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A Retrospective: The Golden Years

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A RETROSPECTIVE: THE GOLDEN YEARS

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While there were notable American writers expressing concerns about the use (and abuse) of the earth's precious natural resources, governmental action to address those issues was virtually unknown until the sixth decade of the twentieth century. Lee Metcalf, a U.S. Representative and then Senator from Montana was among the few progressive decision-makers in this country to begin tipping the balance in favor of preservation of resources over development. Lee was not a hunter, fisherman, or hiker. His political inclinations arose from a sense of justice. In his early legal career in Montana he had direct experience with the imbalance of power when the consumer, whether a farmer or working person, faced big business. And he would not tolerate that imbalance.

In the mid 50's he became aware of the significant damage to forests and rivers caused by the U.S. Forest Service policy of spraying DDT on forests to control spruce-bud worm kills. In 1956 and 1957 he sponsored legislation to significantly increase funding for research into the toxic effect of large-scale spraying on the environment. The results of these studies served as the basis for Rachael Carson's *Silent Spring*,

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1. In 1970, the energy industry, together with the federal government, set its sights on Montana's coal reserves, calling for the opening of land to strip mines and gargantuan coal-fired generation plants. Montanans knew something about the drastic results of mineral extraction—having felt its effects ever since gold was discovered in Western Montana in 1864—and between 1970 and 1980, the state imposed the best environmental protections in the nation, to preserve its natural beauty and the safety of its water and soil for future generations. Rep. Francis Bardanouve called the 1970s "The Golden Years" in Montana's legislative history, and I had a ringside seat.

I served in the Navy and returned home to Montana in the spring of 1971 to begin working as an attorney for the Montana legislature. Because the legislature was not in session during the 1972 Constitutional Convention, I worked for Convention Delegates and Convention staff drafting amendments to various Delegate proposals. I later served two terms in the Montana legislature. I observed and was directly involved in the construction of these new laws protecting the environment. I met and worked with most of the characters central to that time in Montana politics. I've drawn on my personal recollections, on news stories, and on legislative histories in compiling the following history. My focus in this narrative is on the enactment of the Montana Environmental Policy Act, the constitutional right to a healthy environment, the development of the Montana Facility Siting Act and the administrative process which followed the Siting Act on Colstrip Units 3 and 4.

considered to be the inspiration for the environmental movement. He was a co-sponsor of the Clean Air Act of 1963, the National Wilderness Act in 1964, the Water Quality Act of 1965, and Frank Church's Wild and Scenic Rivers Act of 1968 and led the opposition to the dam on the Yampa River which would have flooded Dinosaur National Monument. While Lee Metcalf was at the forefront of the national environmental movement in the 50's and 60's, policymaking within the state was still in the backwaters of the movement.

From subsistence farming to the giant timber and mining industries, Montana's economic fortunes had been derived from the land since before statehood. Economic interests had a "stranglehold" on the three policy-making branches of government: the Legislature, the Supreme Court and the Governor. K. Ross Toole in *The Rape of the Great Plains*, put it succinctly:

> There was little turnover in the legislature. It met for a brief sixty days every two years and no student of the history of that body could amass much evidence that it was other than "kept" in every real sense of the word. Aside from those few areas beyond the purview of the Anaconda Company, the Montana Power Company and Northern Pacific Railroad, the Legislature did what it was told.[2]

But that stranglehold was loosened in 1971 and one of the initial proponents of environmental legislation was a Republican, George Darrow. Darrow was born in Wyoming, and attended the University of Michigan, graduating with a degree in economics. He worked as a roughneck in the oil fields, served as an enlisted sailor during World War II, and returned to the University to complete a degree in geology. He worked for Hess oil in Casper, Wyoming, and was transferred to Billings where he later set up an independent geology consulting business. He was first elected to the Montana House in 1967, served two terms and moved to the Senate in 1973. Although he ran as a Republican, Darrow was what would later have been considered an "environmentalist." He spent summers hiking in the Beartooth Mountains, and he and his wife operated a dude ranch outside Yellowstone Park.

It was acceptable then for Republicans to support environmental issues: the predisposition of the party against government regulation had not yet become dogma, and many Republicans, on balance, cared more about preserving Montana's natural beauty than they did about economic

2. K. ROSS TOOLE, THE RAPE OF THE GREAT PLAINS (1976).

concerns. Darrow persuaded fellow House Republican leadership (Speaker Jim Lucas and Majority Leader Tom Harrison) to co-sponsor a bill modeled after the National Environmental Protection Act of 1969, signed by President Nixon a year earlier, Darrow described HB 66 as "basic landmark legislation" which would put Montana "in the forefront among all other states in its environmental program."[3]

The bill was initially recommended by the Montana Conservation Council headquartered in Billings, of which Darrow was a member.

Darrow contended that his legislation was designed to impose a unified systematic approach toward environmental problems because "we must recognize that all our industrial, economic and social actions are interrelated with the environment in complex ways." HB 66 was not only co-sponsored by House Republican and Democratic leadership but also supported by Democratic Governor Forrest Anderson.

While not actually setting pollution standards, HB 66 required state regulatory agencies to coordinate with one another and mandated these agencies to include a "detailed statement" on the environmental impact of any decision or recommendation affecting the environment. The bill also established the Environmental Quality Council as a joint state oversight agency to create "a new partnership" between the legislative and executive branches of government "to [e]nsure that the 'unique quality' of the Montana environment would be preserved."

The bill was assigned to the House Committee on Environment and Natural Resources and was heard on January 18, 1971. The Executive Director of the Montana Conservation Council, Will Clark, a professor at Eastern Montana College reassured the committee hearing the bill:

> I believe that one needs to also state what the Bill is not. It is not a bill controlling or setting regulations for any specific land or resource use. It is not a measure to make the state one vast park and playground. It is not a piece of legislation that anyone need fear, for its goals are constructive and long range. It is not a device for throttling industrial or agricultural development—and in fact, it will encourage and foster economic development that is socially responsible and environmentally sound.

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3. Although it is unclear whether Nixon understood the reach of the federal Act, he seized upon it as a political demonstration of his support for the environment. When he signed the Act, he prophesized: "The 1970s must absolutely be the years when America pays its debt to the past by reclaiming the purity of its air, its waters and our living environment. It is literally now or never."

Testifying in support of the bill were pioneers of the conservation movement in Montana, including Cecil Garland of the Montana Wilderness Society. A year later Garland would succeed in his long-term effort (with the substantial help of Lee Metcalf) to create the Scapegoat Wilderness. Dorothy Eck, who had encouraged a young Dorothy Bradley in her successful run for the legislature in 1970, testified in support of the bill on behalf of the Montana League of Women Voters. A year later, Eck served as a Constitutional Convention Delegate and was instrumental in the adoption of an environmental rights provision, something no other state constitution had. Don Aldrich spoke on behalf of the Montana Wildlife Federation. He said: "House Bill 66 not only recognizes that all persons should be entitled to a healthful environment, but it goes on to say that we all have a responsibility to contribute to the preservation and enhancement of the environment."

Also among the proponents of the bill were representatives of the wood-product and oil and gas industry, the Montana Chamber of Commerce, and the Montana Stock Growers Association. No one appeared in opposition. The major industry lobbyists from the utility, mining, and railroad interests were conspicuous in their absence from formal participation in either the House or Senate. But one can be assured they had their collective eye on the bill.

Several minor amendments were made in committee action and the bill was given a do-pass and sent to the Senate. An identical hearing occurred in the Senate. The Bill passed both houses with few dissenters and was signed by Governor Anderson in March 1971.

Rep. Darrow was appointed to the New Environmental Quality Council and was elected as its first Chair. At the first meeting of the Council, Darrow told the members "from time to time their work (the Council's work) will have an influence on industry . . . when industry needs a permit from a state agency. The state agency involved can require the industry to provide an environmental impact statement so the agency can be assured that environmental consequences have been anticipated."

While the proponents of the new law sought a more uniform approach to environmental regulation, the legislation created as many questions as solutions.

If, as Will Clark explained, the law did not control or set regulations, then what was its legal effect on state and local entities that did set such rules? How was the Environmental Quality Council supposed to assure the coordinated approach contemplated by MEPA? Was it only a research arm of the legislature, limited to making recommendations about environmental policy? Or was it supposed to be a super-environmental

watchdog reviewing all environmental impact statements to make sure the regulators were doing their job? The federal counterpart, NEPA, existed as an executive branch agency. MEPA was a legislative branch agency.

Was there separation of powers issues when the EQC leaned on the Department of Natural Resources for failure to comply with its regulations? All these issues would be addressed by the legislature and the courts over the next ten years.

One may wonder why the most powerful industry lobbyists chose to stay out of the effort to pass the Montana Environmental Policy Act. There are several obvious reasons. One was that Rep. Darrow had garnered such support for the bill, from both sides of the aisle, that it would have been difficult for big business to oppose it. And certainly, the industry lobbyists took Rep. Darrow's word that the Act would not have any substantive effect but was only a measure designed to assure cooperation and interchange among the various executive branch agencies charged with administering environmental laws. Rep. Darrow had greased the skids for the bill so well that it would have been difficult for big business to oppose legislation that was supported by both sides of the aisle. And, it was only a measure designed to assure cooperation and interchange among the various executive branch agencies charged with administering environmental laws.

But perhaps the most significant reason for their forbearance was that the utility lobby was simultaneously engaged in an effort to slip Senate Bill 204 through the 1971 session, unnoticed. This bill would have exempted permit decisions on new power plants from air and water pollution standards and vested exclusive authority in the industry-friendly Montana Public Service Commission. If this bill passed, it would make the new MEPA irrelevant.

