of an announced agency decision. The additional time is crucial for several reasons: the agency decision typically is not ripe for judicial review until after formal announcement; private parties could become involved at the time of decision (such as Department of Health approval of a subdivision) and could begin to rely on a decision that is about to be litigated; bonding requirements then could preclude litigation if a private party has become involved. In short, the additional time period could help assure that administrative decision making could run its course — to the courts if necessary — without unduly burdening private parties or citizens who might seek judicial review.

Informal Sessions

The impact of periodic, informal sessions with agency personnel must not be underestimated (85). Relying too much on the formal rule making or adjudicatory proceedings of agencies can mean that the agency will not have sufficient time to consider public interest opinions in full perspective. Agencies are visited on a day-to-day basis by special interest representatives to discuss pending developments and agency requirements. Citizen groups should be certain to let agencies know that public interest concerns are year-round as well. Periodic contact and dialogue is the only way to do this.

Informal agency contacts by parties to an adjudicatory proceeding sometimes are not allowed. Section 82-4214 of the Administrative Procedures Act prohibits such meetings with members of an adjudicatory board after its hearing notice has been published. After the hearing announcement, all parties must be notified of meetings between the board and any of the parties to the pending decision in order not to prejudice the quasi-judicial deliberations.

LOCAL GOVERNMENT

Many factors bear directly on citizen participation in government decisions at the local level. Two deserve at least brief mention.

The 1972 Montana Constitution contains unique local government review provisions. By that document, the legislature must, within four years of ratification, establish procedures requiring local governments to place one alternative form of government before the voters. Thereafter, local governments must reconsider their form of government at least every 10 years (86).

The constitution also authorized the creation of a commission on local government (87). The commission was created (88), is studying a variety of local government arrangements, and has just released its first annual report to the legislature (89). The report discussed two options important for citizen participation: community councils and town meetings.

The community councils could provide an advisory link between citizens and local governors. Council members would be elected from representative areas and would meet regularly with other local government officials (90).

Town meetings have a long history in the U.S. (91). The possibilities proposed by the Commission on Local Government differ significantly from the present New England experience, primarily by placing greater emphasis on actual decision making by the town meeting (92).

Renewed citizen participation in local government could become even more important for environmental protection if the recommendations of the *EQC Montana Land Use Policy Study* are adopted in some form (93). These would solidify at the local level significant powers to protect the environment.

The major limitation confronting local government in environmental quality decision-making — aside from the local pressure of special interests and acquaintances who may be impossible to regulate effectively (94) — is a lack of funding and staff. Proposals such as those of the EQC would fail lacking full funding of local government efforts to employ persons who are independent, competent, and ecologically aware.

THE PRIVATE SECTOR

Especially in recent years, there has been considerable concern about the role of the public in what are usually called "private" decisions (95). The literature on the subject is building (96). No one sensibly argues against the contention that what were once considered purely private activities — subdividing, mining, timber harvesting — now are recognized to have substantial effects on the public of this and future generations. The enormity of modern corporate innovation and investment only magnifies the effects.

The Corporation, the Stockholder, and the Montana Citizen

The problem of increased impact of corporate activities is compounded further by the significant lack of public controls on the development and implementation of corporate policy. Standard economics texts admit freely that neither stockholders nor the public has very much to say about corporate policy (97).

Although seemingly much decentralized Montana has experienced enormous corporate pressures in the past and will feel corporation influence for the foreseeable future. There is no avoiding it. Whether Montanans will be able to exert effective control on policies of corporations that operate in or influence the state remains to be seen. An increasing citizen role in corporate decisions affecting the state certainly will be needed. Stockholders may never again be in a position to exert control. In the next few years, it may become essential for Montanans to reexamine their traditional opposition to governmental regulation and build effective institutions to control corporate and other private activities.

Assertion of the public's right to participate in corporate decision making immediately confronts numerous problem areas.

Advertising

The primary contact between corporations and citizens — apart from the sale and purchase of goods and services and the environmental consequences of corporate growth and operation — is advertising. During the 1973 legislature committee testimony pointed out that at least one Montana corporation* spent $548,605 for advertising in 1971 — over four times what it spent for research (98). Over one-third of this figure was promotional advertising.

In a recent speech, author Vic Reinemer pointed out that "the annual research and development effort of the Nation's largest industry, the investor-owned electric

*A regulated monopoly.

utilities, is less than the amount Exxon [Corp.] spent to put up and merchandise its new name" (99).

Advertising is not without its defenders. To be sure, it can at least provide important information. But advertising also has the power to degrade the quality and opportunity for public debate. In the words of Joseph Tussman:

> **Our attempts at education for democracy, for participation in public life, are hopelessly perplexed by the divergent demands of marketplace and tribunal. How, for example, shall we teach our children to communicate with the necessary respect for the integrity of language, and for each other, when we support (almost as culture heroes) a large class of professional liars to hail with impartial sincerity the claim of any client? This is not intended as a 'personal' remark; the point is precisely that advertising is a respectable profession in our marketplace culture. But how, supporting such a profession, can we really make the point that the integrity of communication is the wellspring of a community's life? It is no answer to say that we have learned to defend ourselves by not believing what we hear, or that propaganda will counter propaganda and the truth will prevail even though no one tells it. We are poisoning the wells, and we cannot live on antidotes (100).**

At least one Montana statute — the Utility Siting Act — requires that the extent of corporate advertising should be considered in agency proceedings. In approving or denying a facility application, one of the factors to be weighed is the utility's promotional activity, which may have helped create the need for the facility (101). Presumably, a utility's promotional advertising could undermine its claim of public necessity, a precondition of approval required by the siting act.

Promotional advertising could be curtailed, but this would be no panacea, however. Recently, it has been discovered that pressure against corporate advertising has led to a shift toward well-publicized research and development budgets, acclaimed but routine testing of products and public relations campaigns for the circulation of "research" findings among other public relations ploys. Perhaps the public cannot stop the transfer of advertising dollars into research and development accounts, but the quality of work might improve if the advertising concerning research had to be informative and balanced.

Corporations doing business in the state, for instance, could be required to hold public hearings on the services and the products to be advertised and sold in the state. Meetings could be announced and held in geographically appropriate locations, and a record could be kept. In contrast to the gimmickry of existing advertising, balanced views could be aired to increase public awareness.

If the prospect of censored advertising appears to threaten an imposition on advertisers, it should be remembered that the price of advertising nearly always increases the costs of the product — whether it is a household item, an automobile, or a real estate development. Because the consumer ends up paying for the advertising anyway, should he not have a voice in the way his money is expended — just as he does, for example, in the safety of the product? Might he not prefer a balanced, informative discussion of the product rather than gimmickry? The extent to which the state is free to act in this area should be explored and some debates should be undertaken.

Corporate Disclosure

The true dimensions of the 1973-'74 energy crisis never were known, by Congress or the public, primarily because government was not in possession of independent information on oil reserves and existing supplies. Congressional hearings were held in an attempt to discover the needed information and to decide if such information should be collected on a regular basis (102).

Generally speaking, neither government nor the public has sufficient information to judge the machinations of corporate enterprise. In Montana, legal requirements for corporate disclosure virtually are non-existent. Domestic and foreign corporations must file annual reports containing the corporation's name and address; brief statement of its nature; its officers and directors; and shares authorized and issued, stated capital, and property value (103). No systematic filing of other relevant information, such as environmental performance in other states, advertising budgets, research and development affecting the public interest, pollution emissions and effluents or pending litigation or enforcement proceedings in other states or countries is required. In fact, as noted previously, confidentiality provisions can preclude effective public access even to information on the emission of environmental contaminants. Legislation to require systematic disclosure of emissions and effluents failed to pass the 1973-'74 session (104).

Systematic disclosure of corporate responsibility also would be helpful. One commentator has suggested that the federal Securities and Exchange Commission undertake the task. "New categories of society-oriented disclosure should be developed by the Securities and Exchange Commission and required of corporations. In order to increase corporate responsibility a corporation should be required to disclose fully the impact of its activities upon society" (105).

Safeguarding Employee Rights

One of the ways the public hears allegations about wrongdoings of corporations is through employees. But an employee puts his or her job in danger by making disclosures about corporate policy or practices. The federal Water Pollution Control Act Amendments of 1972 clearly recognize this problem and attempt to cure it. Section 507 of the act provides:

> **No person shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has filed, instituted, or caused to be filed or instituted any proceeding under this Act, or has testified or is**

about to testify in any proceeding resulting from the administration or enforcement of this Act.

A review procedure to protect employee rights is established in the same section. Also protected is the right of an employee to collect the costs of an action to reverse dismissal or discrimination. Whether the provision will work remains to be seen, but it at least attempts to protect a crucial source of public information. There is no similar provision in Montana law, not even in the state's new Occupational Health Act, where one might prove most useful (106).

Public Representation on Boards of Directors

It is now conventional economic thought that certain relatively small segments of management, not stockholders, really make corporate policy. The typical board of directors has been criticized widely for its failure to exercise a strong policy function (107). This trend could be reversed in Montana by requiring a broadening of membership of the boards of directors of major corporations doing business in the state. Perhaps requiring the placement of public representatives on boards of large corporations would be a good step.

Quite often, board members of one corporation are executives of other corporations. Consider, for example, the membership of the directing boards of Montana Power Co., Burlington-Northern Railroad and Anaconda Co., three major Montana corporations:

Montana Power Company (108)

J. E. Corette	*Montana Power Company*
Robert D. Corette	*Butte*
Newell Gough, Jr.	*Gough, Booth, Shanahan, & Johnson, Helena*
J. A. McElwain	*Montana Power Company*
Adrian O. McLellan	*Montana Power Company*
George W. O'Connor	*Montana Power Company*
R. H. Robinson	*Garlington, Lohn, & Robinson, Missoula*
Clark E. Simon	*Billings*
Louis A. Spain	*Bozeman*
L. S. Stadler	*Montana Power Company*
Warren F. Vaughn	*Security Trust & Savings Bank*

Burlington Northern (109)

Royal D. Alworth, Jr.	*Oneida Realty Company*
Charles H. Bell	*General Mills, Inc.*
John M. Budd	*Burlington Northern Inc.*
Donald C. Dayton	*Dayton Hudson Corporation*
Charles Devens	*Retired*
Cris Dobbins	*Ideal Basic Industries, Inc.*
Robert W. Downing	*Burlington Northern Inc.*
Pemberton Hutchinson	*Westmoreland Resources*
J. Howard Laeri	*St. Regis Paper Company*
W. Wallace McCallum	*W. W. McCallum & Associates*
Louis W. Menk	*Burlington Northern Inc.*
John M. Meyer, Jr.	*Morgan Guaranty Trust Company of New York*
Philip H. Nason	*The First National Bank of Saint Paul*
William G. Reed	*Simpson Reed & Co.*
John F. Smith, Jr.	*Inland Steel Company*
Jackson T. Stephens	*Stephens, Inc.*
Alexander L. Stott	*Burlington Northern Inc.*
Robert B. Wilson	*Personal Investments*

Anaconda Company (110)

Robert V. Roosa	*New York City*
William E. Quigley	*New York City*
John W. Brodes	*New York City*
Richard L. Knight	*New York City*
Charles A. Siegfried	*Madison, New Jersey*
John E. Tenge	*Billings*
William H. Kendall	*Louisville, Kentucky*
James D. Farley	*New York City*
Donald D. Geary, Jr.	*New York City*
John B. M. Place	*New York City*

Executives on the boards listed also represent a significant array of major United States corporations. There may be nothing untoward in this, but is may serve to indicate how inbred corporate policies can be and accent the source of differences between corporations and the public. Formal public representation could induce beneficial dialogue, clarify areas of compromise or disagreement, and help assure that major corporations doing business in Montana would hear public viewpoints regularly at high levels of corporate management.

Environmental Consultants

Mention of private sector activities and their relation to public involvement would be incomplete without discussing what aptly has been called the fastest growing industry in the country: environmental consulting (111). Environmental consulting is a private, profit making business service hired out to developers and corporations. The hired consultants typically provide assistance in environmental planning, write reports that must be submitted to state and local agencies, and, sometimes even do a little public relations work, helping companies sell the ecological propriety of their proposed activities.

Citizens or public interest groups currently have no access to the work done by private consultants — unless a report is released. Even though environmental consulting is an important enterprise, laden with public implications, the files of consultants are not open for review; the sometimes revealing correspondence between the employer and the consultant is not subject to scrutiny; performance standards have not been established; and licensing requirements are non-existent.

Even though consultants are in excellent positions to judge, they are rarely given to state whether their projects are ecologically sound and of long-term benefit to the affected communities. Although free and willing to consider the "how" of developments, consultants are not required to judge whether developments are wise, and probably never will unless required by law. Public regulation of environmental consultant activities is essential, however, if the important insights provided by the application of the natural, physical and social sciences are not to be perverted to narrow ends.

Conclusion

There have been many other proposals that would aid the public in efforts to promote corporate responsibility. They include: drafting easier threshold standards for citizen litigation against private parties; stiffer penalties for corporate violation of laws, including suspension of culpable executives; required appointment of in-house

corporate enforcement officers; promoting greater openness of relevant corporate documents; promulgating stricter incorporation standards; appointing decentralized advisory councils on specialized effects of corporate operations; encouraging public debates on corporate policy; and forcing release of explicit information on the social costs of corporate activites.

The list of possibilities is nearly endless. Recognizing that corporate life will be a part of the foreseeable future, some systematic assessment of the role of the public in the development of corporate policy should be undertaken (112). The legislature might establish a corporate responsibility task force, for example, to review the numerous ways of assuring a greater public role in environmental decision making. Such a process could be as important to the quality of Montana's future as the progressing activity to establish state land use and energy policies and goals.

Certainly, there are complexities involved in asserting the public's role in corporate activities. Deciding what size undertaking should be regulated, for example, is a ticklish problem, as is overseeing the effectiveness of the reforms. But, debating and experimenting with these and similar options might promote a beneficial relationship between the public and the corporation.

THE NEWS MEDIA

The news media — newspapers, radio and television — are critically important to citizen awareness of governmental and private decision making. Environmental action citizen groups can and do rely on the news media to present their views and increase environmental awareness. This paper focuses on the rights of access citizens have to the news media.

The Fairness Doctrine

Citizens and public interest groups have automatic access to the news media when they make news — just as do agencies and corporations. However, much of time and space in the news media is devoted to various forms of commercial persuasion and editorial programming — advertising that is the financial support of each medium. Increased concern with the environmental effects of some of these commercially advertised activities — cigarettes, automobiles, the Montana Power Co. public relations campaign on Colstrip Units 3 and 4 — has led some Montanans to wonder how the public can present countervailing views to these well-funded advertising campaigns. The fairness doctrine is one answer in the broadcasting media (113).

Unlike the print medium broadcasting is regulated because radio and television channels are construed to be limited, public resources. Hence a broadcaster providing time for a political candidate must provide equal time for his opponents. The matter is not quite so clear cut when it comes to airing controversial issues of public importance. For decades, the Federal Communications Commission (FCC) has expounded what is called the "fairness doctrine" (114). The FCC basically requires that broadcasters provide time for airing viewpoints contrasting with those expressed in programs and advertisements on "controversial issues of public importance." In early rulings, FCC laid down general principles governing the doctrine:

1. The "public interest requires ample play for the free and fair competition of opposing views . . ." (115)
2. "Strict adherence to the fairness doctrine" is "the single most important requirement of operation in the public interest — the 'sine qua non' for grant of a renewal of a license." (116)
3. "...Broadcast licensees have an affirmative duty generally to encourage and implement the broadcast of all sides of controversial public issues over their facilities, over and beyond their obligation to make available on demand opportunities for the expression of opposing views. It is clear that any approximation of fairness in the presentation of any controversy will be difficult if not impossible of achievement unless the licensee plays a conscious and positive role in bringing about balanced presentation of the opposing viewpoints" (117).