Sponsored by a well-liked and respected Democrat, John C. "Skeff" Sheehy, "The Montana Electric Land Use Act" provided that the Montana Public Service Commission would decide matters related to permitting new electric power plants. The bill would have given the Public Service Commission complete and exclusive control over the location and pollution-control features of both coal-fired and hydroelectric plants. Sheehy was told when he was given the bill by a staff member of the PSC that it was a minor housekeeping bill. The bill, SB 204, was assigned to the Senate Agriculture Committee, which recommended its approval, and it passed the Senate 30–22.

When SB 204 was heard in the House Business and Industry Committee, only two witnesses appeared, both in support: William Johnston, of the Public Service Commission, and Bob Corette, a lobbyist for the Montana Power Company. No one appeared in opposition to the bill.

When the bill was debated before the full House on second reading, Rep. Darrow recognized its inherent dangers, and rose to oppose it. He warned that the bill created a "state within a state." He described the effect it would have: "Every major facility becomes a Vatican within the State of Montana subject only to the regulation such as it may be of the Montana Public Service Commission." He continued, "The Public Service Commission is not environmentally oriented. The bill has the effect of exempting utilities from our existing air and water quality pollution control laws and regulations which every other industry has to abide by."

He was joined by Francis Bardanouve (D–Harlem) who led the fight to move the bill back to committee. Republican Representative Harrison Fagg, a Billings architect, joined Darrow and Bardanouve, saying the bill could "become one of the features that could destroy Montana. Fagg said, "You're going to see Eastern Montana covered with black smoke." He claimed that the result of poorly designed pollution control installations would be to "boil fish in the water" from the heated water discarded by such plants. The vote to send it to the House Environment and Resources Committee passed on a thin margin of 51–48.

When the bill arrived back in the new committee, Montana Power and Montana-Dakota utility lobbyists had amendments ready which made it clear that any decision by the Montana Public Service Commission to approve a new plant would not pre-empt Montana air and water quality pollution standards. The bill was reported back to the floor with these amendments, and after another bitter floor fight, was approved with the amendments, again by the narrowest of margins, 51–49.

The close vote can be attributed, in part, to support given the bill by then House Minority leader (and later Lieutenant Governor) Bill Christiansen, a Hardin Democrat. Christiansen had long supported coal development in Eastern Montana. While he acknowledged there were problems with the coal plant in Billings, he promised, "That won't be repeated in the future." Christiansen believed that the industry could solve air pollution problems by using new technology and constructing coal-fired generation plants away from areas with temperature inversions

When the bill returned to the Senate with the House amendments, Sen. Sheehy, realizing its mischief, disavowed the bill and Jack Rehberg (R–Billings) took it over. Rehberg recognized that if the House did not concur in the amendments, the bill would end up in a conference committee and likely die. Ironically, it was the former sponsor of the bill, Senator Sheehy, who led the fight to reject the House amendments. He argued that the amendments took away from the Board of Health the authority to determine whether air pollution standards would be met by the proposed

plant, and they gave that authority to the PSC. The Senate refused to concur in the amendments on a vote of 29–24.

The bill was sent to a conference committee chaired by Sen. Harry Mitchell, in which he and Sen. Sheehy insisted that if the bill were to pass, it had to contain a provision that pollution-control issues must be decided by the Board of Health. The utilities, of course, could not accept that amendment because the entire "one-stop shopping" purpose of the bill would be lost. The utilities did not want more than one agency dealing with siting decisions. SB 204 died a quiet death in the conference committee upon adjournment of the 1971 legislative session.

Unbeknownst to the Montana policy makers who enacted MEPA, significant plans were being made to develop Montana's vast coal deposits. The Fort Union coal formation, most of which underlies the plains of Eastern Montana, contained an estimated 1.3 trillion tons of low-sulphur coal, and national mining and utility conglomerates all had their eye on developing it. James Smith, an assistant secretary for the U.S. Department of the Interior, was supervising what would become the *1971 North-Central Power Study*. This "study" was performed by "19 investor owned public utilities, six cooperatives, two public power districts, one federal and eight municipal representatives" and was conducted by "technical expertise and the views of practically all bulk power suppliers in a 1,000,000 square mile area."

The energy source central to the study was the Fort Union coal formation. It proposed the development of enormous strip mines and mine-mouth generation plants. For Montana, the plan proposed the construction of twenty-one 700-megawatt generation stations and associated transmission lines. At the time, the largest generation station in Montana was a 130-megawatt plant in Billings, Montana, which was leviathan by Montana standards.

Although the study was not published until October of 1971, SB 204 was surely written with the knowledge that strip-mining of coal and mine-mouth generation was the energy development wave of the future.

A New Breed

1972 was a watershed year for Montana, particularly as it related to environmental policy. Two major events shaped Montana's political landscape. First, the Presidential election featured President Richard M. Nixon seeking re-election against the progressive Senator from South Dakota, George McGovern. Senator McGovern conducted a grass-roots campaign and earned the Democratic nomination. But, in doing so, created a schism between the old party faithful and the "young turks" who

became involved in politics to help him gain the nomination. In the November 1972 election, McGovern lost by one of the largest landslides in American history. But his legacy survived in the form of new and progressive policy makers entering the public arena. The 1972 election turned the Montana House of Representatives from a three consecutive session control by the Republicans to a 54–46 Democratic majority. Former Speaker Jim Lucas was now an ordinary legislator and Democrats chaired the substantive House committees. The Democratic Senate maintained its majority, but the advantage was slimmer at 27 Democrats and 23 Republicans.

Right to a Clean Environment

Delegates elected in the fall of 1971 convened in January of 1972 to rewrite a new Montana Constitution. The Montana Supreme Court had ruled that because two offices could not be held at the same time, sitting office holders from the legislature and local government were barred from participating. The collateral consequence of this ruling was that a fresh new group of Montanans were elected to write the new Constitution.

The organizers of the Convention hired a young and talented staff in preparation for its work. During the summer and fall of 1971, these energetic workers wrote position papers on issues to be taken up by the Convention. Among the staff was Rick Applegate, assigned to assist the Bill of Rights Committee. Applegate wrote an in-depth analysis of the Bill of Rights which included a new right to a clean and healthy environment, and a profoundly different prospective on ownership of lands and resources, the "public trust" doctrine.

I arrived back in Helena the week before the primary election for delegates to the Constitutional Convention, to learn that my father had filed candidacy papers on my behalf, to be a delegate from Lewis and Clark County. In the primary, I was elected as one of the six Democrat candidates to appear on the November election ballot. I spent the summer preparing to take the Montana Bar exam and little time campaigning. In the fall, voters cast ballots for six delegates. Only one Democrat was elected, Geoff Brazier. I came in seventh.

After I passed the bar exam, the Legislative Council hired me as their sole attorney. I worked there until the end of the 1974 session. During my tenure, the Council significantly expanded its staff. When I left, the legal staff consisted of six attorneys. My duties included preparing reports of the interim legislative committees' studies and drafting bills for legislators. I worked on a number of bills passed during the two annual sessions (1973 and 1974). Because I was familiar with drafting statutes, I also assisted Constitutional Convention delegates with their proposals. I

observed most legislative deliberations during that time period, and also a good portion of the Convention committee hearings and floor debates.

Public concerns about air and water quality degradation occupied a substantial part of the deliberations of the Constitutional Convention. It was no coincidence that Delegate Proposal No. 1, sponsored by Republican Earl Berthelson, called for the establishment of "a right to a healthful environment." Delegate Jerome Cate, a Billings Democrat, proposed that the environment be declared "a public trust." Delegate C.B. McNeil, a Kalispell Republican, wanted a right to a "quality environment." Delegate Daphne Bugbee, a Missoula Democrat, offered a provision requiring the state to maintain its natural beauty, and private property "shall be subject to reasonable regulation." Delegate Robert Campbell, a Missoula Democrat, drafted a provision guaranteeing "environmental rights" and directed the legislature to "enhance a high-quality environment as a public benefit." And, Delegate Louise Cross, a Democrat from Eastern Montana, submitted a comprehensive proposal imposing a requirement that the State "maintain and enhance a high quality environment," the sole beneficiary of which was the Montana citizen, who had "the duty to maintain and enhance the trust and the right to enforce it by appropriate legal proceedings against the trustee."

These proposals were all assigned to the Natural Resources Committee, of which Delegate Cross was the Chair. Predictably, these varying proposals divided the Committee. Among the most divisive were proposals to adopt the public trust doctrine. Some delegates perceived the concept as an intrusion on private property rights. Delegate Johnson expressed his opposition to an amendment offered by Delegate Cate, which would adopt the doctrine: "I think if you want socialism to step in the door, just vote for what he proposed." After sometimes heated debates, a proposal supported by a majority of the committee was sent to the floor of the Convention. Delegate McNeil, the manager of the recommendation on the floor, described the proposal as "the strongest constitutional environmental section of any existing state constitution." The recommendation contained neither a public trust provision nor a right to a clean environment.

The Chair of the Committee, Delegate Cross, began the floor debate describing the work of the committee and explaining that the Committee agreed on all but one section, the one on the environment itself. She disputed Delegate McNeil's characterization that the section was the strongest in the nation. She considered the section "not only weak, but possibly restrictive in a direction which is not readily apparent." She characterized environmental concerns as "an issue of recent vintage." She said "Constitutionally speaking, it is a new concept, and we must begin at point zero. After a month of trying to come to grips with the issue, I began to

feel like the environment was like the weather; we all talk about it but doing something about it is a horse of a different color. It is *the* important issue of our time."