In recent rulings, FCC has applied the fairness doctrine to commercial advertising of cigarettes and has been upheld by a U.S. District Court (118). In the court's opinion, several standards were set down for invoking the fairness doctrine against product advertising: product danger to health; danger in normal use of the product; threat to a substantial portion of the population; and the presence of statistical evidence in support of the danger.

Relying on these standards, environmental groups at first were unsuccessful in using the doctrine against high octane gasoline and high performance automobiles (119). However, environmentalist challenge of ads urging the quick need to develop the oil reserves of Alaska and claiming that this could be done without significant environmental impact was upheld by the FCC (120). Additionally the FCC held that the stations showing the ads must go beyond editorials and news coverage of the Alaskan oil controversy to overcome the lack of fairness (121).

A U.S. District Court reversed the FCC denial of the environmentalist petition in the high octane gas and high performance auto case (122). The court said that promoting a "high performance" lifestyle was presenting a controversial view on an important public issue. The court also noted that the public health hazards of high performance autos parallel the hazards of cigarette smoking.

There are many thorny questions involved in the use of the fairness doctrine. What, for example, is a controversial issue

of public importance? Must the response be accorded the same time slot or same viewing potential? Must the time be provided free? At least where an advertisement clearly argues one side of a controversial and publicly important question, or advocates a life style that has adverse public health impacts, the doctrine probably will apply. Sometimes the air time will be free. Further court interpretation of the doctrine could make it an even broader asset of the public interest.

Right of Access

Beyond the ad hoc, predictably expensive, and time consuming use of courts to enforce the fairness doctrine, there are a number of other ways to open regular citizen access to the news media (123). The FCC's guaranteed right of response covers political editorials and personal attacks only.

The FCC requirements (of course) cover broadcast media only — not newspapers. Yet it seems clear that measures similar to the FCC's public interest requirements could and should be applied to newspapers as well. One commentator has written quite accurately that "the right to expression is not very substantial if it can be exercised only at the will of those who manage mass communications" (124). He suggests that "freedom of the press includes the right of a party to rent the paper's facilities through its advertising department for the purpose of effectively presenting one's ideas" (125). It should mean more.

In 1967, another commentator wrote that "too little attention has been paid to defining the purposes which the first amendment protection is designed to achieve and to identifying the addressees of that protection" (126). He recommended either a court-fashioned right of access or a right of access statute, because the "free market" approach to freedom of expression no longer suffices (127). Elsewhere it is argued that the opportunity for free expression is as important now as its protection (128) and that statutory duty "to afford reasonable opportunity for the discussion of conflicting views" should compel more than just an opportunity for response. Initial access to news space for the presentation of stands on significant public issues also is important. One solution would require the news media to dedicate a certain percentage of (paid) broadcast time or newspaper space for the discussion of important public issues. This intervention in the arena of first amendment rights could help reduce what has been called the "exploitation of a romantic theory of the first amendment for completely commercial and non-ideological ends" (129). By itself, however, this would not do much for those who do not have the resources to buy the advertising time.

Increased public access to the news media must be provided. Unless that access can be guaranteed on a regular basis, the huge potential value of the news media to fulfill the public interest will continue to be eclipsed by the seemingly limitless supply of banality and triviality they dispense and disperse daily (130).

Of course, the educational media are also prospects. Montana soon will be involved in educational television. However, whether a publicly financed state educational channel will reach the audiences that also view the national network programs and advertisements is unknown. While adding an important dimension to broadcast media choice and quality, education media will not replace the need for right of access to the broadcast networks and newspapers.

THE PUBLIC INTEREST

The notion of the public interest (or the public good) is a most troublesome concept (131). It is fair to ask what is the public interest, if it exists at all? Who can present it? How do we know it when it is being argued sincerely? And how can public interest groups be certain that they are in fact representing the public interest? Troublesome questions. Some tentative reflections must be offered, however, since the public interest presumably is what is pursued through increased public participation.

The public interest is not clearly articulated when a corporation, rightly concerned about its own profit picture and market position, presents its viewpoint on an environmental quality issue in isolation. Neither can we assume with assurance that the public interest will emerge from a number of parties each arguing his own special interest. Especially if public interest is viewed as extending to future generations, a clamor of present interest groups, each urging its own case, will not likely add up to a public interest. Finally, the notion of the public interest is not automatically a sure guide to making correct decisions.

The public interest is most likely to be found, it seems, when:

1. An agency clearly is charged with pursuing the public interest and is subject to judicial review to help insure that special interests are not dominant.

2. Economically interested parties are present who can assure that the special interest issues in the controversy are clearly articulated.

3. Public interest or citizen participants are present who have a clearly demonstrated commitment to the well-being of the public and to the quality of the environment, present and future; who have a less direct, preferably non-economic concern about the outcome; and who can make their voices heard and their positions felt.

If the history of regulatory agencies is any guide the first and last categories are fulfilled rarely. Citizens may have little

direct financial stake in a given decision. Hence citizens may have to invest time and energy without a chance of personal gain, beyond the satisfaction of finding the solution best for the public interest. Special interest tendencies of administrative agencies also may disillusion the concerned citizen.

With all its difficulties, the notion of public interest at least adds an important dimension to public life. It suggests that there are principles that must be sought apart from special interests. Perhaps it is in the seeking of these principles that the public interest, however difficult to define, is approached.

THE LIMITATIONS OF PARTICIPATION

One commentator has written that citizen participation is not an end in itself (132). This is only partly correct because citizen participation is not just a means either. Participation in public life is important in its own right — but that is not to say it is without limitations. Writings on citizen participation tend to be uncritical; some of the more important limitations should be sketched for consideration (133).

The most frequently cited limitation on citizen participation is the delay, obstruction, or cost problem. Full citizen participation does slow down decision making, and there certainly is a time when someone has to stop listening and decide. Time is "increasingly unforgiving," as one commentator has written. (134). Very carefully drafted emergency provisions are probably the best answers where speedy action is necessary, since decisions made without public participation always risk ignorance of the public viewpoint. In fact, the clamor for increased citizen participation arose precisely because it was felt that the public viewpoint was being consulted inadequately.

A second argument is that certain types of agency decisions will not be made any better by virtue of citizen participation. The claim is most frequently advanced in cases involving, for example, Atomic Energy Commission licensing procedures and other similarly complicated technical determinations (135). The thrust of this argument may be perilously close to adoption by the state Board of Natural Resources if early indications prove true.

Agencies will continue to be faced with technical decisions — matters of law, fact and engineering technicalities. But even the most technical decisions have policy implications that canot be left to technicians. For agencies, a critical task is to be certain not to exclude public interst testimony by harrassment of its spokesmen or understatement of its importance.

A third limitation of citizen participation is the fact that it is costly and time-consuming for citizens. It is difficult to say how many citizens want to or would participate if the costs of participation and the opportunities for success were more favorable. The Bureau of Land Management recently has been seeking citizen understanding and input on range management planning. Citizens have been contacted and encouraged to attend field trips, demonstrations, and meetings for this purpose. The effort is laudable, but it is said that very few people can afford the time to travel at their own expense and attend agency meetings or briefings. Some form of financed citizen participation needs to be considered because those least able to pay are least likely to participate in general.

A final line of argument is the most serious. Increased citizen participation will not guarantee achieving the public interest. Citizen participation does not, and probably cannot, insure that citizens will not simply argue their own self-interests. And, although general citizen self-interests are generally broader than the interests of (say) major corporations, they are not broad enough to constitute an overall interest. Moreover, citizen participation does not insure what can be called inter-generational equity — a central aspect of the public interest (136). Many who will share the costs and benefits of this generation's decisions are not here to participate. The preferences and values of the unborn are unknown to us. How can we be assured that the decisions we make will be good for the unrepresented future generations? For now, there are few very good answers to this vital question. More than any other previously cited difficulty, inability to see far enough ahead constitutes the greatest deficiency in citizen participation and public policy decision making, especially where environmental quality is at issue.

Additional Reflections

Increased citizen participation in environmental quality decisions should not be viewed simply as a means of conflict resolution or as an opportunity to mesh divergent opinions. In fact, fully operative citizen participation probably will clarify the contrasts among value choices, leading toward beneficial public dialogue and debate and heightened cooperation in search of solutions.

Citizen participation should not be viewed simply as a generalized increase in access to government although that would be important. Citizen participation is one way to strike a fair balance between those who have a direct financial or commodity interest in decisions and those who do not.

Those with large-scale financial interests in decisions nearly always are able to secure well-organized representation of their concerns. However, as has been noted throughout this paper, the public does not stand to realize immediate or tangible benefits and is not effectively organized for most decisions. In most cases, full citizen participation can help redress the imbalance and offer some assurance that a public viewpoint will be heard.

Although it is fashionable to focus on establishing a process for citizen participation, it is also crucial to consider its substance. Why is citizen participation being encouraged? What is being sought? What effect will the participation have on actual decisions? How will citizens know of their part in the decisions? (137) These and other questions need to be answered if citizen participation is not to be a fad or a failure.

Public action based on principles rather than just self-interest is a key human virtue. Participation in political processes alone, no matter how carefully designed, will not assure that the human capacity for principled public action will be realized (138). There must always be a certain, messy, ad hoc character. Precisely from this character will arise some of the most important concerns in the pursuit of the public interest.

Public involvement and participation are vital to sound environmental decision making. As noted by Arnold Bolle, "effective public participation within the decision process of natural resource agencies is vital to environmental quality" (139). If "agencies" is expanded to include the private sector, the point is complete and well-taken.

The constitutional, legislative, and judicial record of recent years at least reveals some concern with increased citizen participation. But unless Montanans are willing to experiment a little — perhaps along some of the lines suggested here — the promise of effective public participation could well be a hollow one.

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> **There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases . . .**
>
> **5. A public officer cannot be examined as to communications made to him in official confidence, when the public interests would suffer by the disclosure.**

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Environmental Efforts In The 1974 Legislature

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Introduction

Environmental measures played a significant role again this year in the legislature. Legislators considered a substantial number of environment-related bills introduced during the session as well as a sizeable number of bills held over from the 1973 session.

Yet, for one reason or another, most environmental measures, some containing significant environmental concepts, were killed. The major enacted bills of the 1974 legislature are discussed below.

Coal and Energy Development

The vast implications of coal and energy development in Montana were again the driving force of environmental issues in the 1974 session of the 43rd Legislative Assembly. The energy resources in Montana are being challenged by an ever-increasing demand as the nation and the world finds itself in the midst of a far-reaching energy crisis. While the crisis has been realized, the actual development of a national energy policy is piecemeal and barely embryonic. What Montana's role will be in the formulation of that policy depends on the state efforts toward a state energy policy.

Strip Mine Siting

In the Strip Mine Siting Act (SB 681) the legislature attempted to provide for long-range preplanning, examination, and control of new strip mine locations which are permitted under the Strip Mining and Reclamation Act (Title 50, Chap. 10, R.C.M. 1947). Anyone intending to operate a new strip mine involving the removal of more than 10,000 cubic yards of mineral or overburden is subject to the act.

The importance of proper planning for new strip mine locations relative to the potential adverse environmental impact on the air, water and land is recognized. The act vests the Department of State Lands with the authority to review new strip mine locations and reclamation plans and either approve or disapprove locations and plans. An applicant must receive a mine site location permit before beginning even preparatory work on a mine site, unless the mine already has a permit under the reclamation act which included a long-range mining plan approved by the department. The inclusion of site preparation (construction of roads, railroad spurs, draglines and other mining appurtenances) was important because the reclamation act regulated only prospecting. Site preparation was allowed without approval by the department.

Eminent Domain

The privilege of private corporations to use eminent domain for "public uses" was scrutinized by the 1974 legislature. One result was HB 1,009, which includes the commencement of eminent domain proceedings within the meaning of "commence to construct" in the Utility Siting Act. The requirement restricts condemner's use of eminent domain to secure land or right-of-way for a utility to the special case of facilities for which a certificate has been acquired under the siting act.

The passage of HB 1,101 was directed to another side effect

of energy development, the procurement of water for industrial development and consumption. Prior to HB 1,101, the existing eminent domain laws combined with the provisions of Art. IX, Sec. 3(2) of the Montana Constitution to allow non-governmental entities to condemn landowners in eastern Montana to obtain industrial water reservoir sites. Water speculators hoped to net tremendous profit by selling the precious water to developers of industrial facilities made feasible, ironically, by the speculators' activities. The act, however, restricts the exercise of private eminent domain rights: "Provided, however, that such reservoir sites must possess a public use demonstrable to the district court as the highest and best use of the land."

Coal Taxation

Coal taxation again stimulated heated debate in the legislature this year. Legislators were unable to agree on an equitable and adequate system of taxation to assure that the state would share in the benefits of coal development. Finally, late in the 1974 session, the two houses agreed that the taxation of fossil fuel industries deserved a thorough analysis. Three resolutions, HR 45, HR 93, and SR 83 established an interim legislative committee to study fossil fuel taxation and directed it to report findings and propose legislation to the 1975 legislature.

The legislature enacted HB 576, a holdover from the 1973 session. It authorized presentation of a constitutional amendment to the voters. In November, the amendment passed easily and elevated the Resource Indemnity Trust Fund, established by the 1973 legislature, to constitutional status, so that succeeding legislatures cannot violate the original intention to provide financial security for the people of Montana against environmental damage from the extraction of nonrenewable resources.

Geothermal Development

The potential for development of Montana's geothermal energy resources also was considered in two bills enacted by the legislature. The first, HB 1,010, includes the use of geothermal or other underground resources within the definition of utility facility, and so placed geothermal energy facilities under the Utility Siting Act. HB 1,010 expands the definition of "commence to construct" in the siting act to include the "fracturing of underground formations by any means, if any such activity is related to the possible future development of an underground facility employing geothermal resources."

Another bill, SB 640, provides for the leasing of state lands for geothermal resource development. The act provides for a primary lease term of 10 years, which may be extended as long as geothermal resources are produced in paying quantities. The rental on the leases must not be less than $1 an acre and/or a royalty of not less than 10 percent of the value of energy produced. The act could provide substantial trust income for state lands if geothermal energy were developed on state lands; however, increased technology development and exploration would be needed first.

Land Use Planning

The 1974 legislature devoted considerable attention to land use planning measures, seeming to recognize that if Montanans hope to preserve some vestiges of the wide open spaces as an integral part of Montana tradition, they must at least monitor and regulate the ever mounting pressures of land development.

Reclassification of State Lands

In passing HB 22, the legislature took a new look at the categories by which state lands are classified for management purposes. The act amends Sec. 81-302, R.C.M. 1947, to establish a new land use category for state lands. Before HB 22, under Sec. 81-302 state lands classifications were limited to grazing, timber, agriculture or urban uses. Such categories were required under Art. XVII of the 1889 Constitution. Art. X, Sec. 11 of the new Constitution simply states that "all public lands shall be classified by the board of land commissioners in a manner provided by law."

The new categories allow classification for grazing, timber, crop production or other uses. HB 22 requires the department to evaluate all state lands for alternative land uses and to manage the land with alternative values in mind. Many potential uses will have to be evaluated and policies proposed before the Board of Land Commissioners can establish a working multiple use management system for the state's 5.25 million acres of grassland and forests.

Natural Areas

The 1974 legislature recognized the peril of misuse and overdevelopment of land possessing scenic, educational, scientific, biological, and geological values by passing the Montana Natural Areas Act (HB 628). A natural area is defined as an area of land "which must generally appear to have been affected primarily by the forces of nature with the visual aspects of human intrusion not dominant," and possessing one of the act's recognized land value characteristics.

The act provides an orderly system to preserve and protect such lands and retain the integrity of their natural ecosystems for future generations to enjoy. The Department of State Lands is required to inventory state land for significant natural areas and to collect information on natural areas existing on other land. Natural areas can become part of the system in one of five ways: designation by the Board of Land Commissioners on land controlled by the board; designation by the legislature on state-owned land; acquisition of private land with the consent of the landowner; gifts of land accepted by the board; and trade or exchange of trust land for federal, county or private lands of equal value and approximately equal area. Once any natural area is so designated, it is protected from any land use or condemnation action which would affect adversely the integrity of the area, unless the legislature allows an exception.

The governor has established an advisory council under the natural areas act to advise the board on administration and

acquistion of natural areas. The department planned to issue draft rules on the designation and management of natural areas for public comment before the end of the year. And a citizens' group, the Montana Natural Areas Committee, planned to coordinate the many Montana groups interested in the preservation of natural areas and ecologically fragile land.

Subdivision Regulation

The Subdivision and Platting Act of 1973 contained problems in definition and administration that plagued developers and administators alike. HB 1,017 was an attempt to solve those problems. New definitions are offered in the amendments for "division of land" and "occasional sale." The definition of "division of land" is significant because it includes contract for deed sales and so makes them subject to the requirements of the act.

Also included in the amendments is a redefinition of "subdivision" (". . . a division of land, or land so divided, which contains one or more parcels containing less than twenty (20) acres . . .") which alleviates some of the problems in the original definition (". . ., or land so divided into two (2) or more parcels, whether contiguous or not, any of which is ten (10) acres or less. . ."). Condominiums constructed on land divided in compliance with the act are exempted from its requirements. County clerks are authorized to refuse to record any documents purporting to convey land in violation of the act. The amendments exempt the sale, rent or lease of portions of buildings from the act. The park dedication requirement also was modified to require that the dedicated park area be a fractional portion of the subdivision itself, rather than of the entire platted area including streets.

Floodway Management

The Floodway Management Act was amended in the 1974 session to make it responsive to local needs. The amendments allow political subdivisions to establish separate land use regulations for the areas within the floodway (channel of a watercourse and adjoining areas which would carry and discharge floodwaters) and floodplain (area adjoining the watercourse which would be covered by the floodwater of the 100-year flood as designated by the Board of Natural Resources).

The new amendments also permit certain land uses, including residential, commercial and industrial structures, within the floodplain but outside the boundaries of the floodway. Because boundaries of floodways are ambiguous, such uses actually could be in hazardous areas and could weaken the intent of the Floodway Management Act.

Water

Appropriation and Use

The appropriation of water for coal and energy development was a primary consideration of the 1974 legislature. When SB 728 was introduced in late January, Governor Thomas L. Judge said the rush for water appropriations related to coal development in the Yellowstone Basin threatens the economic lifeblood of the state's billion-dollar agricultural industry. The legislature reacted swiftly by approving the bill. It bans the appropriation of any large diversions of water from the Yellowstone Basin for three years — time to allow the state to determine how much water remains unappropriated and how it should be put to use. The Yellowstone River has an average annual flow of about 9 million acre-feet of which agricultural enterprises currently divert about 2.3 million acre-feet. The problem arises in dry years — about one in every four — when the basin's average flows decrease to less than 2.6 million acre-feet — just enough to supply current agricultural needs. Coal and utility companies have requested more than 3.3 million acre-feet per year of the basin's water. Hence there is a potentially serious conflict between the supply of water available in the basin in some dry years and the demands made on that supply.

The water moratorium passed as SB 728 applies to all applications for permits under the Montana Water Use Act to appropriate surface water from any part of the Yellowstone River Basin for either or both of the following uses: a reservoir of 14,000 acre-feet or more, or a flow rate greater than 20 cubic feet a second. The Department of Natural Resources and Conservation may not take any action on such applications until March 11, 1977, or until a final determination of existing water rights has been made. Exempted from the provisions of the act are applications to appropriate water for utility facilities for which a certificate of environmental compatability and public need is granted under the Utility Siting Act (Sec. 70-810 R.C.M. 1947).

The act also prohibits the federal government from applying for a water reservation in the basin until the determination of water rights has been completed. Only state agencies, municipalities, and irrigation associations are permitted to apply for reservations in the basin. Primary emphasis in granting such applications will be to protect existing rights and to ensure minimum flows for the protection of aquatic life.

Others

Additional measures enacted by the legislature and related to the environment include:

Economic Analysis

The legislature recognized the basic interrelationship that exists between economic and environmental concerns when it passed House Join Resolution 73.

The resolution directs the EQC to elicit from state agencies a "thorough economic analysis" as a part of environmental impact statements. The legislature said that the economic aspects of the total human environment had not been represented adequately in the environmental impact statement preparation and review process.

Saline-Alkali Study

The threat mposed by saline-alkali damage to the natural resources of Montana was addressed by two bills passed by the 1974 legislature. The first, HB 755, directed the Department of State Lands to study saline-alkali damage and execute programs necessary to correct the damage.

Governor Thomas L. Judge vetoed this bill, however, on the grounds that some of the administrative functions of a council established by the act would conflict directly with the Constitution, and the authority of the Board of Land Commissioners. The governor emphasized that his veto did not preclude the establishment of a saline-alkali control program. Such a program was funded by SB 737, which the governor later signed, thus appropriating $10,000 for the remainder of fiscal year 1974 and $255,685 for fiscal year 1975 for a study by the Department of State Lands and development of state programs to control saline-alkali problems. The appropriation should allow the department to establish a program to gather data and make recommendations concerning the prevention and control of saline-alkali damage in the state.

Noise Pollution

The legislature enacted two bills to control excessive noise — an important, but often overlooked aspect of pollution. SB 479 established a decibel limit for motorcycles operated on the streets and highways. The act created a graduated scale of allowable noise ranging from 92 db. (for motorcycles manufactured before 1970), to 70 db. (for motorcycles manufactured after 1987). HB 989 similarly established a decibel limit for snowmobiles.

Speed Limit

A prospective loss of federal highway funds forced the legislature to enact a 55 m.p.h. speed limit for the state. Aside from the intended fuel conservation benefits, the speed limit also has decreased the number of highway fatalities in the state according to the Highway Patrol. It is worth noting that while the nation and state reeled under the impact of an energy crisis, a speed limit was the only significant energy conservation measure passed by the 1974 legislature.

EQC Operations

The work of the Environmental Quality Council staff under Sec. 69-6514 of the Montana Environmental Policy Act (MEPA) is diverse and demanding, providing exciting opportunities to investigate, analyze and make recommendations concerning the profound and rapid environmental changes buffeting a developing Montana today. This report's emphasis on the problems and challenges of land use represents one aspect of the council's work in fulfilling its responsibilities under MEPA — to report results of work specifically requested by the Legislative Assembly — but simultaneously fulfills an array of other EQC mandates under MEPA to document trends, review programs, and in general "foster and promote the improvement of environmental quality to meet the conservation, social, economic, health and other requirements and goals of the state" (Sec. 69-6514 (c)).

The chronicle of activities that follows records further EQC efforts as the Legislative Assembly's authoritative source of information on the state of the state's environment and on the status of agency activities that affect the conditions under which Montanans and their natural environment can coexist in productive harmony.

The 1973 legislature directed EQC to undertake two comprehensive state policy studies — one on land use, the other on energy. Additional funding for the studies was provided by a $150,000 grant from the Ford Foundation. Walter I. Enderlin, an environmental engineer, joined the EQC staff in July 1973 to coordinate the *Montana Energy Policy Study*. Also in July 1973 Charles E. Brandes, a regional planner, accepted the responsibility for the *Montana Land Use Policy Study*. The *Second Annual Report* summarized the progress of these two studies.

As reprinted in this *Third Annual Report*, the *Montana Land Use Policy Study* was a major EQC accomplishment during the past year. Publication of the full report in November, 1974 marked the "coming of age" of the EQC in the sense of being able to produce research-policy reports capable of assisting state legislators and providing interested citizens with the information required to participate effectively in the decision making process.

Work on the *Montana Energy Policy Study* did not proceed as smoothly. A major obstacle was the absence of a model that could provide guidance for the systematic integration of different kinds of data. Another complicating factor was Walt Enderlin's decision to leave EQC for a research position with the Battelle Laboratory in Richland, Washington.

Dana H. Martin, another environmental engineer who had worked for EQC the previous summer and produced an excellent report on energy conservation, was hired to finish the study. The major task was to assemble Enderlin's material on various energy sources, add a new section on coal, and somehow shape it into a coherent unit organized around a state energy policy. Ms. Martin was ably assisted in this effort by Thomas W. Frizzell, a student at Montana State University. When Dana left in September she had produced a rough draft which, while falling short of our objectives, did get the material together in one place for critical review and revision. The task of reorganizing the *Montana Energy Policy Study* fell to Tom Frizzell. New material on energy demand, rate structures, and the policy implications of the concept of "net energy" was prepared by Richard L. Bourke, who joined EQC in February 1974 as staff economist. Material on alternative energy sources was provided by William Tomlinson, an EQC consultant in Missoula.

The EQC *Montana Energy Policy Study* will be available in early 1975. Like the *Montana Land Use Policy Study* it fails to include draft legislation to implement its major recommendations. Nevertheless, the study, like its land use counterpart, provides a valuable handbook of basic data and will help shape the energy-related legislative agenda for some years to come.

The EQC has been a leader within the state in saline seep research. Work by EQC ecologist Loren Bahls and Montana Bureau of Mines and Technology hydrogeologist Marvin Miller reported in the *Second Annual Report* was instrumental in providing the 1974 legislature with the information that led to the creation of the Saline-Alkali Advisory Council attached to the Department of State Lands. During the summer of 1974, Dr. Bahls supervised additional work by Michael Harlow which resulted in the publication of *Environmental Impacts of Saline Seep in Montana* (September, 1974).

Harlow's report has been widely circulated and is in much demand. The Cooperative Extension Service at Montana State University is preparing a summary of the report for distribution to farmers and ranchers throughout the region.

At its December 6, 1974 meeting the EQC endorsed Harlow's report and directed the staff to bring the conclusions and recommendations to the attention of the proper authorities. Those conclusions and recommendations were as follows:

Report Conclusions

1. Saline seeps constitute a severe threat to the land and water of Montana.

2. Saline seeps have increased greatly during past wet cycles, and the present high water tables and land use patterns virtually assure new growth and outbreaks during future normal and wet years.

3. Saline seeps have four components: recharge area, subsurface water table, discharge area, and surface drainage. Adverse environmental impacts occur as direct and secondary results of discharge and surface drainage.

4. Surface drainage is operative primarily during heavy rainstorms.

5. Surface drainage from saline seeps threatens water quality and all ecosystems in contact with waters polluted by this drainage. The damaging agents are currently under investigation; they are assumed to be a combination of heavy metals, high TDS, and high nutrient levels. Sediment from erosion of soils also degrades surface water quality.

6. Adverse on-site environmental impacts include: a) formation of saline soils due to saturation of exchange sites with sodium; b) loss of present vegetation due to soil saturation, osmotic disruption of plant processes, and specific ion toxicities; c) drastic changes in microclimate due to loss of cover and presence of a salt crust; d) invasion by halophytic annual weeds; e) virtually complete disruption of animal habitats; f) susceptibility to sheet and gully erosion and wind erosion; g) deterioration (to an unknown extent) of shallow aquifers, with possible effects on domestic and stock water wells.

7. Off-site impacts are not fully documented at this time. Known adverse off-site impacts include: a) leaching of salts, heavy metals, and nutrients into surface waters of the state b) eutrophication and saline stratification of ponds and reservoirs, and loss of trout fisheries; c) poisoning of livestock under certain circumstances; d) loss of surface drinking water for big game and other wildlife, with consequent habitat disruption.

8. Control of saline seep is technically possible using known methods, although practical problems, especially agricultural economics, remain to be solved. A great deal of additional experimentation and demonstration work is needed.

9. The 4-probe soil resistivity technique offers a practical and economical method for diagnosing the features of individual saline seeps, and for monitoring treatment progress. Calibration of the technique in terms of the many geologic variables is proceeding, and a handbook is being prepared for use of the 4-probe on a wide-scale field basis.

10. Education of farmers, about the problem and the alternatives for controlling it, is sorely needed. Much has been done along this line by individuals but an organized and properly funded effort is needed. It is critical that this education effort include information about the environmental impacts of saline seep, and of the various alternatives. The present narrow focus on agricultural technology and economics is understandable, but unfortunate. This focus should be expanded to explain the broader implications of control alternatives to complete the farmers' information set during his inevitable decision-making effort with regard to saline seep.

11. Data, needed for a complete evaluation of the environmental impacts of saline seep, are not currently available. Some important new information is now being collected and evaluated, and this new information will modify and extend the interpretations expressed in the body of this [the saline seep] report.

12. A well-publicized saline seep information clearinghouse is needed, especially for collection and investigation of reports of livestock, wildlife, and fisheries damage due to saline seep, and for coordination of research. The Department of State Lands is well situated for such a function, and could incorporate it into its present saline seep program.

13. Specific information on the toxicity of saline seep to livestock, wildlife, and fishes is not now available. Research into this subject is essential for interpretation

of impacts of existent or projected levels of surface water pollution.

14. The alternative methods for control of saline seep involve manipulation of the hydrologic factors of the recharge, and/or subsurface storage and drainage components. Saline seep cannot be cured by manipulations of the discharge area.

15. Ranked in order of decreasing adverse environmental impacts, the currently known control technologies include:

    No action.

    Artificial subsurface drainage with untreated surface disposal.

    Artificial drainage with evaporative lagoon disposal.

    Artificial drainage with fossil-fueled desalinization.

    Intensive or annual cropping methods.

    Intensive cropping with perennial barriers.

    Artificial drainage with solar-powered desalinization.

    Recropping with deep-rooted perennials in recharge area.

    Native or reestablished grasslands on recharge area.

Report Recommendations

Education

a. Establish, fund, and staff a well-defined and adequately publicized central clearinghouse function within the Department of State Lands for collection and dissemination of information on saline seep; generation and storage of data, reports, and research; coordination of research efforts; and investigation of incidents.

b. Continue to fund Cooperative Extension Service and Agricultural Research personnel for dissemination of current state-of-the-art information on farming economics and techniques, and the environmental consequences of these techniques.

c. Clarify and make public the legal implications of saline seep pollution, especially regarding artificial drainage into surface waters of the state of Montana.

d. Fund and provide expert technical assistance for frequent farm management seminars on saline seep, to provide a forum for exchange of ideas, experiences, and mutual aid.

Research

a. Involve the state's university system in disciplines other than agriculture. Much research is need on the many unknown parameters of saline seep impacts on the environment. Much of this work could be accomplished by research projects at the graduate and undergraduate levels in the fields of terrestrial ecology, aquatic biology, limnology, water resources management, wildlife biology, rural economics, game management, sociology, land use planning, biochemistry, and toxicology. This potential source of manpower and expertise has not been adequately tapped in the past.

b. Continue to fund the current establishment of a water quality monitoring network for saline seep. Expand this system to provide representative trend data for all areas of the state which are afflicted with saline seep.

c. Coordinate the various agency and commercial laboratories which test water samples originating from seep-polluted sources. This should be a task for the state clearinghouse.

d. Initiate formal research into the water budget of the native prairie ecosystem, to discover the precise mechanisms which allow it to fully utilize available water and prevent deep percolation. Apply this information to agricultural practices.

e. Expand the effort to calibrate the 4-probe resistivity technique: initiate a broad effort to fully evaluate its potential for diagnosis and monitoring of saline groundwaters. If the technique continues to look promising, the instrument should be widely distributed and field personnel should be trained to use it.

f. Pending results of the Environmental Protection Agency biological study on the Highwood Bench, additional research into the effects of saline seep on fisheries and water quality should be given top priority. The state clearinghouse should coordinate the efforts of Federal, state (Fish and Game, Water Quality Bureau, Department of Natural Resources and Conservation), and university research personnel in carrying out a broad investigation of the long-term impacts of saline seep on the surface waters of Montana.

g. Initiate live model (bioassay) studies on the toxicology of saline seep.