The majority provision did not guarantee any environmental rights and imposed a duty on the State and each person "to maintain and enhance the environment of the state . . . ." Delegate Marshall Murray, a fellow Kalispell Republican moved for its adoption. During the debate on the motion, proponents of a public trust attempted unsuccessfully to amend the section. Ironically, one of the arguments against a stronger provision cited Darrow's Environmental Policy Act as an example of how the legislature had already given protection to the environment. Finally, Delegate Campbell successfully moved to amend the proposal leaving the final version to read: "The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations." But this amendment fell far short of creating a constitutional right to a clean and healthy environment.

The floor debate on the environmental provision (Article IX) was long, contentious, and often tedious. Later during the Convention, the delegates took up the inalienable rights provision. The recommended proposal from the Bill of Rights Committee enumerated the inalienable rights to include pursuing life's basic necessities; defending lives and liberty; acquiring property; and seeking safety, health, and happiness. These were simply a repeat of those enumerated in the 1889 Constitution. Delegate Burkhardt moved to amend the provision by adding a right to a clean and healthful environment. Burkhardt touted his amendment as no more than a non-substantive clarification of Article IX. He suggested that the right was self-evident, and "I don't care to belabor the issue."

Wade Dahood, the chair of the Bill of Rights Committee asked Burkhart whether he intended his amendment to provide an independent right of action for citizens whose health or property was not directly affected by the challenged action to initiate a lawsuit. Dahood had resisted any proposals giving standing to citizens raising challenges to environmental regulations or decisions. Such proposals had been raised and rejected during the debates on the environmental provision. Burkhardt assured Dahood that he did "not see it as an overt attempt to slip in with the opportunity to sue." Dahood, not wishing to suggest he didn't trust his colleague, added for the record "that this amendment does not have as one of its purposes an attempt to circumvent the votes that were taken with respect to the Natural Resources motions that attempted to put in theories with respect to the environment that were rejected by a majority of these constitutional delegates. And I trust that this is not the intention of the mover of the amendment, and if that be correct, then I would have no

objection to the amendment." Burkhardt responded: "I did not vote for the public trust concept because I felt it had been an emotional, distorted issue and that it would have been misunderstood; and it seems to me that we are providing a clear intent. It does present the right of every person."

In ten minutes of the Convention debates, a right to a clean and healthful environment was added to the list of inalienable rights. This new constitutional guarantee did not create a public trust but would serve as a basis for challenging any governmental action harming the environment. The amendment passed 79–7 and I so clearly remember the wry smile spreading across staffer Applegate's face when the vote was announced.[4]

The 1972 election produced a bevy of new, young, progressive legislators for the 42nd Legislature assembling in January 1973. These legislators came primarily from urban areas of the state and were different from their predecessors in several important respects. Ross Toole characterized it: "The first session of the new legislature, 1973, bore about as much resemblance to previous sessions as Congress bears to the Politburo." He explained the difference:

> The initial and most shocking change was immediately apparent. There was not a bookstore in the state that could keep *Robert's Rules of Order* in stock. If legislators were fractious and undisciplined, they did not miss committee meetings or votes. They did not, as of old, read newspapers at their desks; if there was a lull, they were much more apt to be found reading their college texts . . . It was the committee hearings, however, that represented the most drastic change. It was a rare committee, indeed, that did not find itself inundated by a flood of people. These hearings by those committees which had bills pending concerning the environment were hard pressed to find space for people to attend. Often these hearings were held at night so the entire House chamber and gallery could be used; on several occasions the hearings were moved to the auditorium of Helena High School.[5]

The New Legislature

4. In 1999, Justice Trieweiler's historic opinion in *Montana Envtl. Info. Ctr. v. Dep't of Envtl. Quality*, 1999 MT 248, ¶ 64 relied upon this provision, ignored Delegate Dahood's record statement, and recognized that a private right of action existed to enforce this provision and any state action which infringed on that right implicates a strict scrutiny analysis.

5. TOOLE, *supra* note 2, at 217-18.

The new Constitution required the legislature to conduct all its sessions, including conference committees in the open. In prior years, the committee chair would excuse the public during the actual committee debate and vote on a bill, and all conference committee sessions were done in private. Public interest groups sprang up like mushrooms after a rainstorm. Not only were these special interests allowed to participate in policy making, but they were expected to, and their information was considered essential to committee deliberations. The openness of the Constitutional Convention process influenced the entire political process.

In August of 1972, at the Montana Democratic platform convention Representative Dick Colberg from Billings and Representative Dorothy Bradley from Bozeman successfully persuaded the Convention to add a plank calling for a suspension of all coal development in Montana until measures could be devised to assure that such development would take place in a way that minimized its effect on the environment. The measure passed, but created a divisive debate among the various candidates, many of whom saw coal development as the solution to Eastern Montana's depressed economy. Mining coal and building electric generation plants and associated transmission lines would not only provide new jobs but would significantly improve the local government tax base.

In September of 1972, a group of Eastern Montana ranchers formed a nonprofit corporation called the Northern Plains Resource Council. Fearing their collective concerns about coal development were not reaching policy makers the group banded together to make a louder noise about the adverse effects mining would have on their land and water. The group's top priority was to see a moratorium on coal development passed in the upcoming legislative session. Pat Sweeney, a young activist staff member for the Council declared: "We'd like to see a moratorium on strip mining so we can check all the alternatives before we move ahead." The Council also filed suit against the Montana Power Company alleging that its proposed construction of two 350-megawatt power plants in Colstrip, Montana (Units 1 and 2) were proceeding without a permit and adequate environmental impact statement, Sweeney said his group "was violently against the construction of the Colstrip plant."

During the summer and fall of 1972, Lee Metcalf was campaigning in what would turn out to be his last and closest U.S. Senate race against State Senator and Helena area rancher Hank Hibbard. Metcalf gave serious consideration to stepping down after his second term. It was not until late November of 1971 that he decided to stand for reelection, which, at the time, was considered very late to start a U.S. Senate race. Instead of campaigning, Metcalf remained in Washington working on

legislation among which was a resolution calling for a moratorium on coal development, nationwide. Hibbard, a third generation Montanan with a square jaw and cowboy hat had spoken in favor of coal development in previous sessions of the legislature. Switching gears, Sen. Hibbard proposed his own moratorium saying that failing to stop new coal mining would be "catastrophic" for Montana. Metcalf was re-elected by a razor thin margin.

The Coal Moratorium

Following her election in November, Representative Dorothy Bradley requested the Legislative Council staff to draft a moratorium bill which would ban all coal-related development for two years. The bill required relevant state agencies to do studies that would give the legislature sufficient information to deal with the myriad of issues related to mining and generation of power.

With its new majority, Democrats elected Representative Harold Gerke of Billings Speaker of the House. Gerke was an old-guard Democrat whose seniority resulted in his promotion to Speaker. One of his first tasks was to appoint members of the various House Committees. He appointed long-time lawmaker Art Sheldon of Libby, to Chair the House Natural Resources committee and Rep. Bradley as the vice-chair. However, the make-up of the committee that would consider environmental legislation was split almost 50–50 between legislators who had environmental leanings and those that generally voted in favor of industry. Gerke was publicly accused of loading the committee with pro-industry legislators to assure strong environmental legislation would not be successful. Gerke denied the charge, characterized the committee as "a really good, sound committee" and claimed there was "absolutely no intent to load it in any direction."

On January 29, 1973, Representative Bradley introduced HB 492, her "peoples' bill," which called for a two-year moratorium on coal surface mining development and related conversion facilities. Instead of commitment to the Natural Resources Committee, the bill was assigned to the House Judiciary Committee which heard the bill on February 10th, 1973. While Northern Plains and the Montana Farmers Union appeared in support of the bill, the Montana Power Company mobilized several Eastern Montana ranchers to attend the hearing and oppose the bill. Nonetheless, the Judiciary Committee sent the bill to the House floor with a do pass on Lincoln's birthday, February 12th. The House Democrats were divided on the measure, and after caucusing, they elected not to vote on party lines. The bill was moved on the calendar to Valentine's Day,

Thursday, February 14th for all parties, both proponents and opponents to get their proverbial ducks in line.

On Thursday, the House engaged in one of the longest floor debates ever held. One-third of the members of the House rose and spoke on the bill. Leading the opposition to the bill was former Speaker, Jim Lucas. Rep. Bradley emphasized that although the bill had a two-year time frame, it could be undone at any time before 1975 if enough information was collected to deal with the problems associated with development.

Rep. Lucas, a skilled and well-respected legislator from Eastern Montana, argued that Eastern Montana was in dire economic straits and needed the boost that coal development would bring. He also claimed that adequate land reclamation was possible and existed in other states, and that legislators had already introduced a plethora of bills to "attack the problem from every conceivable angle there is." "Time is on our side," he said. "We don't have to interrupt this thing that is so important to Eastern Montana." He also took a shot at the proponents of the bill claiming they were using "an abundance of scare tactics" and political maneuvering to ram the bill through. Bradley called this latter argument hypocritical, because the opponents of environmental bills generally used such tactics to kill bills.

After some 30 house members had given their respective opinions on the bill, the House Majority Leader, John Hall, a Great Falls attorney, stood to be recognized. Hall was one of the most eloquent orators in the legislature. To a hushed audience he said emphatically: "No-one in this House has the knowledge to enact the laws we must enact at this time." Hall spoke for twenty minutes. When he sat down, the House broke into tumultuous applause. While Bradley expected Hall to vote in favor of her proposal, she was floored by the brilliance with which Hall articulated his support for the bill.