Control and Reclamation

a. Artificial drainage with untreated surface disposal should be discouraged. Techniques for disposal by injection should be studied further to evaluate the ultimate fate of the water.

b. Desalinization, especially techniques using solar distillation, should be evaluated for use in areas where artificial drainage is under consideration.

c. On-going agricultural research into intensive cropping, use of barriers, water-efficient crops, and deep-rooted perennials in the recharge area should be continued, as

these techniques must ultimately be adopted in most areas. This research should be coordinated with efforts by the Montana Department of Fish and Game to reintroduce wildlife into these areas where feasible.

d. Marginal and submarginal agricultural land in recharge areas should be returned to grass cover, preferably native prairie species.

e. The Agricultural Stabilization and Conservation Service should recognize the serious consequences of uncontrolled saline seep. This agency should revise its national policy, to make saline seep control measures eligible for cost-sharing programs on an equal basis with soil erosion control measures.

f. The federal government and the state should give serious consideration to establishment of "land bank" type program, to compensate farmers for loss of agricultural production due to recharge control and reclamation techniques, and to encourage cooperation among farmers with saline seep systems whose component parts are divided by a property line.

EQC actively assisted legislators during the 1973 session. The council endorsed an ambitious legislative program (see *Second Annual Report*, pp. 76-79) and the staff was actively engaged in drafting legislation, preparing amendments, testifying, and providing research material requested by individual legislators. The EQC staff provided services for some 100 bills having some environmental significance, including major efforts for the following: resource indemnity trust fund, inclusion of geothermal in utility siting act, reclassification of state land, natural areas, subdivision amendments, stream preservation, sulfur tax, shoreline preservation, and environmental education.

In January, 1974, Fletcher E. Newby, EQC executive director, announced to the council that he was resigning to become deputy director of the Montana Department of Fish and Game. The council advertised the position. Eleven applications were received. In March, the council reduced that number to six candidates who appeared to meet the qualifications of Sec. 69-6511: Donald Beuerman, a chemist at Montana College of Mineral Science and Technology; Donald Bianchi, Fish and Game Department Information chief of the Bozeman district; Elmer Gless, a biologist at Montana College of Mineral Science and Technology; Spenser Havlick, natural resource specialist at San Jose State University, California; John Reuss, political scientist and director of the Gallatin Canyon Study at Montana State University; and Charles Tulloss, chief of recreation assistance with the Bureau of Outdoor Recreation, Denver. In April, the council narrowed the choice to Gless, Havlick, Reuss, and Tulloss and interviews were scheduled for meeting of the council on May 10. On June 21, 1974 the council named John W. Reuss to succeed Fletcher E. Newby as EQC Executive Director, effective July 1, 1974.

As a relatively new agency with a small, young professional staff and a modest budget, the EQC has performed well given its awesome responsibilities in Sec. 69-6514 of the Montana Environmental Policy Act. Each year the EQC improves on skills gained the previous year and moves forward to a new challenge. The EQC *Montana Land Use Policy Study* and *Montana Energy Policy Study* are evidence of the staff's keen ability to provide the legislature and people of the state with research-policy documents of a quality unexcelled in state government. EQC administration of the environmental impact statement process helps assure that actions taken by state agencies having significant environmental impacts activate the EIS process. No other device has so forcefully challenged bureaucrats to examine their assumptions, anticipate decisions and allow citizens to participate in making the decision. Lastly, the EQC review of state agency programs and reports to the governor and legislature on state agency compliance with MEPA assist the legislature in judging how well the agencies are carrying out the legislative intent. These EQC activities help ensure that agencies perform as directed by the legislature, that government decision making be as open as possible, and that state agency decisions have as little adverse environmental impact as practicable.

Background Information on Water, Land and Energy Available

An annotated bibliography on pertinent eastern Montana water resource literature is available for inspection at EQC offices in Helena. The material was compiled in 1973 by Bob Anderson, once an EQC consultant and now a doctoral candidate in environmental engineering.

An in-depth report, "The Potential for Energy Conservation in Montana," *also is available from the EQC. Although necessarily dated in its discussion of energy policy, the 1973 report (classified as a review draft) contains useful statistics on energy sources, supplies and conservation. The author is Dana Martin, former energy policy study coordinator.*

More historically useful background is contained in two other 1973 EQC reports, "Ponderosa Pines Ranch, A Subdivision Case Study," *and* "A Perspective on Subdivision Activity in Montana's Bitterroot Valley," *both available from the EQC upon request. Authors of the reports are Kenneth F. Porter and Tina Torgrimson, respectively.*

Detailed information on the results of the 1974 EQC Land Use Questionnaire is available for inspection at EQC offices in Helena. The survey polled all 56 boards of county commissioners, 59 boards of conservation district supervisors and 69 city, city-county and area-wide planning boards. The combined response of the survey was reported in the EQC News, *Vol. 2 No. 3 (Sept. 12, 1974).*

State Agency Programs and Activities

a review by
Kenneth F. Porter
Research Assistant

Introduction

Toward fulfillment of the requirements of Sec. 69-6514 of the Montana Environmental Policy Act (see Appendix B), this section reviews six of the many state agencies responsible for programs and activities that affect the environment and the conservation, development and utilization of natural resources. Further review of agency activities, particularly in connection with land use policy, is in the Montana Land Use Policy Study* *featured earlier in this report and, in connection with energy policy, in the* Montana Energy Policy Study** *drafted by the EQC for the 1975 legislature. Reviewed here are the Departments of Public Service Regulation, State Lands, Natural Resources and Conservation, Health and Environmental Sciences, Fish and Game and the activities of the Montana Energy Advisory Council (MEAC), an intragovernmental review arm of the executive branch.*

The Department of Public Service Regulation

The Department of Public Service Regulation and its policy making governing board, the Public Service Commission (PSC), is responsible for regulating rates and services of Montana railroads, motor carriers, pipelines and utility companies. The department's major goal, as stated in its 1974 *Annual Report to the Governor,* is "to assure the consumer of safe and adequate transportation and utility services at just and reasonable prices."

The legislature has given the PSC authority to supervise, regulate, and control public (including municapally owned) utilities that provide water, electricity, gas, power, telephone or telegraph service. Every aspect of state utility operation is controlled except activities (planning and construction) covered by the Utility Siting Act of 1973. The PSC's regulatory authority over the utility industry could play a significant role in the conservation of natural resources and enforcement of an energy policy for Montana.

The significance of PSC authority in energy policy and the conservation of natural becomes visible in the case of railroad regulation, for example, because railroads are much less energy consuming than either air or motor transportation. It is yet undecided, however, just what part the PSC could have in a state policy to foster use of energy saving transportation or inexpensive rates for transportation of recyclable materials. Regulation of the transportation industry has a definite effect upon energy use, however.

*Discusses policies of the Departments of Fish and Game, Health and Environmental Sciences, Highways, Intergovernmental Relations, Natural Resources and Conservation, State Lands, Revenue and powers of county governments as they relate to land use.

**Particularly Appendixes F and G of the *Energy Policy Study.*

Other significant decisions affecting the conservation and prudent use of energy-related natural resources could lie in the PSC's reconsideration of established rate structures for power utilities. The effect of rate structures (the system determining price of energy for various customers and quantities) on consumption can be illustrated with the example of natural gas.

The PSC has established a block rate structure in which the price per unit of gas declines as more is used. This structure, known as quantity discounting, hinges on the premise that average consumer costs decline as production increases — to reflect what are known as economies of scale. Changes in the national economy and in the availability of natural gas have made the premise — and the practice of quantity discounting — highly questionable.

Montana Power Co.'s natural gas rates for residential customers can be used as an example. For residential customers, the first thousand cubic feet (1 mcf) cost $2.97 a month (which happens to be the minimum monthly bill). For the next 99 mcf, the price is 88.1 cents per mcf. Use more than 100 mcf a month receives further price breaks. The table illustrates the declining block system:

Declining Block Rate Structure*

(Montana Power Co.)

Amount used (mfc)	Customer cost (cents per mcf a month)
1 or less	297.0
next 99	88.1
next 200	64.2
next 700	50.0
next 4,000	45.2

*Source: Schedule GSG-72, Supplement No. 4, General Natural Gas Residential Service, Public Service Commission of Montana.

The declining block rate structure encourages consumption by offering a lower price per unit of product for increased consumption. But in the case of natural gas, supply is declining and price is rising. Hence the declining block rate structure fails to reflect the actual additional cost incurred in producing additional units of natural gas and so violates a fundamental principle of economics, marginal cost pricing. Under conditions of restricted supply and rising prices, then, the rate structure should reflect increased prices for increased use. Currently it does not.

Both the residential and commercial sectors are controlled by a declining block rate structure, but individual industries, which account for about 50 percent of the natural gas consumption in Montana, are given individual contracts at flat rates that are a third to a half of the residential unit price.

The demand for natural gas for residential users is more inelastic than for industrial users. As prices rise, residential consumers are reluctant to shift to other energy sources until it is time to buy new equipment such as stoves and heaters. The industrial sector is relatively more elastic than residential users and small commercial businesses, however. Some industry boilers are designed to use two or more types of fuel; in such cases the demand is elastic (changeable in response to price). However, if the industry already is committed to gas-fired machinery, it might be costly to replace boilers. It should be noted that the industrial sector has the ability to greatly increase the efficiency of the processes which use natural gas, thus conserving fuel and lowering industry demand. In this sense, too, industrial demand is very elastic.

The existing rate system thus encourages the excessive consumption of natural gas. Through individual flat rate contracts, industry is allowed to use a rapidly declining supply of natural resources at a price much lower than its marginal cost. Similar arguments can be made against the use of the declining block rate structure for electricity.*

Past rate setting by the Public Service Commission generally has disregarded environmental considerations of its decisions, looking instead at the rate of return necessary to protect the investment of the utilities. But rates and rate structures can affect profoundly both consumer demand and energy resource conservation.

The 1974 legislature expanded the PSC to five members elected from five separate districts across the state. The commission is empowered with statutory authority sufficient to make it an influential policy maker in the energy field. The new commission could begin by committing itself to a comprehensive examination of rate structures, setting timely reviews, and following the procedures established by the Montana Environmental Policy Act necessary for significant decisions affecting the environment and the guidelines promulgated by the Environmental Quality Council on preparing environmental impact statements.

Department of State Lands

By the Enabling Act of 1889, Congress granted two sections of land in every township in the state to Montana for support of the common schools. To this land the act and other subsequent acts granted acreage for additional educational and institutional purposes. The proceeds from the sale of these lands and the income from their use are placed in a permanent fund and must remain forever inviolate.

Originally created by the 1889 Constitution, the Board of Land Commissioners now has the authority to "direct, control, lease, exchange and sell school lands which have been or may be granted for the support and benefit of the various state educational institutions" (1972 Constitution, Art. X Sec. 4).

The Department of State Lands has responsibility for administering state land and the various laws and regulations pertaining to it. The department is responsible for the leasing of state-owned land and the reclamation of mined

*See *Montana Energy Policy Study*, Appendix A.

land in the state. The department currently enforces an no-lease policy for coal on state land. Prospecting for coal is being permitted, however, under contractual agreements with the board. Four reasons for this policy have been offered by the department: First is the doubtfulness of reclamation; there is no proof that reclamation is always feasible everywhere. Second is the low price of Montana coal. Third, the department wishes to assess the amount of coal actually on state lands before resuming leasing. A fourth reason has to do with the timing of federal coal land leases adjacent to state lands. It is said that simultaneous leasing by the state and the federal government will draw a price higher than if the state leases before or after.

The department is responsible for the following mining and reclamation acts: the Strip Mining and Reclamation Act 1973 (Secs. 50-1034 to 1057*), the 1971 hard rock mining act for the reclamation of mining lands (50-1201 to 1226), the Strip Mined Coal Conservation Act 1973 (50-1401 to 1409), and the Strip Mine Siting Act of 1974 (50-1601-1617). The 1972 Montana Constitution requires that "All lands disturbed by the taking of natural resources shall be reclaimed. The legislature shall provide effective requirements and standards for the reclamation of lands disturbed" (Art. IX, Sec. 2). The legislature apparently intended the mining and reclamation acts to fulfill the constitutional provision. The Strip Mining and Reclamation Act requires miners to obtain an annual permit from the Department of State Lands and also requires a comprehensive reclamation plan to be submitted with an adequate performance bond before strip mining is allowed. The act specifically refers to coal and uranium. It forbids the strip mining of certain lands because of their unique or unusual character. The so-called hard rock mining act of 1971 covers the mining of any ore, rock, or substance other than "oil, gas, bentonite, clay, coal, sand, gravel, phosphate rock, or uranium" (50-1203). The act requires the reclamation of all explored, developed and mined land and the submission of a reclamation plan in advance of any activity. The Strip Mined Coal Conservation Act gives the Department of State Lands the authority to review strip mine plans and to disapprove them if marketable coal would be wasted. The Strip Mine Siting Act gives the department control over the location of new strip mines. No preparatory work may be done at a mine site until a permit s issued under the law.

The four mining reclamation laws have given Montana unprecedented control over strip mining — heretofore considered insignificant or ignored altogether. There remain though, many serious problems. Reading the Strip Mining and Reclamation Act of 1973 can give a deceptively secure feeling to those concerned with reclamation. Serious questions of value and definition remain unresolved. For example, part of the Strip Mining and Reclamation Act says:

> **(2) The department shall not approve the application for prospecting or strip mining permit where the area of land described in the application includes land having special, exceptional, critical, or unique characteristics, or that mining or prospecting on that area would adversely affect the use, enjoyment, or fundamental character of neighboring land having special, exceptional, critical, or unique characteristics. For the purposes of this act, land is defined as having such characteristics if it possesses special, exceptional, critical or unique:**
>
> **(a) biological productivity, the loss of which would jeopardize certain species of wildlife or domestic stock; or**
>
> **(b) ecological fragility, in the sense that the land, once adversely affected, could not return to its former ecological role in the reasonable foreseeable future; or**
>
> **(c) ecological importance, in the sense that the particular land has such a strong influence on the total ecosystem of which it is a part that even temporary effects felt by it could precipitate a system-wide reaction of unpredictable scope or dimensions; or**
>
> **(d) scenic, historic, archeologic, topographic, geologic, ethnologic, scientific, cultural, or recreational significance. In applying this subsection, particular attention should be paid to the inadequate preservation previously accorded Plains Indian history and culture (50-1042).**

The subsection specifically states the department has a duty not to approve any applications for prospecting or strip mining where the land area has the characteristics listed. With the possible exception of subsection 2d, however, there is much latitude for discretion. The department's Reclamation Division has applied for a grant to develop a "land unit classification system." The system would provide some way of presenting different variables and values in a matrix system that would give a yes or no answer for mine applications. It is difficult to predict the success of such a system but it could at least provide a guide or inventory of important ecological characteristics.

The Reclamation Division apparently has played down its duty to deny applications on these grounds even where possibility of ecological damage was evident. Applications for continued mining by the Decker Coal Company at Decker, Montana and a new mining permit for Western Energy Company at Colstrip both were approved by the department although serious environmental questions existed. The environmental impact statement (EIS) prepared for the Decker permit stated "Since there are now abundant concentrations of saline-alkali salts at Decker the problem of revegetating the graded and retopsoiled spoils becomes more pressing. Drought and saline-alkali tolerant species must be utilized in revegetation processes. It has not yet been proven that adaptable species exist or can be used. Even tolerant species tested have had a very low success ratio" (1). Unresolved even now is the possibility of the salts

*Of the Revised Codes of Montana, 1947; all laws referenced hereafter in the Program Review are listed parenthetically by section number.

contaminating surface and ground waters. The EIS prepared for the Decker permit also failed to mention the possibility of effects on ground water created by cutting and removing the coal seam aquifer — which since has been shown to lower the level of groundwater and introduce soil contaminants that affect water quality. The removal of a coal seam aquifer is thought to produce the effect of a dam on the flow of underground water. The dam effect is said to be compounded as more mines disturb water bearing coal seams. The consequences of strip mining on the availability and quality of water are known to be serious but research and experience has not been able to show how extensive.

Considering the legal mandate and the constitutional precepts on reclamation of mined land, the EIS prepared by the Department of State Lands for the Decker mine was inadequate in substance. The procedural requirements of the Montana Environmental Policy Act (MEPA) also were skirted (2). To the extent that reclamation of mined land is an unproven art in Montana, it would seem prudent for the Reclamation Division and the department to deny mining applications that are attended by unresolved significant ecological problems. The reclamation law may have been designed to prevent unnecessary land abuse, but the legally available control is useless unless it is asserted on behalf of the legislature.

Another problem for the Reclamation Division has been the enforcement of the Strip Mined Coal Conservation Act. The original plan for Western Energy's Colstrip mine contended that the McKay Seam (the second seam from the surface) lacked marketability in the usual course of trade. The Decker Coal Company similarly maintained that the D-2 (second from the surface) seam of their mine was not strippable economically because of its depth, among other engineering and equipment problems. A review of Western Energy's economic study made by a Department of Intergovernmental Relations economist at the request of the lands department said that "the 'unmarketability' contention does not appear realistic." Even with much prodding by the department, Western Energy still was unable to find a market for the McKay seam. The permit was issued when it was proven to the department's satisfaction that the seam was unmarketable. A spokesman summarized the department's conclusion by saying there is better quality coal available at cheaper prices.

Decker was allowed to skip the second seam because its contention could not be disproved without a very extensive economic analysis of the company's operation. The department's economic review stated, "The company officials appear to be generally receptive to the idea of mining the D-2 seam coal, but not at the expense of causing a massive disruption in their current mining plan. The one year approval by the Department of Lands on the Decker permit largely reflects these realities" (3).

Staffing obviously is crucial to the division's ability to handle the diverse questions involved in reclamation. The division currently has an authorized strength of 15 in a wide range of technical fields. Two of these positions are currently vacant but the division hopes to fill them with persons in range management and hydrology. In July of 1975 there will be two new positions. One of those positions should be filled by an economist.

The Reclamation Division now makes approximately 1,800 inspections a year concerning almost 1,200 different mines and permits. The division opened a Billings office December 23, to save time and travel and also make it possible to do more inspections in the Fort Union coal area.

According to the Reclamation Division, some coal miners have not complied with the reclamation act. A spokesman explained that the miners are slow to achieve reclamation standards. Many of the problems that arise seem to stem from operators' unfamiliarity with reclamation laws; the strip miners are from anoter era when reclamation was done voluntarily or not at all. One of the most serious problems is forcing the coal companies to plan ahead; planning is a function that must be an integral part of strip mining if meaningful reclamation is to take place.

Within the mining and reclamation laws there also appear to be serious deficiencies in the laws' ability to handle mining problems of the foreseeable future. The mining and reclamation laws are presently written to cover two separate categories: method of mining and type of minerals. By using these two categories the legislature has left significant holes in the mining and reclamation laws.

Three acts previously discussed, the Strip Mining and Reclamation Act, the Strip Mined Coal Conservation Act, and the Strip Mine Siting Act plus the Open Cut Mining Act all refer to a method of surface mining. The Open Cut Mining Act refers to the surface mining of bentonite, clay, scoria, phosphate rock, and sand or gravel. The act requires the miner to enter into contract with the state for the reclamation of those mined lands and allows the state to sue for breach of contract. The so-called hard rock mining act for the reclamation of mining lands is categorized by a number of minerals and specifically excludes the coal, uranium, and underground phosphate.

The hard rock mining act requires reclamation of mined land, whether mined by surface or underground methods, but only for the minerals specifically listed. Taken together, the laws fail to ensure reclamation of surface land (disposition of tailings piles, correction of mine mouth disturbances) disturbed by the underground mining of coal, uranium and phosphate. This is true despite the fact there is good potential for underground mining for these minerals in Montana. In fact, new exploration for underground phosphate mining continues near Gold Creek west of Garrison.

The hard rock mining act has other problems. It makes most of the information contained in the mining applications — even the names of the companies that are exploring in the state — confidential. The confidentiality provision of the act contradicts both the 1972 Montana Constitution (Art. II, Sec. 9, the right to know) and the Montana Environmental Policy Act, which required full disclosure of the impact of agency actions significantly affecting the human environment (such as the granting of mining permits).

Montana law contains other serious deficiencies regarding reclamation of mined land. There is no control over the use of acid solution mining, an extremely dangerous and potentially polluting mining method commonly called in situ mining. Another critical problem is the lack of adequate bonding under the Open Cut Mining Act to ensure reclamation. The bonding limits are presently set at a minimum $200 and a maxium $1000 per acre. Bonding preferably should prevent the state from ever having to reclaim mined land; at the very least, the bond should be adequate to cover costs of a complete reclamation project. A practical minimum bond should be about $1500 and extend to a maximum of $5500 per acre. Bonding is inexpensive compared to most mining costs and is good preventive medicine.*

Department of Natural Resources

The Department of Natural Resources and Conservation (DNR) has profound influence on the environment, energy and land use of Montana. The Energy Planning Division, Oil and Gas Conservation Division, and the Water Resources Division are discussed below.

The Energy Planning Division administers the Utility Siting Act of 1973. The act gives the division the authority to require and review long range planning by certain utilities and to give approval to energy generation and conversion plant sites and associated facilities such as transmission lines. Fees may be charged for environmental investigations. The act also requires preconstruction certification of the "environmental compatibility and public need" of such facilities. Final decisions on most energy related facilities are made by the Board of Natural Resources.

Because of the scope and power of the Utility Siting Act, the Energy Planning Division is perhaps chiefly responsible for crucial and delicate balancing of energy needs and environmental protection in Montana.

Interpretation appears to be one of the most severe problems with the act. Most court cases involving the Utility Siting Act hinge on definition of crucial portions of the law. Cases have been taken into court to determine what constitutes a "transmission line" under a certain circumstance or what is "construction" for the purpose of interpreting the grandfather clause. A clarification of these and other vague terms within the law could aid the department and reduce litigation on matters of definition rather than the actual merits of a case.

Another, and possibly more serious, problem may involve determination of need. The act does not define need or spell out what is meant by "public need." It would not be surprising, especially considering the controversial generating facilities in the Colstrip area, to see court tests concerning the definition of "environmental compatibility and public need."

One apparent major oversight of the act is its failure to include natural gas pipelines in the definition of energy facility. The impacts of natural gas pipelines on the environment may be at least significant as a power transmission line.

Fees under the act vary according to the size of the proposed facility. Allowable fees appear substantial enough to finance department preparation of adequate environmental impact statements, and meet all the investigatory requirements of the act.

The Energy Planning Division completed two major environmental impact statements in 1974. The first, on the water supply system and other associated facilities of Colstrip Units No. 1 and No. 2, primarily was an after-the-fact academic exercise. The second was on a 230-kilovolt Colstrip-to-Broadview transmission project. The transmission line review is one of the best examples so far of a systematic, interdisciplinary approach to decision making. The corridor for the transmission project was chosen by the Energy Planning Division. It did not coincide with the one preferred by the applicant (Montana Power Co., et al). The difference between the two corridors, as explained in the environmental impact statement, is "the extent to which they create new linear patterns. A totally new corridor across farms and undissected landscape is created by route A [preferred by the applicant]. In contrast, corridor F [DNR's preferred route] takes advantage of existing corridors over a sizable portion of the route. Although this may not be without some drawbacks, it certainly is less limiting on future land use."

The other issue involved in the Colstrip-to-Broadview transmission line concerns the construction of support towers. The department advised the Board of Natural Resources and Conservation to approve its preferred corridor and to delay decision on the towers until the decision on generating Units No. 3 and No. 4 could be made. The power company had stated its intention to build towers to handle the projected 500-kilovolt output of the proposed Units No. 3 and No. 4. Because the application for Units No. 3 and No. 4 was made before the application for the transmission line, the board did not have to decide on the transmission line before the decision for the generators. In spite of this and against the recommendations of the department, the board recently approved the proposed transmission towers.

The draft EIS on the proposed 700-megawatt power plants at Colstrip was released Nov. 25, 1974, and a series of public hearings was begun across Montana to summarize the impact statement information. The department intended to analyze additional information, perform further calculations, consider the public commentary solicited at the hearings and make a final departmental recommendation to the Board of Natural Resources and Conservation in late January, 1975.

The Energy Planning Division has installed a permanent sophisticated computer system to store mapped resource inventory information for ready recall and use in selection of transmission line corridors.

*Annual premiums for bonds are approximately 1 percent of bonded face value.

The Oil and Gas Conservation Division of DNR has made its greatest impact on energy by developing and encouraging secondary oil recovery techniques. Montana's production of oil increased 2 percent from 1972 to 1973; the division, in its 1973 annual review, attributed the increase to secondary recovery.

Secondary recovery techniques are not without environmental consequences. One secondary technique is to pump water down into a well to float up the remaining oil. Often oil wells simultaneously produce a certain amount of water and this has been recycled for secondary recovery. When there is no water to recycle, the recovery technique becomes water consumptive. A source of fresh water is found to pump into the wells. This water is lost for all practical purposes. The most important effect in some situations has been a drastic lowering of the level of ground water that was previously used for domestic and stock purposes.

The Water Resources Division was created with the abolition of the Water Resources Board (which began with the Water Resources Act of 1967). The two major laws administered by the division are the Water Resources Act (Title 89, Chap. 1) and the Water Use Act (Title 89 Chap. 8). The Water Resources Act gave the division responsibility for developing a state water use plan. The Water Use Act was designed to determine the existing water rights in the state, to centralize the records of all existing water rights, and to adjudicate those rights in local district courts. These two acts have great significance in the development of energy and land resources within the state and the region. The determination of water rights and the data provided by the division's water studies should play a profound part in future energy and land use decisions of the state.

The water law of western states including Montana has operated under an appropriation rights doctrine in which the beneficial use (as defined by each state) of water is the basis, the measure, and the limit of the water right. The first beneficial appropriation is first in right. Appropriations are for a definite rate of diversion or amount of storage. The appropriation right is obtained and sustained only by actual and continuous beneficial use. Failure to make beneficial use of an appropriation may result in its loss.

With the implementation of the Water Use Act, water rights are to be established with certainty for the first time in Montana. The statewide inventory process is time consuming, however, and complicated by demands on water for possible energy use. The immediate concern of the Department of Natural Resources and Conservation, many of the ranchers and farmers of the area, and recreational users is protection of existing rights. Problems concerning competition for use and the validity of existing rights are compounded during low flow periods. The lack of any coordinated or standardized records has been a major complication in the determination of water rights in Montana.

The conflict between the national goal of energy self-sufficiency and the future of Montana's resources, particularly water, should be of paramount concern to Montana citizens. Many recent federal programs and policies are in direct opposition to those of Montana. One example is the policy of making federally controlled water available to corporate industrial lessees at the same time federal coal is being leased; another is leasing of federal lands without the demonstration of substantial need. Such actions can be seen as further erosions in citizen control of the future of Montana and the Montana way of life, to say nothing of the conflict with local and state planning efforts now underway. One cannot underestimate the interconnection of water and energy development and land use. The effects of energy development on the state and the diversion of water for that industrial use probably will mean an important decline in agricultural land use in the area along with the ensuing economic and social troubles.

Central to the issue of energy development is the Yellowstone Water Moratorium that went into effect March 11, 1974. The three-year moratorium was enacted largely to give the state time to study the implications of energy and coal development in the Yellowstone River Basin. The moratorium suspends for the three-year period the granting of any new water permits of substantial size. According to the Water Resource Division, only a fraction of the necessary studies in the Yellowstone Basin under the Water Use Act will be completed at the end of the moratorium in 1977.

Of the major drainages in the Yellowstone River Basin scheduled for water rights determination under the Water Use Act, only the Powder River Basin is expected to be adjudicated by the end of the moratorium. The drainages which will not be finished include the Tongue River, Rosebud Creek, Armells Creek, Sarpy Creek, The Big Horn River, and the Clarks Fork of the Yellowstone

The Powder River Basin was chosen to lead for several reasons: it is an area with sparse population, little irrigation, no Indian water rights, and in an important coal development area. The Water Rights Division is still revising its methodology. Division officials fully expect to have to change their approach once they get the experience of working with district courts in determining water rights.

In 1950 the Yellowstone River Compact was signed by commissioners for the states of Montana, North Dakota, and Wyoming and ratified by the Montana legislature in 1951. All existing water rights in the Yellowstone River Basin and the right to supplemental waters to satisfy existing rights were continued. The remaining waters were apportioned to the states according to fixed percentages as found in the compact for each individual drainage of the Yellowstone River covered by the compact. The agreement has remained largely ineffectual because water rights existing as of the date of the compact were never determined; hence the correct apportionment of waters to the states could not be determined. The lack of a systematized water rights determination in the state has made the adjudication of water rights very complicated and confusing. The question of the Indian water rights expands these troubles.

Indian water rights is a complicated legal question and appears to be predicated on treaty relationships with the federal government. Just as the states have little or no

control over federal waters so it is with Indian waters. One of the most heated issues surrounding Indian water rights concerns the extent of Indian ownership. Speaking for many Indians, an intertribal agency has proclaimed rights to all waters arising on, flowing through or underlying the various reservations. Their argument is strong, but opponents question the quantity of water available and belonging to the Indians.

In a legal memorandum prepared for the Montana Attorney General's office in July, 1974, the Department of Natural Resources and Conservation made these conclusions (4):

1. Reservation Indians have a reserved water right in the waters arising on, flowing through or underlying the various reservations. A pro-rated share of the reserved right is an appurtenance to allotted reservation land, regardless of the owner.

2. The reserved right is not subject to regulation or control by the state.

3. The reserved right is not subject to regulation or control even when exercised on allotted lands owned by non-Indians.

4. The state may regulate those waters which arise on, flow through or underlie the lands of an Indian reservation and which are surplus to the Indians' reserved right. Persons wishing to obtain rights in such surplus waters should apply for state permits.

5. The state may join the United States in a water rights determination proceeding in order to assert the Indians' reserved rights. (It should be noted that DNR's conclusions are not an official position of the state of Montana, but they do present well-researched legal reasoning on the subject.)

The determination of Indian water rights will have important implications on the availability of water for both energy and irrigation development in the future. How much water is available, and who controls it could make a considerable difference in the energy development and therefore the life of a large and agriculturally important region of Montana.

Department of Health and Environmental Sciences

Most of the environmental protection programs and activities of the Department of Health and Environmental Sciences fall under the direction of the Environmental Sciences Division. The most important laws concern air and water quality.

The laws relating most directly to air pollution control are the Clean Air Act of Montana (Title 69, Chap. 39) and the Federal Clean Air Act Amendments of 1970. The state law gives broad control and regulatory authority to the Board of Health and the department. Montana's air quality laws and standards are among the most stringent in the nation, and they appear to be fairly well enforced, although several financially powerful corporations hold variances.

The federal Clean Air Act delegates responsibility for enforcement of federal standards to the states. Montana's laws were interpreted by her Attorney General as providing sufficient authority to the department to accomplish the purposes of the federal act. States are required to prepare a plan to attain air quality at least equivalent to national standards as well as retain air quality that currently is better than the standards. The so-called implementation plan must include procedures to prevent developments that would violate the regulations.

The Montana implementation plan, which has been approved by the Board of Health, has been mired in a number of procedural and court complications since the beginning of 1972. Officially, although the plan has been disapproved by the federal government, it still is considered to have the force of law in Montana. Here is its policy statement:

> **it is hereby declared to be the policy that ambient air whose existing quality is better than the established standards, will be maintained at that high quality unless it has been affirmatively demonstrated to the Department of Health and Environmental Sciences of the State of Montana that a change is justifiable as a result of necessary economic and social development vital to the state (5).**

Similar prohibitions in the federal Clean Air Act led to a court suit against the Environmental Protection Agency, whose general regulations were said to be insufficient to prevent "significant deterioration" of regional air quality. The Supreme Court agreed and ordered the EPA to prepare specific regulations. A draft proposal released in August, 1974, essentially would allow degradation of a state's clean air up to national secondary standards with and only with the approval of the individual state. Hence the EPA would relegate responsibility for prevention of significant air quality deterioration to the states. Court challenges to the EPA's non-degradation proposal has been announced.