The tension associated with the floor vote was palpable. Since excused legislators had left "pairs: (proxy votes permitted under house rules which allowed an absent legislator to pair with a member voting the other way) the tally on the board was misleading until the pairs were counted. Then, when it appeared the bill was lost, Rep. Al Kosena, from Anaconda asked that his vote be switched from "nay" to "aye" and the bill passed 50–49. The house chamber and the over-flowing gallery erupted in applause.

The bill proceeded to third reading on Saturday, February 16th. Surprisingly, despite heavy lobbying from the mining and utility industry, the vote stayed tight. However, Rep. Bradley's colleague from Bozeman, Republican Wally Forsgren, switched his vote and the measure failed 49–50.

Bradley was not done. On Monday, February 19th she persuaded Rep. Gorham Swanberg, who voted against the moratorium to move to reconsider. The effect of the motion was to revive the bill and leave it on third reading until the last day of the session. The bill would stay alive and act as a legislative Sword of Damocles to assure passage of the strip-mining and utility siting bills that were then pending before both houses.

Rep. Hall supported the motion. He argued "there was no magic" in the strip mine regulation and utility siting bills considered by the legislature that session, but there was "magic" in the moratorium" magic in delay for more study." Swanburg's motion prevailed, 52–47 with Representative Walt Laas of Chester, Rep. "Red" Menahan from Anaconda, and Speaker Gerke changing their vote to keep the bill alive. The Republican leadership, Lucas, and minority leader, Oscar Kvaalen, complained vehemently about the intense lobbying in favor of the bill. Kvaalen reflected that he used to think environmental lobbyists were "naïve" but now he realized "they used every trick in the book."

The public debate on the moratorium had a number of "side-bars." Don Larson, a young journalist doing free-lance work for the Montana Kaimin, the University of Montana's student newspaper, wrote an editorial that got him into hot water with the House Rules committee. His column implied that Lucas had made a deal with the Butte delegation to vote against the moratorium if the Republicans agreed to kill a bill affecting the Butte sewer system. Political "horse-trading" made the wheels of the legislature move down the track.

On Saturday, March 10th, Bradley attempted to move her bill back into the Judiciary Committee in order to keep it alive for the second (and only) annual session set to reconvene in 1974. By that point in the session, the strip mine reclamation and utility siting bills had passed, and her effort failed on a 62–35 vote. Rep. Colberg, sponsor of the reclamation bill and one of the beneficiaries of the "stalking horse," praised Bradley for holding steadfastly to her philosophical viewpoint and reiterated that notwithstanding his success with the reclamation bill, no-one has the answer to the upcoming coal dilemmas.

The Utility Siting Act

One of the other beneficiaries of the moratorium was the Utility Siting Act. K. Ross Toole described the two bills: "Not only did these pieces of legislation have teeth, the teeth were shark-like, double rowed, and exceedingly sharp."[6]

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6. *Id.* at 172.

Francis Bardanouve, a third-generation rancher from Harlem, was first elected to the Montana House in 1959, defeating conservative attorney Bernard Thomas by a small margin. Thomas would later play a key role in the lengthy proceeding involving Colstrip Units 3 and 4. In his first session, the Democrats controlled the House, and appointed Francis to the powerful appropriations committee. He was reelected in 1961 and 1963, but those sessions featured control by the Republicans. Nonetheless, he was reappointed to the Appropriations Committee. In 1965, his fourth term in office, he was appointed Chairman of the Committee when the Democrats regained control of the House. That service was short lived, and the Republicans regained controlled the House in 1967, 1969 and 1971. Each succeeding session Bardanouve was reappointed to the Committee and continued as one of its more influential members, even when in the minority.

Bardanouve had only a high school education, but he had a brilliant mind and an unrelenting curiosity about anything that piqued his interest. He also had a didactic memory and was an invaluable institutional resource each time the legislature reconvened in Helena. While he was shy and retiring in his personal relationships, he was as persuasive as any legislator when debating bills in committee or on the floor of the House. He wore old cowboy boots and hailed from one of the most conservative areas of the State. But he routinely voted as a progressive. He rarely had a negative word to say about even his harshest critics and, despite his tenure in the House, he was extraordinarily humble and commanded enormous respect and trust on both sides of the aisle. He did, however, have one deep-seated prejudice against any "John Bircher." Blaine County was the hotbed of a very small but vocal group of extreme right-wingers wholly intolerant of anyone who did not share their views.

In March of 1971, Bardanouve was elected Chair of the Montana Legislative Council. First authorized in 1957, the Council was created to provide staff and conduct research for the Legislature between each biennial session. A bipartisan committee composed of six house members and six senators, it employed an Executive Director and several staff members to conduct interim studies and recommend legislation to the next session. Bardanouve was the first House member to Chair the Council since its creation.

Prior to the creation of the Council, legislators were forced to rely upon paid lobbyists to write their bills. Reliance on special interests for this basic legislative task, resulted in legislation which either favored the special interest or was not averse to those interests. The staff of the bipartisan Council were unbiased and provided relief for legislators who needed help with their ideas from someone who had no ax to grind. Indeed, the

Council suffered some rough early years because it was seen as a threat to the monopoly enjoyed by established economic interests and the executive branch of state government.

After my return to Montana in the spring of 1971, I was admitted to practice law in October. I applied for the newly created attorney position with the Legislative Council and was interviewed by its Chairman, Francis Bardanouve. I was hired, and Francis and I began a long-time personal and professional relationship.

In the fall of 1972, Francis came to my office and asked me to come up with an idea that he could sponsor as a sort of "legacy" bill. He was interested in legislation that would not only be relevant but would serve as a highlight of his legislative career. Francis had devoted his attention in prior sessions to fiscal matters and wanted to pursue a project that was different.

At the time, development of Montana's vast coal resources was largely unregulated. The North Central Power Study projected construction of mine-mouth coal conversion of colossal proportions. I advised Francis that given the impending development of coal fired generation in Montana and its associated environmental problems, power plant siting was to be a significant policy-making event for the foreseeable future. My suggestion resonated with Bardanouve, in part, because he played a significant role in the defeat of the Utility Siting Act bill the power industry tried to slip by the legislature the previous session. He felt obliged to address this issue in a positive manner.

I was familiar with the general process for drafting legislation. However, the complexity of crafting a statute that would address utility siting decisions of the magnitude expected was far beyond my expertise. At the time, there were a few states that were beginning to address siting issues which could serve as a model. But for the most part, utility lobbyists wrote these statutes, as they wrote the 1971 Montana Electric Land Use Act. Francis needed a bill which would meet the potential for siting 22 enormous power generation facilities head on.

Even though there was no existing blueprint for this legislation, there were certain principles and goals that would be the centerpiece of the bill. At bottom, this new act needed to provide the people of Montana with the opportunity to weigh in on facility siting decisions before they were made. The enormous costs of performing the detailed studies necessary to making informed decisions about the impact of these facilities would have to be paid by the developer and needed to be paid up front. The state agencies tasked with performing these studies would need sufficient time to complete these studies before any siting decisions were made. Finally, and perhaps most importantly, the pivotal public policy of whether to burn

coal in Montana air and make use of Montana's limited water supply must be weighed against shipping Montana coal to the place of use.

Montana had a strong Clean Air Act already being administered by the Department of Health. The Health Department also had authority to control and monitor water quality. However, I was concerned that if this law did not have a strong central lynchpin there was no way a technical administrative decision could withstand a challenge by a utility whose application was denied. The legislation needed an unequivocal requirement that a permit could not be issued unless the siting agency certified that all environmental air and water quality laws would be met, and it was necessary to build the plant in Montana. As Governor Judge later noted when he signed the bill, no other state siting law contained these important provisions.

Accordingly, this would not be a "one-stop shopping" process that was the hallmark of the utilities' 1971 bill. While the Montana Department of Natural Resources was vested with the responsibility for doing the environmental analyses, the Department of Health would consider the air and water quality implications of a project and the permit for construction could only be granted if both agencies agreed.

Even though there was no model for the bill, crafting the foregoing principles into law was not a difficult task. The bill required citizen participation. Permit applications were required at least two years before construction was to begin. A filing fee of one percent of the estimated cost of the facility to defray the costs of the environmental review, had to be paid with the application and an ongoing fee of one-quarter percent of the gross license tax to fund ongoing administration and monitoring was required.

The bill was drafted, introduced, and became HB 127. It was assigned to the evenly divided House Natural Resources Committee and was set for hearing on Jan 26th, 1973. On the day before the hearing, George O'Conner, the president of the Montana Power Company, issued a strongly worded attack on the bill. Expecting the worst, the largest legislative hearing room, the Governor's reception room, was reserved by the chair of the committee. When the committee convened, the room was packed.

Francis prefaced his comments by calling the bill "the most important piece of legislation I have ever sponsored." Fourteen witnesses appeared in support of the bill including representatives from the League of Women Voters, Northern Plains Resource Council, State Department of Health, Farmer's Union, American Association of University Women, AFL-CIO, conservation groups and several individuals who appeared on their own behalf. George Darrow (who had moved to the Senate) appeared on behalf of the Environmental Quality Council describing the bill as

"above all a systematic process for long-range planning and decision making." The measure was characterized at one point in the hearing as "one of the most important proposals placed before any legislature in our history."

The crowd held its collective breath when the first witness from the utility industry, John Carl, approached the rostrum to speak on the bill. He stunned the audience by supporting the bill. Gene Phillips, another utility lobbyist also expressed his support of the legislation. He said, "We feel it is essential and would strongly urge the committee to recommend passage of the legislation."