In response to a petition by the Northern Plains Resource Council and the Rosebud Protective Association, the Montana Board of Health on November 22, 1974, verbally expressed a desire to move ahead on the non-degradation clause in the implementation plan. Although there was no firm commitment, the board assented to a cooperative effort between the petitioners and the department to establish procedures and regulations for a non-degradation rule. The board either will deny the petition or initiate the rule making procedure in its January, 1975 meeting.

The move by the petitioners appears to be an attempt to control large industrial developments such as the proposed coal-fired generator Units No. 3 and No. 4 at Colstrip. Two issues likely to emerge from the promulgation of rules under the non-degradation clause would be, how to determine what is "significant" deterioration and what constitutes "necessary economic and social development vital to the state."

The Montana Water Pollution Control Program prepared in response to EPA requirements has been effective in pollution control and abatement. After the enactment of Montana's first water pollution control law in 1955, water quality standards, classifications of stream use, and minimum requirements for waste water treatment were created for nearly every stream in the state. After the enactment of the federal Water Quality Act in 1965 the state began what became a major rewrite of the 1955 standards that appears in the water pollution control act of 1967 (Title 69, Chaps. 48 and 49). The 1971 legislature added a non-degradation clause at Sec. 69-4808.2.

In addition to its regular functions of regulating water pollution and water supplies in the state, the Environmental Sciences Division is preparing for three water system studies for which it has received grants. The first study concerns the impact of Yellowstone River water withdrawals on water quality. The study is funded by the Old West Regional Commission and is directly related to eastern Montana coal development. An EPA grant is for study of effects of waste on the Yellowstone River near Billings. The study eventually will help control the wastes of individual polluters. The waste level of the Yellowstone may well be the limiting factor of industrial development considering the costs of available water pollution control technology. Although effluents are controlled as individual sources, the non-degradation policy established by the legislature may preclude the siting of industrial development which, despite use of available technology, would measureably increase stream pollution.

A grant also has been made under Sec. 208 of the federal Water Control Act for area-wide water quality planning. The planning is to be done for Montana's entire coal development area, essentially from Billings to Miles City. The division is to develop policies within the planning area that will result in long-term enhancement of water quality. The Environmental Sciences Division believes the policy making to be a form of land use decision making for industrial development and energy generation.

Department of Fish and Game

The Department of Fish and Game has three programs that should be mentioned. The first of these, which began in January of 1973, is the department's comprehensive long-range planning program. The plan is being designed, according to its project director, to meet the requirements of Sec. 69-6504 of the Montana Environmental Policy Act. A few of its long-term goals are the protection of wildlife and habitat and the determination of peoples' values as they might relate to the Fish and Game Department.

One portion of the long-range plan will develop management strategies for the important groups of wildlife, especially those species which may be threatened. The long-term planning for Montana may be modeled after a strategic plan developed by the State of Colorado. Colorado's plan was described as an effort to maximize the benefits man derives from wildlife without damaging the capability of the animals and their environment to continue to provide those benefits. Montana's strategic plan should be ready for operation by January of 1976.

The Montana legislature enacted The Nongame and Endangered Species Conservation Act in 1973. The act requires the management of nongame wildlife and its habitat, and the protection of endangered species. It provides the necessary authority to the Department of Fish and Game to begin and sustain the program.

The act defines nongame wildlife as "any wild mammal, bird, amphibian, reptile, fish, mollusk, crustacean or other wild animal not otherwise legally classified by statute or regulation of this state" (26-1802). Any animals that have been designated as predators by the legislature are excluded from the act.

The first priority of the nongame species program in the department is to inventory the nongame wildlife species in the state, determine their status, and define their range of habitat. There are estimated to be about 700 nongame species in the state. The department will try to secure the limited habitat of rare or endangered nongame wildlife. If certain species appear to be threatened the department may ask the legislature to place them on the endangered species list. The department also is considering two other classifications that would describe slightly lower levels of danger or threat to specific wildlife. The labels may include "threatened" and "rare."

The department will make "recovery plans" and set up recovery teams to work on individual endangered species. This is expected to be done through cooperative agreement with the federal Department of Interior. The state appears to meet the qualifications necessary to gain federal cooperation and substantial matching funds for the program.

The third program, which is still in an embryonic stage, is a long-term biological study of the grizzly bear. The program is to be directed by Charles Jonkel, an internationally acclaimed bear expert. Dr. Jonkel stated that habitat is one of the most important variables and most abused of the grizzly's needs. He hopes to get the bear placed on the endangered species list. The bear's habitat presently is in serious jeopardy; without needed habitat the grizzly will cease to exist.

Montana Energy Advisory Council

The Montana Energy Advisory Council (MEAC) was reorganized from the Montana Coal Task Force on April 23, 1973 to advise the governor and other public officials on energy problems and issues. It also promotes and coordinates research on energy related development. Headed by Lieutenant Governor Bill Christiansen, with members from 10 state agencies, MEAC has achieved much in energy policy and research assistance. The council also

has auxiliary members representing the various units of the Montana University System.

MEAC has been particularly successful in fulfilling its intended function, because of the skilled efforts of the Lieutenant Governor and the MEAC staff. MEAC has worked closely with the federal-state Northern Great Plains Resource Program (NGPRP) in providing direction and comments in specialized work group reports. The high quality of the NGPRP interim report has been attributed largely to the comments and assistance provided by MEAC. The report presents a generally unbiased account of what is known and what needs to be known about coal development in the Northern Great Plains.

In its advisory capacity, MEAC assisted Governor Thomas L. Judge by preparing several drafts of a preliminary state position statement on federal coal leasing. The statement said that for at least the first five years of any renewed federal coal leasing program, the state wants coal to be burned or otherwise converted elsewhere, unless the energy is needed for Montana's own supplies. The position confronted a proposed Department of Interior program to automatically grant large-volume Bureau of Reclamation water options to successful coal lease bidders. MEAC also assisted the governor in preparing Montana's response to the federal Department of Interior's environmental impact statement on the proposed coal leasing program. Interior reportedly is preparing an entirely new draft to objectively evaluate the impacts of coal based industrialization in the agricultural West.

The Lieutenant Governor's Office coordinated preparation of a major proposal by the Departments of Natural Resources and Conservation, Health and Environmental Sciences and Fish and Game to investigate the impacts of industrial water consumption on irrigation, municipal water needs, fish, wildlife and recreation in Montana's portion of the Yellowstone Basin. This proposal to the Old West Regional Commission was granted, effective June, 1974, with a two-year research contract in excess of $500,000. The Department of Natural Resources is lead agency in the study. Also, the Lieutenant Governor's Office successfully sought federal Health, Education and Welfare funds to bolster MEAC's ability to coordinate and support continuing and proposed human resource research on coal and energy development. The federal funds are being used for a full-time research package. The HEW grant has enabled MEAC to prepare and publish a monthly newsletter on research results.

MEAC also prepares a monthly energy status report. These reports, starting in the fall of 1973, have provided information on possible shortages in major energy fuels, and have suggested ways of coping with the "energy crisis." The Montana Fuel Allocation Office has cooperated with MEAC in preparing monthly reports.

MEAC's work largely has been related to coal development and its impacts. It can be said that MEAC has contributed greatly to the flow of reliable information and encouragement of public awareness of coal related development problems and possible solutions.

References Cited

1. *Draft Environmental Impact Statement* on proposed approval of strip mining permit for continuation of the Decker Coal Company mine at Decker, Montana, Montana Department of State Lands, Helena, Montana, Nov. 5, 1973, p. 2.

2. The act, for example, orders agencies to prepare "a detailed statement" on environmental effects and to disseminate the information for public review. The department's three-page Decker EIS left most information required by MEPA to be gleaned from Decker Coal Company documents not generally available to the public. Furthermore, the environmental analysis was inaccurate, according to the comments of other state agencies, and lacked depth (see comments in text). The department probably should be allowed to assess fees to finance proper analyses of mining applications. (The Utility Siting Act fee system so far has had good success.) Fees, however, will not automatically provide the good faith efforts that appear to be missing in the department's approach to strip mining applications and MEPA.

3. Memo to C. R. Draper, dated March 20, 1974, from the Department of State Lands.

4. "State Jurisdiction over Indian Reserved Water Rights," legal memorandum to Atty Gen. Robert L. Woodahl by Ted Doney, legal counsel to the Department of Natural Resources, July 1974.

5. *Implementation Plan for Control of Air Pollution in Montana*, Department of Health and Environmental Sciences, revised June 30, 1972, p. 6.

Appendix A

Biographies

Members of Environmental Quality Council and Executive Director

Elmer Flynn, chairman of the Environmental Quality Council (EQC), was born in Missoula and is now a rancher near that city. He is a Democratic state senator. In the 1973 session he was chairman of the Public Health, Welfare, and Safety Committee, vice-chairman of the Committee on Committees, and served as a member on the Labor and Employment, Natural Resources, and Rules Committees.

Thomas O. Hager, vice-chairman of the Environmental Quality Council, was born in Minneapolis, Minnesota. He attended Billings public schools and Montana State University. Hager, an egg producer in Billings, is a Republican state representative and served in the 1973 session on the Agriculture, Livestock and Irrigation, and Fish and Game Committees. He is a member of the Montana Egg Council, Northwest Egg Producers, and United Egg Producers.

A. L. (Bud) Ainsworth was born in Webster City, Iowa, but is a long-time Montana resident. He attended Thompson Falls public schools and Stanford University and was graduated from the University of Montana. He has been a Republican state representative since 1967. In the 1973 session, Ainsworth served on the Constitution, Elections and Federal Relations, Natural Resources, and Long Range Building Committees. The Missoula resident is a retired retail druggist, a member of the Board of Trustees of the Missoula City-County Library, and a past member of Interlocal Co-op Commission, Missoula County.

Dorothy Bradley, a Democratic state representative, was born in Madison, Wisconsin. She came to Montana in 1950 and attended Bozeman public schools and Colorado College in Colorado Springs. Bradley, a student of anthropology, lives in Bozeman. In the 1973 session she served on the Education and Local Government Committees, and was vice-chairman of Natural Resources Committee.

G. Steven Brown, the governor's designated representative on the EQC, was born in Corvallis, Montana. He graduated from the University of Montana in political science and from the George Washington University School of Law with honors. Brown was awarded an Environmental Law Fellowship from the George Washington University School of Law in 1972. While attending law school at George Washington University, Brown served for two years as a legislative assistant to Senator Mike Mansfield. He is now legal counsel on the governor's staff and was admitted to practice law in Montana in October 1973.

George Darrow of Billings is a geologist and resource consultant with degrees in economics and geology from the University of Michigan. Darrow was a Republican state representative in the 1967 and 1971 legislative sessions, sponsoring the Water Resources Act, the Floodway Management Act, and the Montana Environmental Policy Act. As a state senator in the 1973 and 1974 sessions, Darrow served on the Agriculture, Livestock and Irrigation, Natural Resources, and State Administration Committees. During the 1974 session, he sponsored the Coal Strip Mine Siting Act. Darrow was EQC chairman from 1971 to 1973 and was reappointed as a member from the Senate in 1973. He is the recipient of the 1971 Hilliard Award for outstanding environmental achievement presented by the Rocky Mountain Center on the Environment. He is a member of the American Institute of Professional Geologists, the Geological Society of America, the American Water Resources Association, and a Fellow of the American Association for the Advancement of Science.

Larry Fasbender was born in Great Falls. He attended the University of Montana law school, and graduated from Gonzaga University in philosophy. The Fort Shaw resident is a Democratic state representative and has served since 1967. In 1973 he was House majority leader and as such was an ex-officio member of all committees. He is a farmer-businessman.

Thomas J. Lynaugh is a Billings attorney. He has lived in Montana since 1970. Lynaugh was born in Teaneck, New Jersey, where he attended public schools. He is a graduate of Manhattan College, New York City, and Boston College Law School. Lynaugh is a member of the American Bar Association, Montana Bar Association, and the District of Columbia Bar Association.

Harriet (Mrs. Donald) Marble was born in Petersburg, Virginia and now lives in Chester. She came to Montana in 1964, having earned degrees at Cottey College and Muskingum College. She also holds bachelor's and master's degrees in wildlife management from the University of Montana. Marble is a member of the League of Women Voters, the Wilderness Society, and the Montana Wilderness Association.

George McCallum was born in Conrad and now lives in Niarada, where he is a rancher and Christmas tree operator. He served as a Republican state senator in 1971-73. In the 1973 session McCallum served on the Agriculture, Livestock and Irrigation, Education, Fish and Game, and Natural Resources Committees.

Gordon McGowan was born in Great Falls and has been a lifetime resident of Highwood where he is a rancher. He attended public schools in Highwood. He has been a Democratic state senator since 1955. In the 1973 session he served as vice-chairman of both the Business and Industry, and Natural Resources Committees. He was a member of the Highways and Transportation, and Taxation Committees.

Calvin S. Robinson was born in Kalispell, where he practices law. He attended the University of Montana, University of California, and University of Washington and has a law degree from the University of Michigan. He is a member of the Northwest Montana Bar Association, Montana Bar Association, Illinois Bar Association, American Bar Association, and American Judicular Society. Robinson served in the U.S. Navy from 1942 to 1945.

William G. Walter is department chairman and professor of microbiology at Montana State University. He was born in Lake Placid, New York and came to Montana in 1942 after earning bachelor's and master's degrees from Cornell University. He later received his doctorate at Michigan State University. Walter is a member of the American Society of Microbiology, which awarded him the Carski Distinguished Teaching Award in 1973. Walter is also a member of the American Public Health Association and the National Environmental Health Association, which awarded him the Mangold award in 1972.

John W. Reuss, EQC executive director, was born in San Bernardino, California, and educated in history and political science at the University of California (Riverside), where he completed PhD exams in 1968. Reuss was an instructor in the Science, Technology and Public Policy Program at Purdue University until 1971, when he accepted an assistant professorship at the Montana State University Government Program to teach and conduct research in science and public policy, environmental politics, and public administration with emphasis on management of natural resources. In 1973, he was appointed Principal Investigator for the university's National Science Foundation-sponsored Gallatin Canyon Study, a project of the Center for Interdisciplinary Studies at MSU. He was co-author of "Environmental Impact Assessment: The Gallatin Canyon-Big Sky Study," in the *Journal of Soil and Water Conservation* in 1973. In mid-1974, Reuss was chosen from a field of candidates for the directorship of the EQC. He is a member of the American Association for the Advancement of Science and the American Societ for Public Administration.

Appendix B
Montana Environmental Policy Act

PUBLIC HEALTH AND SAFETY
CHAPTER 65 — MONTANA ENVIRONMENTAL POLICY ACT

69-6501. Short title. This act may be cited as the "Montana Environmental Policy Act."

History: En. Sec. 1, Ch. 238, L. 1971.

Title of Act

An act to establish a state policy for the environment and to establish an environmental quality council and setting forth its powers and duties and providing an effective date.

69-6502. Purpose of act. The purpose of this act is to declare a state policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the state; and to establish an environmental quality council.

History: En. Sec. 2, Ch. 238, L. 1971.

69-6503. Declaration of state policy for the environment. The legislative assembly, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the state of Montana, in cooperation with the federal government and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can coexist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Montanans.

(a) In order to carry out the policy set forth in this act, it is the continuing responsibility of the state of Montana to use all practicable means, consistent with other essential considerations of state policy, to improve and coordinate state plans, functions, programs, and resources to the end that the state may —

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Montanans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our unique heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(b) The legislative assembly recognizes that each person shall be entitled to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

History: En. Sec. 3, Ch. 238, L. 1971.

69-6504. General directions to the state agencies. The legislative assembly authorizes and directs that, to the fullest extent possible:

(a) The policies, regulations, and laws of the state shall be interpreted and administered in accordance with the policies set forth in this act, and

(b) all agencies of the state shall

(1) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on man's environment;

(2) identify and develop methods and procedures, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision making along with economic and technical considerations;

(3) include in every recommendation or report on proposals for projects, programs, legislation and other major actions of state government significantly affecting the quality of the human environment, a detailed statement on —

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible state official shall consult with and obtain the comments of any state agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate state, federal, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the governor, the environmental quality council and to the public, and shall accompany the proposal through the existing agency review processes.

(4) study, develop, and describe approximate alternatives to recommend courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(5) recognize the national and long-range character of environmental problems and, where consistent with the policies of the state, lend appropriate support to initiatives, resolutions, and programs designed to maximize national co-operation in anticipating and preventing a decline in the quality of mankind's world environment.

(6) make available to counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(7) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(8) assist the environmental quality council established by section 8 (69-6508) of this act.

History: En. Sec. 4, Ch. 238, L. 1971.

69-6505. Review of statutory authority and administrative policies to determine deficiencies or inconsistencies. All agencies of the state shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this act and shall propose to the governor and the environmental qualty council not later than July 1, 1972, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set for in this act.

History: En. Sec. 5, Ch. 238, L. 1971.

69-6506. Specific statutory obligations unimpaired. Nothing in section 3 (69-6503) or 4 (69-6504) shall in any way affect the specific statutory obligations of any agency of the state

(a) to comply with criteria or standards of environmental quality,

(b) to co-ordinate or consult with any other state or federal agency, or

(c) to act, or refrain from acting contingent upon the recommendations or certification of any other state or federal agency.

History: En. Sec. 6, Ch. 238, L. 1971.

69-6507. Policies and goals supplementary. The policies and goals set for in this act are supplementary to those set forth in existing authorizations of all boards, commissions, and agencies of the state.

History: En. Sec. 7, Ch. 238, L. 1971.

69-6508. Environmental quality council. The environmental quality council shall consist of thirteen (13) members to be as follows:

(a) The governor or his designated representative shall be an ex officio member of the council and shall participate in council meetings as a regular member.

(b) Four (4) members of the senate and four (4) members of the house of representatives appointed before the sixtieth legislative day in the same manner as standing committees of the respective houses are appointed. A vacancy on the council occurring when the legislative assembly is not in session shall be filled by the selection of a member of the legislative assembly by the remaining members of the council. No more than two (2) of the appointees of each house shall be members of the same political party.

(c) Four (4) members of the general public to be appointed by the governor with the consent of the senate.

In considering the appointments of (b) and (c) above, consideration shall be given to their qualifications to analyze and interpret environmental trends and information of all kinds; to appraise programs and activities of the state government in the light of the policy set forth in section 3 (69-6503) of this act; to be conscious and responsive to the scientific, economic, social, esthetic, and cultural needs and interests of the state; and to formulate and recommend state policies to promote the improvement of the quality of the environment.

History: En. Sec. 8, Ch. 238, L. 1971.

69-6509. Term of office. The four (4) council members from the house of representatives shall serve for two (2) years and may be reappointed. Two (2) council members from the senate, one from each political party, and two (2) council members from the general public shall serve for four (4) years, and these members may be reappointed for a two (2) year term. Two (2) council members from the senate, one from each political party, and two (2) council members from the general public shall serve for two (2) years and these members may be reappointed for a four (4) years term. In no case shall a member of the council serve more than six (6) years.

The council shall elect one of its members as chairman and such other officers as it deems necessary. Such officer shall be elected for a term of two (2) years.

History: En. Sec. 9, Ch. 238, L. 1971.

69-6510. Meetings. The council may determine the time and place of its meetings but shall meet at least once each quarter. Each member of the council shall, unless he is a full-time salaried officer or employee of this state, be paid twenty-five dollars ($25) for each day in which he is actually and necessarily engaged in the performance of council duties, and shall also be reimbursed for actual and necessary expenses incurred while in the performance of council duties. Members who are full-time salaried officers or employees of this state may not be compensated for their service as members, but shall be reimbursed for their expenses.

History: En. Sec. 10, Ch. 238, L. 1971.

69-6511. Appointment and qualifications of an executive director. The council shall appoint the executive director and set his salary. The executive director shall hold a degree from an accredited college or university with a major in one of the several environmental sciences and shall have at least three (3) years of responsible experience in the field of environmental management.

He shall be a person who, as a result of his training, experience, and

attainments, is exceptionally well qualified to analyze and interpret environmental trends and information of all kinds; to appraise programs and activities of the state government in the light of the policy set forth in section 3 (69-6503) of this act; to be conscious of and responsive to the scientific, economic, social, esthetic, and cultural needs and interests of the state; and to formulate and recommend state policies to promote the improvement of the quality of the environment.

History: En. Sec. 11, Ch. 238, L. 1971.

69-6512. Appointment of employees. The executive director, subject to the approval of the council, may appoint whatever employees are necessary to carry out the provisions of this act, within the limitations of legislative appropriations.

History: En. Sec. 12, Ch. 238, L. 1971.

69-6513. Term and removal of the executive director. The executive director is solely responsible to the environmental quality council. He shall hold office for a term of two (2) years beginning with July 1of each odd-numbered year. The council may remove him for misfeasance, malfeasance or nonfeasance in office at any time after notice and hearing.

History: En. Sec. 13, Ch. 238, L. 1971.

69-6514. Duties of executive director and staff. It shall be the duty and function of the executive director and his staff

(a) to gather timely and authoritative information concerning the conditions and trends in the quality of the environment both current and prospective, to analyze and interpret such information for the purpose of determining whether such conditions and trends are interfering, or are likely to interfere, with the achievement of the policy set forth in section 3 (69-6503) of this act, and to compile and submit to the governor and the legislative assembly studies relating to such conditions and trends;

(b) to review and appraise the various programs and activities of the state agencies in the light of the policy set forth in section 3 (69-6503) of this act for the purpose of determining the extent to which such programs and activities are contributing to the achievement of such policy, and to make recommendations to the governor and the legislative assembly with respect thereto;

(c) to develop and recommend to the governor and the legislative assembly, state policies to foster and promote the improvement of environmental quality to meet the conservation, social, economic, health, and other requirements and goals of the state;

(d) to conduct investigations, studies, surveys, research, and analyses relating to ecological systems and environmental quality;

(e) to document and define changes in the natural environment, including the plant and animal systems, and to accumulate necessary data and other information for a continuing analysis of these changes or trends and an interpretation of their underlying causes.

(f) to make and furnish such studies, reports thereon, and recommendations with respect to matters of policy and legislation as the legislative assembly requests.

(g) to analyze legislative proposals in clearly environmental areas and in other fields where legislation might have environmental consequences, and assist in preparation of reports for use by legislative committees, administrative agencies, and the public.

(h) to consult with, and assist legislators who are preparing environmental legislation, to clarify any deficiencies or potential conflicts with an overall ecologic plan.

(i) to review and evaluate operating programs in the environmental field in the several agencies to identify actual or potential conflicts, both among such activities, and with a general ecologic perspective, and to suggest legislation to remedy such situations.

(j) to transmit to the governor and the legislative assembly annually, and make available to the general public annually, beginning July 1, 1972, an environmental quality report concerning the state of the environment which shall contain

(1) the status and condition of the major natural, man-made, or altered environmental classes of the state, including, but not limited to, the air, the aquatic, including surface and ground water, and the terrestrial environment, including, but not limited to, the forest, dryland, wetland, range, urban, suburban, and rural environment;

(2) the adequacy of available natural resources for fulfilling human and economic requirements of the state in the light of expected population pressures;

(3) current and foreseeable trends in the quality, management and utilization of such environments and the effects of those trends on the social, economic, and other requirements of the state in the light of expected population pressures;

(4) a review of the programs and activities (including regulatory activities) of the state and local governments, and nongovernmental entities or individuals, with particular reference to their effect on the environment and on the conservation, development and utilization of natural resources; and

(5) a program for remedying the deficiencies of existing programs and activities, together with recommendations for legislation.

History: En. Sec. 14, Ch. 238, L. 1971.

69-6515. Examination of records of government agencies. The environmental quality council shall have the authority to investigate, examine and inspect all records, books and files of any department, agency, commission, board or institution of the state of Montana.

History: En. Sec. 15, Ch. 238, L. 1971.

69-6516. Hearings by council — enforcement of subpoenas. In the discharge of its duties the environmental quality council shall have authority to hold hearings, administer oaths, issue subpoenas, compel the attendance of witnesses, and the production of any papers, books, accounts, documents and testimony, and to cause depositions of witnesses to be taken in the manner prescribed by law for taking depositions in civil actions in the district court. In case of disobedience on the part of any person to comply with any subpoena issued on behalf of the council, or any committee thereof, or of the refusal of any witness to testify on any matters regarding which he may be lawfully interrogated, it shall be the duty of the district court of any county or the judge thereof, on application of the environmental quality council to compel obedience by proceedings for contempt as the case of disobedience of the requirements of a subpoena issued from such court on a refusal to testify therein.

History: En. Sec. 16, Ch. 238, L. 1971.

69-6517. Consultation with other groups — utilization of services. In exercising its powers, functions, and duties under this act, the council shall

(a) consult with such representatives of science, industry, agriculture, labor, conservation organizations, educational institutions, local governments and other groups, as it deems advisable; and

(b) utilize, to the fullest extent possible, the services, facilities, and information (including statistical information) of public and private agencies and organizations, and individuals, in order that duplication of effort and expense may be avoided, thus assuring that the commission's activities will not unnecessarily overlap or conflict with similar activities authorized by law and performed by established agencies.

History: En. Sec. 17, Ch. 238, L. 1971.

Effective Date
Section 18 of Ch. 238, Laws 1971 provided the act should be in effect from and after its passage and approval. Approved March 9, 1971.

Appendix C
Revised Guidelines

For Environmental Impact Statements (EIS) Required by the Montana Environmental Policy Act of 1971

Adopted by Environmental Quality Council, September 14, 1973

Table of Contents:

1. PURPOSE

The purpose of Section 69-6504 (b) (3) of the Montana Environmental Policy Act (MEPA) and of these guidelines is to incorporate into the agency decision-making process careful and thorough consideration of the environmental effects of proposed actions, and to assist agencies in implementing MEPA in a uniform, deliberate, and systematic manner.

2. POLICY

a. As early as possible and in all cases prior to any agency decision concerning major action or recommendation or a proposal for legislation that significantly affects the environment, state agencies shall, in consultation with other appropriate agencies and individuals, in both the public and private sectors, assess in detail the potential environmental impact in order that adverse effects are avoided and environmental quality is maintained, enhanced, or restored to the fullest extent practicable. In particular, it is especially important that alternative actions that will minimize adverse impacts shall be explored, and both the long- and short-range implications on the human environment and on nature shall be evaluated in order to avoid, to the fullest extent practicable, undesirable consequences for the environment as a whole.

   The language in Section 69-6504 in intended to assure that all agencies of the state shall comply with the directives set out in said Section "to the fullest extent possible" under their statutory authorization and that no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance.

b. The term "human environment" shall be broadly construed to include not only social, economic, cultural, and aesthetic factors, but also, and particulary, the biophysical properties of natural ecosystems, including plants, humans, and other animals, their relationship to each other, and with all environmental components of air, water, and land.

3. AGENCY PROCEDURES

a. Each agency shall establish its own formal procedures for:

   (1) Identifying those agency actions and decisions requiring environmental statements, the appropriate time prior to decision for the consultation required by Section 69-6504 (b) (3) and the agency review process for which environmental statements are to be available;

   (2) Obtaining information required in the preparation of environmental statements;

   (3) Designating the officials who are to be responsible for the environmental statements;

   (4) Consulting with and taking account of the comments of appropriate agencies, private groups, and the public, whether or not an environmental statement is prepared;

   (5) Preparing draft environmental statements.

      (a) In accordance with the policy of MEPA, agencies have a responsibility to develop procedures to provide to the public timely information and explanation of plans and programs with environmental impact in order to obtain the views of any interested parties. Initial assessments of the environmental impacts of proposed action shall be undertaken concurrently with initial technical, energy use, and economic studies, and when required, a draft environmental impact statement shall be prepared and circulated for comments in time to accompany a proposal through the agency review process. During the process, agencies shall:

         (1) Make provision for the circulation of draft statements to other appropriate agencies, selected private groups and individuals, and

for their availability to the public. (Where an agency has an established practice of declining to favor an alternative until public comments on a proposed action have been received, the draft environmental statement may indicate that two or more alternatives are under consideration.);

(2) Give careful consideration to the comments elicited from the aforementioned sectors; and

(3) Issue final environmental impact statements which clearly evidence a responsiveness to such comments. The purpose of this assessment and consultation procedure is to provide agencies, other decision-makers, and the public with an understanding of the potential environmental effects of proposed actions.

Agencies should attempt to balance the results of their environmental assessments with their assessments of the net economic, technical, and other benefits of proposed actions, and use all practicable means to avoid or minimize undesirable consequences for the environment.

(b) If an agency relies on an applicant for the submission of initial environmental information, the agency shall assist the applicant by outlining the type and quality of information required. In all such cases, the agency must make its own determinations on the applicant's evaluation of the environmental issues and the agency must assume responsibility for the scope and content of draft and final environmental statements.

(6) Meeting the requirements of Section 69-6504 (b) (3) for providing timely public information on plans and programs with environmental impact, including procedures responsive to Section 8 of these guidelines. These procedures should be consistent with the guidelines contained herein. Each agency should file a copy of all such procedures with the Environmental Quality Council (EQC) which will provide advice to agencies in the preparation of their procedures and guidance on the application and interpretation of the council's guidelines.

4. STATE AGENCIES INCLUDED

Section 69-6504 (b) (3) applies to all agencies of the State government. Each agency shall comply with the requirements unless the agency demonstrates that existing law applicable to its operations expressly prohibits or makes compliance impossible.

5. ACTIONS INCLUDED

The following criteria shall be employed by agencies in deciding whether a proposed action requires the preparation of an environmental statement.

a. Actions include, but are not limited to:

(1) Recommendations or favorable reports relating to legislation, including that for appropriations. The requirement for following Section 69-6504 (b) (3) procedure as discussed in these guidelines applies to both:

(a) agency recommendations on their own proposals for legislation; and

(b) agency reports on legislation initiated elsewhere. (In the latter case only the agency which has primary responsibility for the subject matter involved will prepare an environmental impact statement.)

(2) Projects, programs, and continuing activities: directly undertaken by state agencies; supported in whole or in part through state funds or involving a state lease, permit, license, certificate or other entitlement for use;

(3) Policy, regulations, and procedure making.

b. The statutory clause "major actions of state government significantly affecting the quality of the human environment" shall be construed by agencies from the perspective of the overall, cumulative impact of the action proposed (and of further actions contemplated). Such actions may be localized and seemingly insignificant in their impact, but if there is a potential that the environment may be significantly affected, the statement shall be prepared.

In deciding what constitutes "major action significantly affecting the environment," agencies should consider that the effect of many state decisions about a project or a complex of projects can be individually limited but cumulatively considerable. By way of example, two suitable illustrations can be drawn: (1) one or more agencies, over a period of years, commits minor amounts of resources at any single instance, but the cumulative effect of those individually minor commitments amounts to a major commitment of resources, or (2) several government agencies individually make decisions regarding partial aspects of a major action. The guiding principle is that the whole can be greater than the sum of the parts. The lead agency shall prepare an environmental impact statement if it is foreseeable that a cumulatively significant impact on the environment will arise from state action. "Lead agency" refers to the state agency which has primary authority for committing the state government to a course of action with significant environmental impact. As necessary, the Environmental Quality Council will assist in resolving questions of lead agency determination.

Finally, the determination of what constitutes "major action significantly affecting the human environment" will unavoidably involve considerable judgment on the part of the responsible agency. To assist in that judgment, the following points should be general considerations (but not viewed as final determinants):

(1) Is the action under consideration the first or the only governmental decision to be taken on the proposal?

(2) Is the action decisive; could it substantially change the nature of the proposal, stop the proposal, or allow it to proceed to full implementation?

(3) Is the action expected to have direct statewide or regional implications?

(4) Is the action fixed for a certain period of time not to be modified except under new conditions not previously known, or conditions of an emergency nature?

(5) Does the action deal with environmental conditions (physical, social, biological) which have been clearly recognized as being endangered, fragile, or in severely short supply; or clearly approaching a precarious level of quality, hardship, or public safety?