Supporting an offensive bill was a new strategy for the power industry. The utilities, fully aware of the risk they faced dealing with this new brand of lawmaker, had counted their votes. Their new approach involved resisting the bill by agreeing with the concept but submitting "minor" amendments. After he spoke, Carl dropped a list of amendments he'd like to see made to the bill. Rep. Bradley asked him to explain his amendments. In short, he wanted the review process to be streamlined, the lead time shortened, and the fee significantly reduced. His amendments limited participation in the process to the applicants and the state agencies So far as the utility industry was concerned, the public had no business in this proceeding.

At the conclusion of the hearing Chairman Art Sheldon put the bill in a subcommittee chaired by Rep. Herb Huennekens. Over the next several weeks, the subcommittee met with stakeholders, including the power company lobbyists to consider their amendments to the bill. A few of the utility amendments were added to the bill. The subcommittee changed the flat one percent fee to a sliding scale depending on the construction costs of the plant. The sliding scale was acceptable to the sponsor and the full committee discussed the bill on February 13th. The two-year lead time provision remained, but small transmission lines (under 69 kw) were exempted from the Act.

Even with the amendments, the utilities were expected to oppose the bill without their other amendments. Rep. Lucas tried to sidetrack the bill into a study and hold it over until 1974, arguing: "I'm concerned we're rushing into something that we don't know what we're doing . . . I don't believe in passing bad legislation just to be passing it." The bill was reported out of committee with a do pass on only two dissenting votes.

When it reached the floor, the debate only lasted 20 minutes, and the House cast a unanimous vote in favor of the bill 97–0. Bardanouve exclaimed, "I'm overwhelmed." The bill moved to the Senate and, after a hearing in the Senate Natural Resources Committee that parroted the House hearing, the committee declined to accept the power company

amendments and passed the bill to the Senate floor where it was adopted with only one dissenting vote. Governor Judge signed the bill into law on March 16th, 1973.

Pressures for coal development escalated when the Arab oil exporting companies declared an embargo in October 1973. OPEC embargoed the U.S., Canada, Japan the Netherlands, and the United Kingdom. In response, President Nixon imposed "Project Independence" which gave free rein to the oil, gas, and coal industry and upped the ante on potential environmental contamination.

The 1974 session was the first and, as it turned out, the only annual session in Montana history. Bills still alive from the first session could be considered in the second session. New bills could be introduced, but only for the first ten days. The leadership of the House and Senate, as well as committee chairs, remained the same as the prior year. The energy industry regrouped and armed with the notion of energy independence, increased its opposition to environmental legislation.

On April 1st, 1974, Ron Schleyer, a Lee Newspaper state bureau reporter, issued his recap of the 1974 session: "Environment lost, 113–66 in the 1974 legislature with no overtime." The "score" was the percentage of bills passed with those killed during the session. While the legislature tightened the controls of the strip and hard rock mining laws, restricted water grabs from the Yellowstone River and strengthened subdivision statutes, it also killed bills allowing citizen suits, establishing streambank protection, permitting state agencies to charge fees for environmental impact statements and raising the coal severance tax. Sen. Towe predicted that all these unresolved environmental issues "contain the seeds for continuing controversy when the 1975 legislature convenes."

Carrying out its tasks to study and recommend changes, MEPA's Environmental Quality Council staff turned out studies recommending "outlandish" measures to increase citizen participation in environmental decisions, extending lakeshore and stream bank protections, a tax on air pollution, and capital gains on land speculation. While political considerations generally motivated the legislative members of the Environmental Quality Council, those considerations did not affect its staff. The staff clearly set forth facts about environmental impacts of land use decisions. But to some lawmakers these recommendations were blasphemous. During the summer of 1974, the Council considered rules muzzling staff.

This effort was precipitated when staff member Dick Burke was asked by the Department of Health to give testimony at a hearing on the Anaconda Company's request for permission to keep violating air quality standards. Burke told the hearing examiner these continuing violations needed to stop. At a subsequent Council meeting, Sen. George McCallum

called Burke on the carpet, claiming staff should not be permitted to speak without clearing the speech with the Council. Rep. Dorothy Bradley, a member of the Council, objected to any attempts to stop staff members from giving opinions on environmental matters. Because Fletcher Newby, the initial executive director of the Council staff, had resigned to become a deputy director of the Fish and Game Department, the Council decided to hold off on dealing with the problem until the new executive director came on board.

Several months later, the staff issued a report claiming there was a substantive basis for the fears that Montana could become "a national sacrifice area" in the rush to attain energy self-sufficiency. This report ramped up the controversy of the role of the Council. Sen. Darrow defended the role of the Council under MEPA: "One of the greatest benefits of MEPA has been to force decisions of what use to be nameless, unaccountable, invisible bureaucrats, out into the open." According to Darrow, the Council "must see to it that state agencies develop the staff and administration to expand their environmental horizons and recognize their place in this grand scheme. We have an alert, concerned citizenry who have been immensely important in this process. Perhaps it is only possible in Montana; but it has happened here, and it is working here."

I resigned my job with the Legislative Council to run for a seat in the House of Representatives from Helena. I was elected in the fall of 1974 defeating Ruth Castles, a Constitutional Convention delegate and spouse of Judge Wesley Castles. The 1974 midterm elections resulted in a significant increase of Democrats in the House and the Senate. When the 44th legislative session convened in January 1975, the House had 67 Democrats and 33 Republicans, the Senate, 30 Democrats and 20 Republicans. Rep. Pat McKittrick was elected Speaker and Rep. Dorothy Bradley was appointed Chair of the House Natural Resources Committee. I was elected House Majority Whip.

The 44th Legislative Session

Beginning in 1975, industry's new slogan was "you folks have done too much, it's time to slow down." To start the session, Rep. Darrow's MEPA came under attack. Sen. Carroll Graham, a Democrat from Lodge Grass introduced a bill to repeal the Act. He claimed the purpose of the Bill was to eliminate the Environmental Quality Council. The EQC was seeking an increase in its budget from less than $30,000 when it was first authorized to $204,000 for fiscal year 1976. The supporters of his bill were concerned that the EQC had "gone overboard" in its monitoring of

environmental impact statements and were causing unreasonable delays in approving new projects.

Before his bill was acted on by the Senate Natural Resources Committee, Graham submitted amendments which removed the repeal of MEPA from the bill but change the make-up of the Council by eliminating the citizen members. The bill passed the Senate, as amended, and went to the House Natural Resources for hearing. Chair Bradley promptly sent the bill to the House Rules Committee to determine whether the Senate had so changed the purpose of the bill as to violate the single-purpose requirement of the Constitution. The bill died there.

In the House, Rep. Gail Stoltz introduced HB 453 which would place a moratorium on construction of new energy conversion plants. The Bill authorized the Department of Natural Resources to lift the ban if the applicant could establish that the need for power in other states outweighed the adverse impacts of the facility on the environment. Rep. Bardanouve considered HB 453 to be an expression of dissatisfaction with his Siting Act Bill and spoke against the bill on the House floor. He was also concerned that the Bill would detract from the improvements he was making to the Utility Siting Act.

One of the amendments to the Siting Act added in the Senate would have restricted participation in any hearings conducted under the act by members of the public and public interest groups. Under the Senate amendment, a putative party to the proceedings would have to show that they would be directly affected by construction and operation of the facility. Senator John Manley successfully added the restriction "to stop harassment by certain groups that don't want development." Manley singled out the Sierra Club as an example. Herb Huennekins and I argued against the amendment on the House floor and the amendment was rejected. When the bill went back to the Senate without the participation limit, it was concurred in on a close vote.

Nonetheless, the commitment to the protection of Montana's natural beauty continued. In 1975, the Legislature passed an act that required local officials to determine that new sub-divisions of land—less than 10 acres—were in the public interest before they could be approved. Having failed the prior session, Rep. Bardanouve returned to the perilous waters of streambed protection and emerged with a new law protecting Montana streams and rivers.

MEPA's Treatment by the Courts

Two non-legislative events were also occurring in early 1975. The application of the coalition of utilities seeking to construct Colstrip Units

3 and 4, two huge 760 mw plants, was under state review. This would be the first test of the Utility Siting Act. At the same time, the Montana Wilderness Association and other environmental groups were involved in two lawsuits in which MEPA was the fulcrum for challenges to governmental decisions affecting the environment. In one, MWA had sued the Board of Land Commissioners and Department of State Lands seeking to void a decision granting an easement to the National Park Service to build a highway along the Big Horn River across a portion of state lands. The environmental groups claimed the Board and Department had failed to comply with EQC guidelines concerning environmental impact statement procedures.

The second case involved a decision by the state Department of Health and Environmental Sciences to lift sanitary restrictions on a 160-acre subdivision of land known as Beaver Creek South, located several miles south of Big Sky. In this case, the MWA claimed MEPA imposed substantive requirements on the Health department's consideration of subdivisions and a much broader range of factors needed to be weighed before a major subdivision could be approved.

In the Big Horn road case, there had been an ongoing dispute between the EQC and state agencies over whether EQC guidelines were mandatory. Some state agencies expressed resentment against the guidelines claiming they had no obligation to follow rules promulgated by a legislative agency. The case squarely confronted the separation of power issue inherent in MEPA. The case also raised the issue of whether nonprofit groups had standing to compel compliance with environmental laws.

In April of 1975, Judge Gordon Bennett dismissed the suit concluding that MEPA had been rendered useless because neither the executive branch nor legislative branch had developed "a workable system for effective enforcement of its provisions." Accordingly, the Land Board had not acted illegally in granting the easement. In his memorandum dismissing the case, Judge Bennett opined that under MEPA, as written, "There is no apparent authority to require anybody to do anything." Judge Bennett found that MEPA does nothing more than authorize the Council to make studies and recommendations. For these recommendations to have the force of law they must be implemented by either the legislature or executive order. As a result, EQC rules and guidelines were of no force and effect.