(6) Is the action intended as environmentally regulatory or protective?

(7) Does the action involve considerable expenditure?

(8) Would environmental conditions be substantially altered in terms of size, quality, well-being, availability, or type or use?

(9) Would environmental conditions be affected over a large geographical area?

(10) Would environmental effects be beneficial, adverse or both?

(11) Would environmental effects be short-term, long-term, or permanent?

(12) Would environmental effects be reversible?

(13) Will the action involve a reasonably important "segment" of opinion in a controversy?

c. When an agency responsible for the issuance of a state lease, permit, license, certificate, or other entitlement for use, should be able to foresee that the issuance of a large number of such entitlements will cumulatively, have a significant impact upon the environment, an environmental impact statement shall be prepared. Normal agency procedures, as delineated in Section 3 above, shall be used in the preparation of such an impact statement. Information supplied by applicants for these entitlements may be used or considered in the preparation of an impact statement, but such information may not be submitted by itself in place of an impact statement.

Section 69-6504 of the MEPA indicates the broad range of aspects of the environment to be surveyed in any assessment of significant effect. The MEPA also indicates that adverse significant effects include those that degrade the quality of the environment, and curtail the range of beneficial uses of the environment, and serve short-term, to the disadvantage of long-term, environmental goals. Significant effects can also include actions which may have both beneficial and detrimental effects, even if, on balance, the agency believes that the effect will be beneficial. Significant adverse effects on the quality of the human environment include both those that directly affect human beings and those that indirectly affect human beings through adverse effects on the environment.

6. CONTENT OF ENVIRONMENTAL STATEMENT

a. The following points are to be covered:

(1) A description of the proposed action including information and technical data adequate to permit a careful assessment of environmental impact by commenting agencies and the public. The amount of detail provided in such descriptions should be commensurate with the extent and expected impact of the action, and with the amount of information required at the particular level of decision making (planning, feasibility, design, etc.).

(2) The probable impact of the proposed action on the environment, including impact on ecological systems. Both primary and secondary significant consequences for the environment shall be included. A primary impact is one which generally results from the project input; a secondary impact is one which generally results from a project output. Primary impacts are usually more susceptible to measurement and analysis by an agency proposing an action because the primary impacts are more immediately related to an agency's area of responsibility and expertise. Secondary impacts, on the other hand, usually require analyses by a number of agencies because they are not within any single agency's area of responsibility or expertise.

(3) Any probable adverse environmental effects which cannot be avoided, should the proposal be implemented. If there are adverse environmental effects which are unavoidable, mitigative measures shall be proposed to minimize such adverse environmental impact.

(4) Alternatives to the proposed action:

Section 69-6504 (b) (4) requires the responsible agency to "study, develop, and describe appropriate alternatives to recommend courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." A rigorous exploration and objective evaluation of alternative action (including no action at all) that might avoid some or all of the adverse environmental effects is essential. In addition, there should be an equally rigorous consideration of alternatives open to other authorities. Sufficient analysis of such alternatives and their costs and impact on the environment should accompany the proposed action through the agency review process in order not to foreclose prematurely options which might have less detrimental effects.

(5) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term effects from the perspective that each generation is trustee of the environment for succeeding generations.

(6) Any irreversible and irretrievable commitments of natural and economic resources (including energy resources) which would be involved in the proposed action should it be implemented. This requires the agency to identify the extent to which the action curtails the range of alternative and beneficial uses of the environment.

(7) A discussion of problems and objections raised by other agencies and by private organizations and individuals in the review process where appropriate and the disposition of the issues involved.

(8) Insofar as it is practicable, a balancing of the economic benefits to be derived from a proposal with economic costs and environmental costs.

(9) Discussion of potential growth-inducing aspects of the proposed action.

(10) A listing of all agency personnel having chief responsibility for the preparation of the statement; a brief account of the formal education, training, and professional experience of such personnel; and a description of the sources of data, research or field investigation on which the statement and its conclusions are based.

b. Each environmental statement shall be prepared in accordance with the precept in Section 69-6504 (b) (1) that all agencies "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and decision making which may have an impact on man's environment."

c. Agencies which are required to submit statements under Section 102 (2) (c) of the National Environmental Policy Act may, with EQC approval, substitute copies of that statement in lieu of the Section 69-6504 (b) (3) requirement of the MEPA.

d. Appendix I prescribes the form of the draft environmental statement.

e. Appendix II suggests environmental values to be considered in connection with the preparation of impact statements.

7. STATE AGENCIES TO BE CONSULTED IN CONNECTION WITH PREPARATION OF ENVIRONMENTAL IMPACT STATEMENTS

A state agency considering an action requiring an environmental statement for which it takes primary responsibility shall consult with and obtain the comment on the environmental impact of the action of state agencies or institutions with jurisdiction by law or special expertise with respect to any environmental impact involved.

In addition, any state agency responsible for a draft environmental statement may seek comment from appropriate federal and local agencies, from private individuals, organizations and institutions, and in particular from private parties whose interests are likely to be significantly affected by the proposed action.

Agencies seeking comment shall determine which one or more of the agencies or institutions are appropriate to consult on the basis of the areas of expertise. It is recommended that these agencies and institutions establish contact points for providing comments on the environmental statements and that departments from which comment is solicited coordinate and consolidate the comments of their component entities. It is further recommended that each agency establish a "fund file" of expertise available from the public and private sectors. The requirement in Section 69-6504 (b) (3) to obtain comment from state agencies having jurisdiction or special expertise is in addition to any specific statutory obligation of any state agency to coordinate or consult with any other agency. Agencies seeking comment shall establish time limits of not less than thirty (30) days for reply, after which it may be presumed, unless the agency consulted requires a specified extension of time, that the agency consulted has no comment to make. Agencies seeking comment should endeavor to comply with requests for extensions of time up to fifteen (15) days. Failure of EQC to publicly comment on any agency's environmental statement does not imply tacit approval of that agency action.

8. USE OF STATEMENTS IN AGENCY REVIEW PROCESSES: DISTRIBUTION TO ENVIRONMENTAL QUALITY COUNCIL: AVAILABILITY TO PUBLIC

a. Agencies will need to identify at what state or stages of a series of actions relating to a particular matter the environmental statement procedures of these guidelines will be applied. It will often be necessary to use the procedures both in the development of a state program and in the review of proposed projects within the program. The principle to be applied is to obtain views of other agencies and the public at the earliest feasible time in the discussion and development of program and project proposals. Care should be taken to avoid duplication but when action is considered which differs significantly from other actions already reviewed pursuant to Section 69-6504 (b) (3) of the MEPA, an environmental statement shall be provided.

b. Two (2) copies of draft environmental statements, and two (2) copies of the final text of environmental statements (if prepared) together with all comments received thereon by the responsible agency from all other agencies and from private organizations and individuals, shall be supplied to the office of the executive director of the Environmental Quality Council. It is important that draft environmental statements be prepared and circulated for comment and furnished to the Environmental Quality Council, the governor, and the public at the earliest possible point in the agency review process in order to permit meaningful consideration of the environmental issues before an action is taken. It is not the intent of the MEPA that the environmental statement be written to justify decisions already made. No administrative action subject to Section 69-6504 (b) (3) shall be taken sooner than sixty (60) days after a draft environmental statement has been circulated for comment, furnished to the council and except where advance public disclosure will result in significantly increased costs of procurement to the government, made available to the public pursuant to these guidelines. If the originating agency has a full and good faith consideration of the environment in its plans, and if this is reflected in favorable comments from review agencies and the public, the draft statement may be considered as satisfying the requirement of MEPA for a detailed statement. Agencies satisfying the requirement of MEPA with the draft statement must submit two (2) copies of all comments received thereon together with formal notification of the final decision on the proposed action. Agencies must furnish the same information (final decision and all comments on draft) to all commenting entities, whether public or private, as a logical termination to the process. In cases where the final environmental statement is required administrative action shall not be taken sooner than thirty (30) days after the final text has been made available to the council and the public. If the final text of an environmental statement is filed within sixty (60) days after a draft statement has been circulated for comment, furnished to the council and made public pursuant to this section of these guidelines, the thirty (30) day period and sixty (60) day period may run concurrently to the extent that they overlap.

In those instances where an agency has, after careful consideration, concluded that a proposed action or project does not require the preparation of a final environmental impact statement, the EQC, through the office of the executive director, may, upon request from the agency, remove any further time restrictions for the implementation of such agency actions or projects.

c. With respect to recommendations or reports on proposals for legislation to which Section 69-6504 (b) (3) applies, a draft environmental statement may be furnished to the appropriate legislative committee and made available to the public pending transmittal of the comments as received and the final text, if required.

d. All agencies shall make available to the public all the reports, studies, and other documents that may and should underlie the draft and final impact statements and comments.

e. Where emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of these guidelines concerning minimum periods for agency review and advance availability of environmental statements, the agency proposing to take the action shall consult with the EQC about alternative arrangements. It is important that the agency provide the EQC with a precise, factual statement detailing the nature of the emergency, and the reasons the agency feels it must depart from normal procedural requirements. Similarly, where there are overriding considerations of expense to the state or impaired program effectiveness, the responsible agency shall

consult with the EQC concerning appropriate modifications of the minimum period.

f. In accord with the MEPA, agencies have an affirmative responsibility to develop procedures to insure the fullest practicable provision of timely public information and understanding of agency plans and programs with environmental impact in order to obtain the view of interested and significantly affected parties.

These procedures shall include, whenever appropriate, provisions for public hearings, and shall provide the public with relevant information including information on alternative courses of action. In deciding whether a public hearing is appropriate, an agency should consider: (i) the magnitude of the proposal in terms of economic costs, the geographic area involved, the uniqueness or size of commitment of resources involved, and the amount and types of energy required; (ii) the degree of interest in the proposal, as evidence by requests from public and from state and local authorities that a hearing be held; (iii) the complexity of the issue and the likelihood that information will be presented at the hearing which will be of assistance to the agency in fulfilling its responsibilities under the act; and (iv) the extent to which public involvement already has been achieved through other means, such as earlier public hearings, meetings with citizen representatives, and/or written comments on the proposed action. Agencies which hold hearings on proposed administrative actions or legislation shall make the environmental statement available to the public at least thirty (30) days prior to the time of the relevant hearings. Hearings shall be preceded by adequate public notice and information to identify the issues and to obtain the comments provided for in the guidelines and should in all ways conform to those procedures outlined in the Montana Administrative Procedure Act, where applicable, R.C.M. 1947, Section 82-4201, *et. seq.*

g. The agency which prepared the environmental statement is responsible for making the statement and the comments received available to the public, including inter-agency memoranda when such memoranda transmit comments of agencies upon the environmental impact of proposed actions subject to Section 69-6504 (b) (3).

h. Agency procedures prepared pursuant to Section 3 of these guidelines shall implement these public information requirements and shall include arrangements for availability of environmental statements and comments at the head and other appropriate offices of the responsible agency.

9. APPLYING SECTION 69-6504 (b) (3) PROCEDURE TO EXISTING PROJECTS AND PROGRAMS

The Section 69-6504 (b) (3) procedure shall be applied to major state actions having a significant effect on the environment even though they arise from projects or programs initiated prior to enactment of the MEPA on March 9, 1971. Where an agency demonstrates that it is not practicable to reassess the basic course of action, it is still important that further incremental major actions be shaped so as to minimize adverse environmental consequences. It is also important in further action that account be taken of environmental consequences not fully evaluated at the outset of the project or program.

10. SUPPLEMENTARY GUIDELINES, EVALUATION OF PROCEDURES

These revised guidelines reflect the experience of pertinent state agencies and the EQC subsequent to the time the interim guidelines were issued. It is believed that this experience has made the guidelines more helpful and comprehensive. As more experience is gained, and as more comments are received, these guidelines will, from time to time, be further revised.

Agencies are encouraged to conduct an ongoing assessment of their experience in the implementation of the Section 69-6504 (b) (3) provisions of the MEPA and in conforming to these guidelines. The EQC will welcome comments on these areas at any time. Such comments should include an identification of the problem areas and suggestions for revision or clarification of these guidelines to achieve effective coordination of views on the environmental factors (and alternatives, wherever appropriate) of proposed actions without imposing unproductive administrative procedures.

Appendix I of Guidelines

The environment statement submitted to the Environmental Quality Council should cover the following items:

Status: ( ) Draft
( ) Final Environmental Statement

Name the responsible state agency (with name of operating division where appropriate).

Kind of action:
( ) Administrative
( ) Legislative

1. Description of action indicating what geographic area of political subdivision is particularly affected.
2. Environmental impact.
3. Adverse environmental effects.
4. Alternatives considered.
5. The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity.
6. Any irreversible and irretrievable commitments of resources.
7. (a) (For draft statements) List all agencies from which comments have been requested.

   (b) (For final statements) List all agencies and sources from which written comments have been received. Discussion of comments and disposition of issues involved.
8. Balance of economic benefits with economic costs and environmental costs.
9. Potential growth-inducing effects.
10. All agency personnel having chief responsibility for the preparation of the statement; a brief account of the formal education, training, and professional experience of such personnel; and a description of the sources of data, research or field investigation on which the statement and its conclusions are based.
11. Date draft statement and final statement was made available to the governor, the Environmental Quality Council, and public.

Draft environmental statements should be concise, but in sufficient detail to allow a reviewer with appropriate expertise to grasp the essence of the action and comment intelligently.

In cases where final environmental statements are prepared, this format should be followed considering in detail the points covered in Section 6 of these guidelines.

Appendix II of Guidelines

The following are some environmental variables that could be affected by agency actions and programs. The number of variables to be analyzed in a draft EIS is subject to the lead agency's discretion and primarily depends on the type and magnitude of the proposed action.

Terrestrial and aquatic life and habits

Water quantity, quality, and distribution

Soil quality, stability, and moisture

Vegetation cover, quantity and quality

Natural beauty and aesthetics

Access to and quality of recreational and wilderness experiences

Historic and archeological sites

Unique, endangered, fragile or limited environmental resources

Air quality

Social structures and mores

Environmental diversity represented by roadless and natural areas

Cultural uniqueness and diversity

Local and state tax base and tax revenues

Agricultural production

Demands on environmental resources of air, water, land, energy

Quantity and distribution of community and personal income

Human health

Transportation networks, traffic flows

Quantity and distribution of employment

Distribution and density of population and housing

Demands for government services, i.e., water, waste disposal, schools, police, fire, health, streets

Industrial and commercial activity

Appendix D

Documents Submitted in Compliance with MEPA

July 1, 1973 to June 30, 1974

Lead Agency	Environmental Impact Statements	Agency Impact Determinations*
Department of Fish and Game	0	7
Department of Health and Environmental Sciences	33	55
Department of Highways	5	39
Department of Livestock	1	1
Department of Natural Resources and Conservation	7	0
Department of State Lands	5	4
Department of Intergovernmental Relations	1	0

*New terminology referring to a written document in support of a determination that, if the proposed action were taken the anticipated effects on the human environment would not be significant (formerly called a negative declaration)

Appendix E

Environmental Quality Council

Program Cost Summary

July 1, 1973 - June 30, 1974

General Fund:

Salaries	69,070.17		
Other Compensation	2,225.00		
Employee Benefits	7,762.46		
		79,057.63	
Contracted Services	7,713.15		
Supplies	1,402.10		
Postage & Telephone	2,848.60		
Travel	9,293.26		
Repair & Maintenance	343.60		
Other Expense	1,319.95		
		22,920.66	
Equipment		3,467.26	
Total General Fund Expense			$ 105,445.55

Ford Foundation Grant:

Salaries	70,283.18		
Other Compensation	157.65		
Employee Benefits	6,415.92		
		76,856.75	
Contracted Services	10,383.51		
Supplies	1,416.32		
Postage & Telephone	2,339.81		
Travel	6,575.52		
Repair & Maintenance	275.07		
Other Expense	2,612.86		
		23,603.09	
Equipment		3,293.18	
Total Grant Expense			$ 103,753.02
Grand Total			$ 209,198.57