In the Beaver Creek South case, MWA and others had sued the Board and Department of Health and Environmental Sciences over its determination that the subdivision complied with the 1973 Subdivision Act. At issue in the case was whether MEPA extended the authority of

reviewing agencies and local governments requiring a comprehensive set of social, economic and environmental criteria as part of the approval process.

As with the Big Horn road litigation, the case was filed in Lewis and Clark County and Judge Bennett assumed jurisdiction of the case. However, unlike the Big Horn case, the plaintiffs were not asking the court to enforce EQC guidelines in the face of separation of powers barriers. Instead, the plaintiffs sought to enjoin the Department of Health's narrow scope of review contending that MEPA, itself, required a broad and comprehensive review.

On July 26, 1974 the Department approved the lifting of sanitary restrictions on the subdivision plat. This action green-lighted the sale of the tracts. On that same day, MWA obtained an order restraining the Department from approving the plat. On February 11, 1975, the district court dissolved the temporary restraining order and gave the plaintiffs permission to file a declaratory judgment action on any additional environmental impact statement other than the one that served as a basis for the initial approval. The Court also determined that MWA and others had standing to pursue their claims against the Department. Three days later, the Department again lifted the sanitary restrictions.

MWA filed its amended pleading arguing that the revised environmental impact statement did not: (1) consist of the systematic, interdisciplinary approach required by MEPA; (2) consider alternatives to approval; (3) consider the relationship between local short term uses of the environment, and long-term impacts; and (4) consider the environmental and economic costs of the proposed subdivision.

On August 29, 1975, the district court issued its opinion holding that MWA had standing under MEPA to pursue the claim, and, on the merits, the revised EIS did not meet the substantive requirements of MEPA. A permanent injunction was issued, and the Department and the developer appealed. A year later, on July 22nd, 1976, the Supreme Court issued an opinion affirming Judge Bennett's ruling breathing life, for the first time, into the force and effect of MEPA and settling the standing issue. Unfortunately, this incredible and monumental ruling was short-lived. The Department and developer moved to reconsider and in a virtually unprecedented action, on December 30, 1976, a week before the 43rd Legislature convened, the Supreme Court withdrew the opinion and in a 3–2 ruling concluded that the only entity with power to approve or disapprove a subdivision was the local county commission.

Justice Castles, for the Court, wrote the majority opinion based on an argument that had not been made by any party to the appeal. Justice Castles recast Judge Bennett's opinion by claiming that "it is seen that the

district court findings and judgment are premised on the MEPA being the ruling statute and that the Department of Health…has the final land use decision over and above its obligations to consider water supply, sewage, and waste disposal issues." Conceding that the district court really didn't discuss this problem, it was central to the Supreme Court's decision. Accordingly, the majority bootstrapped its way into characterizing the dispute as one involving local over state control and giving the nod to the local county commission (which had never participated in the case).

In one of the sharpest dissents in jurisprudential history, Justice Haswell characterized the majority ruling: "The decision of the Court today deals a mortal blow to environmental protection in Montana. With one broad sweep of the pen, the majority has reduced constitutional and statutory protections to a heap of rubble, ignited by the false issue of local control." Haswell recognized that the ruling eviscerated the rights of those who use the environment to remedy environmental degradation: "If they cannot, the inalienable right of all persons to a clean and healthful environment guaranteed by Montana's Constitutions confers a right without a remedy; the requirements of Montana's Environmental Policy Act and related environmental legislation will become meaningless and illusory; and the mandatory Environmental Impact Statement deteriorates into a meaningless gibberish, providing protection for no-one."

The Beaver Creek South decision ended the debate about the substantive effect of MEPA.

The Utility Siting Act's First Test

Virtually on the effective date of Rep. Bardanouve's Utility Siting Act, the Montana Power, Puget Sound Power and Light, Portland General Electric, Washington Water Power, and Pacific Power and Light Companies submitted an application under the new act for approval of two 760 MW power plants known as Colstrip Units 3 and 4. Under the Act, the Department had 600 days to complete its review of the application. The 600 days were set to expire on January 31st, 1975.

On January 28th, 1975 the Department issued its final environmental impact statement concluding that the permits would be denied. The primary grounds for denial were that the utility consortium had failed to establish that: (1) the facilities were needed in Montana; (2) there were no alternatives to building the plants; (3) that the facilities as proposed represented the minimal adverse impact; (4) that Montana's obligation to the region to provide its share of power goes beyond reasonable alternatives; and (5) that the facilities will serve the public interest, convenience, and necessity.

The express language of the Siting Act left the certification to the Department of Natural Resources. But, under the Administrative Procedures Act, a party dissatisfied with an agency ruling could appeal the decision to the Board of Natural Resources. The Board consisted of mostly non-technical members of the public appointed by the Governor. None of the Board members had any significant experience with environmental matters.

The applicants appealed to the Board of Natural Resources and requested a hearing on the Department's findings. Joe Sabol, a Bozeman attorney, was the Chair of the Board of Natural Resources and he appointed himself to serve as a "hearing officer" for the Board, setting a prehearing conference in February of 1975. The Northern Plains Resource Council hired Leo Graybill, the former President of the Constitutional Convention to represent the Council at the hearing. I was hired by the Northern Cheyenne Tribe and joined the fray in opposition to the application. Arden Shenker, a Portland, Oregon attorney was retained by the Department of Natural Resources. Shenker, a Yale law school graduate was known as one of the best environmental attorneys in the Northwest. On the other side of the case appeared Bill Bellingham and Jack Peterson for the utility consortium.

Bellingham was a quintessential white shoe attorney from a prestigious Billings law firm bearing his name. He was a tall, well-spoken, silver haired attorney with twenty-seven years of practice under his belt. He had been the editor of the Montana Law Review when he was in law school before he graduated in 1948. Unfortunately, his method of dealing with opposing counsel was to sneer and act as if we were all beneath him, including Leo Graybill who had recently served as President of the Constitutional Convention and was only four years his junior.

While Graybill tolerated Bellingham through the months of hearings, Shenker did not. The hearing transcript is spiced liberally with sharp interchanges occurring between Bellingham and Shenker. These incidents went well beyond the customary skirmishes one would ordinarily encounter in litigation and set the tone for an uncomfortable and often bitter proceeding.

Shortly before the start of testimony, the International Brotherhood of Electrical Workers joined the applicants in support of their effort. The IBEW hired Ben Hilley, a law partner of Pat McKittrick, then Speaker of the House. The AFL-CIO had taken a soft approach to the approval of the power plants. The unions had supported several environmental bills even though some of their members would financially benefit from construction projects. As to Colstrip, AFL-CIO recognized that most of the construction workers on the plant would come from out-of-state and would

not provide many jobs for Montana union members. The IBEW, on the other hand, had opposed environmental legislation and had generally supported industry policy.

At the time of the prehearing conference convened by Joe Sabol, one of the pre-requisites for approval of the application had yet to be completed. Under the Act, the Department of Health and Environmental Sciences had to certify that the proposed facility would meet air and water quality standards. Nonetheless, the Board of Natural Resources proceeded with their hearing. In March of 1975 the opponents to the application complained that Sabol could not serve as hearing officer and chair of the Board at the same time. He finally agreed to step down and Dillon attorney and former Constitutional Convention delegate, Carl Davis, was appointed to serve as hearing officer.

On April 12, 1975, the Department of Health announced that it could not certify that the plants, if constructed as planned, would meet state and federal air quality standards. According to the Department, the plants would meet water quality standards, but the plants' design would have to be modified in order to meet air-quality standards. Notwithstanding this serious development, Hearing Officer Davis held a pre-hearing conference on April 15th and set the date for the start of the hearing for April 21. Interestingly, there was scant discussion at the pre-hearing conference about the Department of Health's determination which held significant consequences for how the parties would proceed.

To complicate matters further, the Health Department's attorney Richard Klinger, argued there was no authority for an administrative review of the Department's position. Board of Health Chairman, John Bartlett agreed that it did not have the authority to conduct a hearing on the Department's findings. He read the Siting Act to vest the Department, not the Board, with authority to determine air and water quality standards. At the time, the Board of Health had always used the Department's attorney when it needed legal advice.

On April 18, 1975, Northern Plains went to court and asked for a temporary injunction, halting the entire process until resolution of the issue of whether the Department of Health determination was reviewable. Moreover, Northern Plains was unhappy with the Department's water quality approval. It argued that a hearing before the Board of Health was necessary so that it could contest the Department's water quality decision and that that hearing should take precedence. Accordingly, the Board of Natural Resources' proceeding should be halted until the Board of Health concluded its review of the air and water quality issues. Judge Gordon Bennett agreed and issued a temporary injunction stopping the hearing.

During briefing these issues of first impression, Rita Sheehy, one of the lay members of the Board of Health, submitted a brief written by her husband Skeff Sheehy, arguing that the Board of Health did have the authority to review the Department's decision under the Utility Siting Act. The morning before the scheduled hearing on Northern Plains' request for a permanent injunction, the Board of Health met and unanimously agreed that it did have authority to hold a hearing and review the Department's certifications. This led the Department's attorney to recuse himself because of the conflicting positions on the issue taken by the Department and Board. The Board resolved the conflict by hiring C.W. Leaphart to represent its interests in court.

At the hearing before Judge Bennett, the Department of Health contended that it had exclusive authority to decide the air/water quality determinations under the Siting Act. As to that argument, however, it stood alone. The Board of Health, through Leaphart, claimed the Board of Health did have authority to review the Department's actions as a matter of administrative law, apart from the provisions of the Siting Act. The utilities, of course, agreed. They wanted the opportunity to challenge the Department's decision before the Board of Health. Graybill was also in agreement because of the Department's water quality approval and focused his argument on the separate hearings issue.

At the hearing Klinger attempted to introduce into evidence a letter, from Governor Judge, to the Health Department Director opining that the Department had the exclusive authority over air and water quality standards. Judge Bennett refused to admit the letter, ruling that it was irrelevant. Bill Bellingham, one of the utility lawyers, called the siting law "a bastard act" which was unclear and unspecific on procedural issues, and claimed the utility applicants were losing hundreds of thousands of dollars occasioned by each month of delay.

Following the hearing on April 29th, Judge Bennett concluded that critical public decisions should not be made by computers programmed by unidentified public servants. The Board of Health should make those determinations after conducting public hearings. The Department of Health agreed to abide by his decision and not appeal. All parties agreed that Davis could serve as a hearing officer for both Boards.

On May 5th, Davis scheduled the hearing before the Board of Natural Resources for May 20th. The hearing before the Board of Health would follow. NPRC and the Tribe objected to joint hearings. In fact, since Davis called the pre-hearing conference to deal with matters related to the Board of Natural Resources, he could not schedule anything related to the Board of Health. Davis was following the utilities' desires to have a continuous end-to-end hearing. NPRC and the Tribe moved that the

Board of Health hearing be conducted first, and all other matters held in abeyance until the Board of Health made its air and water quality decision. Assuming the Board made such certifications, then the Board of Natural Resources hearing could commence. If the Board of Health determined that air and water quality standards could not be met, then the case would be over. Davis disagreed and denied our motion.

Since NPRC had assumed the laboring aura on the Department/Board of Health dispute, the Tribe would address the joint hearing conflict. On May 12th the Tribe filed suit asking the court to prohibit the Board of Natural Resources from proceeding on the application until after the Board of Health completed its task of determining compliance with air and water quality standards. Additionally, the Tribe contended that since the Department of Health had already made the determination on air quality, the Board would have no other option but to approve this determination. Once that occurred, the entire application must be denied because the Siting Act required such certification as a condition precedent for granting approval. Judge Bennett agreed that the Board of Natural Resources should recess its hearing until after the conclusion of the Board of Health hearing and decision concerning air and water quality matters. However, he declined to enjoin the scheduled May 20 hearing date set earlier before the Board of Natural Resources. Witnesses had been scheduled to appear and the court would let that process go forward. The Board of Health then met and decided that a separate hearing would start on June 3rd. Several Montana Power Company witnesses completed their testimony in that ten-day period including, George O'Conner, the former longtime President of the Montana Power Company.

O'Conner, an attorney, was little prepared for the level of cross-examination he would receive. His direct testimony was typical industry fluff—the kind he had given many times before the legislature. It was clearly permissible for a legislative witness to base statements upon hyperbole and supposition. When the opponents cross-examined, it became clear his testimony had little basis in fact. He had testified on direct examination that electricity rates would increase less sharply if the plants were built. On cross-examination he admitted MPC had done no projections to determine the impact the plants would have on rates and that no other alternatives had even been considered. He also admitted that MPC had conducted no studies to determine the relative economics of mine-mouth generation versus shipping coal to load centers.

On May 30, 1975, after presenting only O'Conner and MPC chief engineer Roger Hafacker, the parties found themselves embroiled in a discovery dispute concerning the timing and location of depositions of upcoming witnesses. Hearing officer Davis elected to stop the testimony

before the Board of Natural Resources until after the air and water quality issues were resolved by the Board of Health. The Hearing before the Board of Health would commence on June 10th, 1975.

Davis also ruled, over the objections of the applicants, that direct testimony would be submitted in writing in order to speed up the process. While a short delay would result for the parties to prepare written direct testimony, in the long run the hearing time would be shortened.

The applicants rested their case on air and water quality issues before the Board of Health on July 23rd, 1975. The Board of Natural Resources voted that same day 4–3 to hold off on any further hearings until the Board of Health certified the applicants could meet air quality standards. The opponents moved for an order dismissing the entire case upon grounds that the applicants had failed to prove they would meet air-quality standards. The Board convened a telephone conference call and agreed to defer action on the opponents' motion until the members obtained and considered the written transcript of testimony. The opponents then went immediately to district court and obtained an order from Roundup Judge Nat Allen halting all proceedings. The applicants filed an emergency appeal with the Supreme Court. The Court set aside Allen's decision concluding that the district court had no authority to stop the hearing.

The Board of Health hearing reconvened in August and after 53 days of hearing, the Board "conditionally" certified that the facilities would meet air and water quality standards. The Board of Natural Resources then reconvened its hearing On January 19th, 1976. Lt. Governor Bill Christianson led off the opponents' case in chief. Following Christianson were the various state employees tasked with determining the state response to coal development: Director of the Department Gary Wicks, Jim Posewitz of the Department of Fish and Game, Fred Barrett of the Department of Labor, all testified against the application.

Northern Plains Resource Council witnesses all testified on the significant impacts to their agricultural land and water. And, providing a respite from the technical testimony which predominated the hearings, Clancy Gordon and Ross Toole, both professors from the University of Montana, spiced up the testimony with their opinions in support of Northern Plains' objections to the application.

Gordon, a botanist and head of the environmental studies graduate program at the University gave a blistering indictment of the applicant's plans to deal with air and water quality damage from the plants. His position was that even if the plants could meet applicable pollution standards, the applicants had not provided any evidence that the standards would protect citizens' health and property. Toole repeated the adage he had developed in this recent book that reclamation of strip-mined lands was like

putting lipstick on a corpse. He hammered on the idea that because of the arid nature of the Great Plains, it was impossible to tell whether even the most advanced reclamation efforts would be successful. On cross examination, Bellingham reminded Toole that the Colstrip area got between 12 and 15 inches of precipitation a year. Toole replied: "Average precipitation doesn't mean anything unless it comes at the right time of the year."

While most of the testimony was of a highly technical nature, witnesses like Gordon, Toole, and Don Bailey were expected to have significant impact because most of the decision makers on both the Boards of Health and Natural Resources were "lay" people.

Finally, the Northern Cheyenne Tribe, led by its Chair, Allen Rowland, testified that the proposed plants would emit pollutants that would cause severe damage to the tribe's timber stands, livestock operations, and wildlife.

On cross-examination, he acknowledged that construction of the plants may provide jobs, but "we do not intend to trade our homeland for a few jobs, especially at the sacrifice of our Cheyenne way of life."

Although not a well-educated man by white America standards, Rowland had a keen sense of humor and a proverbial steel trap mind. At one point in Bellingham's cross-examination of Rowland, he was asked about his claim that state-highway 79 through the Cheyenne Reservation would experience a serious increase in heavy truck traffic and accompanying damage if the plants were constructed. Why, asked Bellingham condescendingly, would there be additional traffic through the reservation when the closest Interstate Highway to Colstrip came from the north and would not go through the reservation. Without missing a beat, Rowland patiently explained to Bellingham that trucks could avoid weigh stations by detouring through the reservation.

On March 30th, the parties completed presenting testimony in favor of and against the applications for a total of 104 hearing days, through a total of 309 witnesses called before both Boards. Over 1400 exhibits were offered and admitted, many of those exhibits exceeding hundreds of pages. Final arguments would be presented on April 15th, 1976, before the seven-member Board of Natural Resources. After another continuance of the oral argument date, the parties completed arguments on May 20th, exactly one year after the hearing started on May 20th, 1975.

On June 25th, 1976, the Board of Natural Resources voted 4–3 to "conditionally" approve the application to construct Colstrip Units 3 and 4. On July 20th, 1976 the Northern Plains Resource Council asked the Board to reconsider its decision upon grounds that one of the members voting to approve the facilities (Will Clark) had *ex parte* communications with representatives of the applicants prior to the vote and had failed to

adopt findings of fact before issuing an opinion. NPRC also contended that a "conditional" approval was not an appropriate decision and the Board needed to decide whether the plants were needed. Finally, the Board should have required the sulphur-dioxide removal technology to be "the best available." On July 22nd, 1976 the Board reconvened to ponder the NPRC petition to reconsider. With Clark abstaining the Board unanimously rejected the petition to reconsider.

On August 20th, 1976, Northern Plains and the Tribe filed a judicial review proceeding in the district court. At the time of the court action, $855,000 had been spent by DNRC for their environmental review. Shenker and his firm were paid $300,000 in fees and costs associated with representing the Department before the Board and in court. Carl Davis was paid $25,000 for his services. These sums were paid from the $1.2 million fee accompanying the original application.

In October 1976, a new twist was added to the mix. The Environmental Protection Agency ruled that the Colstrip plants had to comply with federal air quality rules, including installation of sulphur-dioxide removal technology to meet federal non-degradation standards, the most stringent of EPA's requirements. At the time, the Northern Cheyenne had requested that the reservation be upgraded from Class 2 to Class 1, the most stringent of the EPA's air quality classifications. Arguably, re-designation to Class 1 would effectively prevent development within 60 miles of the reservation. Colstrip, of course, was less than 20 miles north of the reservation.

The applicants immediately filed suit in federal court on challenging the EPA determination. Long story short, the federal court actions were resolved in favor of the stronger air pollution limits, but the EPA reversed its initial determination and finally concluded the plants would not violate the stringent "non-degradation" standards.

As the 45th Legislative Assembly was about to convene in January of 1977, a tangle of environmental issues predominated. Whether Colstrip Units 3 and 4 should be built was at the top of the list. A questionnaire—circulated by the media to incoming legislators—inquired whether changes to Montana's Siting Act should be made. Most legislators supported changes to "expedite" the process of review. Newly elected (and later gubernatorial candidate) Rep. Jack Ramirez (R–Billings) claimed that the experience with the siting process with Units 3 and 4 compelled changes to expedite the decision-making process: "The hearing process is essential to protect the rights of all parties who might be affected, but I believe we have gone to extremes."

The political atmosphere had also shifted. Lee Metcalf had unexpectedly passed away. Mike Mansfield announced he would step down as majority leader.

The extraordinary Democrat majority of the Montana House had shrunk a bit from 67 to 57 and the industry mantra was "energy independence at all costs." I was elected Majority leader of the House and Dorothy Bradley was the majority whip. Herb Huennekins was appointed as chair of the House Natural Resources Committee.

Several bills were introduced to amend the Siting Act. Senator Harold Dover and others sponsored a bill to repeal the authority of the DNRC to charge a fee for applicants under the Act. Rep. Les Hirsch from Miles City introduced a bill to require applicants to give a one-year notice of any intent to file an application under the Act. Rep. Tom Conroy introduced his HB 660 to limit fees, participation, and reduce the time periods contained in the Act. Rep. Huennekins offered an amendment to the Act including certain mineral processing facilities. I introduced a bill to add the siting of railroads to and from a facility to the Act, and another bill to define "need" under the Act. The proposed change would implement an "export only" policy by defining need to be 20 percent of out-of-state sales of energy over a twenty-year period.

Rep. Huennekins in a rather ironic move introduced a bill to change the siting authority under the Act from the Board of Natural Resources to the Public Service Commission. When the bill was heard in committee, it was supported by lobbyists for the MPC, citing their earlier efforts to place siting authority in the PSC back in 1971. But the industry was not together on this bill. One of the Colstrip applicants, Pacific Power and Light, opposed the bill upon grounds that the PSC had neither the staff nor the expertise to make siting decisions. The Chair of the PSC, Gordon Bollinger, did not oppose or support the bill, but did re-emphasize its opposition to Colstrip Units 3 and 4.

Sen. Frank Dunkle (R–Helena) filed a bill amending the Act to restrict participation in hearings under the Act to only parties who were directly affected by the proposed facility. The bill also prevented the Department from using any of the filing fee to hire attorneys and pay for staff to participate in proceedings under the Act. It also removed fertilizer plants. This bill got early traction, passing the Senate on second reading by two votes. However, the $650k fiscal note prevented the bill from moving to third reading and instead was sent to the Finance and Claims Committee.

By the end of the session all proposed modifications of the Siting Act died except Dunkle's bill to limit participation and exclude fertilizer plants and Hirsch's bill to provide a five percent discount for applicants who filed early notice of intent to seek approval of a plant. Governor Judge vetoed Dunkle's bill, so the Siting Act emerged from a contentious session virtually intact.

But the battle over Units 3 and 4 continued, unabated. On January 28th, 1977, U.S. District Court Judge Jim Battin ruled that because "construction" of Units 3 and 4 had begun before June 1, 1975, the plants were exempt from applications of EPA's non-degradation standards. NPRC and the Tribe appealed his decision to the 9th Circuit. Following Judge Battin's ruling, the applicants announced they intended to break ground on the facilities. This announcement spawned an immediate reaction. NPRC and the Tribe asked Judge Battin to enjoin the applicants from breaking ground on the plants until after the court appeals involving the plants were finally resolved.

At the same time, NPRC and the Tribe asked Judge Bennett, whose decision was then on appeal to the Supreme Court, to issue an injunction against construction pending final resolution of the appeal. On July 11th, 1977, Judge Bennett, after a ninety-minute hearing, declined to enjoin construction. Several days later, the Board of Health weighed in, ruling that before any construction could begin the applicants needed a construction permit from the Health Department. Jack Peterson in classic "Butteese" was quoted by Chuck Johnson as saying: "I don't know how many goddamned permits we have to get to build these plants."

On August 5th, 1977 the EPA designated the Northern Cheyenne reservation as the first area in the nation to receive a Class 1 air quality rating. Notwithstanding this obvious setback, the applicants applied for construction permits with the Department of Health "to avoid costly and time-consuming litigation." The Department of Health issued the construction permit and the applicants started construction. At the same time, the applicants asked Judge Battin to enjoin the EPA from imposing Class 1 air quality standards. Judge Battin declined to issue the injunction so the applicants ceased construction activities.

By the end of the year, both the Department of Health and the EPA tentatively determined that the proposed plant with its proposed air pollution equipment could meet Class 1 air quality standards. No operation permit could be approved until after construction and imposition of sulphur-dioxide scrubbers designed to meet air quality standards. The applicants re-commenced construction activities.

On March 5th, 1978, Judge Gordon Bennett reversed the Board's ruling and remanded it back for further hearings. In a 57-page decision, he called the decision to approve the facilities "procedurally defective" and the hearing that preceded the issuance of the permits a "procedural travesty." He faulted the Hearing examiner for denying cross-examination of same-side parties' witnesses. He found that the Board of Health failed to make its air quality standards determination based on best available technology and failed to make any determination as to ground water standards.

Finally, he determined that there was not substantial credible evidence supporting the determination that the proposed plant represents the minimum environmental impact. As to the issue of need, he remanded the case back to the Board of Natural Resources to determine whether less environmental impact would result from burning coal at the mine-mouth and transmitting power as opposed to shipping coal where it would be used. He also said the Board should consider the relative energy efficiency of both methods, rather than just the economic impacts.

The applicants filed an immediate appeal and asked for an expedited hearing, which both Boards of Health and Natural Resources joined. The applicants attached an affidavit from Joe McElwaine reiterating the mantra the applicants had relied upon virtually from the beginning: failure to approve the plants will have disastrous effects for the state and region if the construction of the plants is delayed. The Court set a hearing on the appeal for March 28th, 1978. Leo Graybill chastised the appeal as a "sham and an affront to the integrity of the Montana Supreme Court." He contended that "a case with a record of this magnitude should not and could not be submitted to the court in such a wholesale fashion, nor need it be so considered."

Following the hearing, the Supreme Court stayed operation of Judge Bennet's ruling. Hearing the appeal were Justices Harrison and Shea with district judges Bernard Thomas and William Coder sitting in for the recused Justices Haswell and Sheehy. As an historical footnote, Judge Thomas was the ultra-conservative Republican attorney that Francis Bardanouve defeated by a thin margin of 129 votes in his first legislative race. He was later appointed to the district court bench. The Supreme Court voted 3–2 with Harrison, Thomas and Daly voting in favor of issuing the stay, and Justice Shea and Judge Coder voting no. Coder issued a stinging dissent accusing the majority of placing its reliance on McElwaine's uncross-examined affidavit. Justice Daly responded that Coder's dissent went beyond the right (to dissent) with his remarks. He implied that Coder had taken his position "to gain the huzzas of thousands of the daily praise of all the papers which come from the press."

Justice Shea, who ran for the Court on the premise that Montana Power had a headlock on the Court, also dissented. In his dissent, he surmised that the majority was defeating one of the major purposes of the Siting Act by allowing construction to proceed when a district court had determined that the license to construct was improperly issued. Nonetheless, Judge Bennett's decision was stayed, and the Court would consider an expedited briefing schedule.

On October 25th, 1978, the Supreme Court held oral argument on the appeal from Judge Bennett's order. Leo Graybill argued that the Siting

Act was meant to force the best energy options for Montana, not necessarily the best power plants. Graybill analogized the requirements of the Act to transportation considerations. argued that the best wagon has been built to fulfill transportation needs when there may be a better means of transportation than a wagon. I argued that the applicants had foreclosed consideration of any options by setting their minds on Colstrip and a particular design for the plant without ever considering any other scenario.

Bill Belllingham accused the opponents of staging a "charade" and a "ruse" from the beginning in their insistence on cross-examining all witnesses. He called Judge Bennett's ruling as being "more impressed with form than substance." Jack Peterson claimed that Judge Bennett had predetermined the outcome of the case and ignored facts counter to his preconceived ideas.

While working to maintain a law practice when the legislature was not in session, and running for re-election, I lost my seat to a moderate Republican rancher from the Helena Valley, Gene Donaldson. When the Legislature re-convened in January of 1979, Rep. Ann Mary Dussault, a Missoula Democrat, succeeded me as Majority Leader.

Shortly before the November 1978 elections, Frank Morrison, who had filed against John Harrison for his seat on the Court, criticized Harrison's last-minute campaign ad containing inappropriate endorsements. As an example, Morrison cited the endorsement of William Coldiron, a Butte Attorney. Coldiron was not a practicing attorney but was vice-president of the Montana Power Company. Moreover, claimed Morrison, five others of the 16 lawyers named in the ad did a significant amount of legal work for MPC. Among the other attorneys were Jack Peterson's partner J.J. McAfferty and Bill Bellingham, both of whom were representing the applicants in the Colstrip appeal pending before the Supreme Court. Morrison, who was soundly beaten by Harrison in the primary, lost the general election by less than 6,000 votes. Harrison would remain on the Court.

On December 8th, 1978, NPRC and the Tribe filed a motion asking that Justice Harrison be removed from consideration of the Colstrip case. The basis for the motion was an affidavit that Harrison and Bellingham had an *ex parte* conversation outside the courtroom after oral argument on the Colstrip appeal. The opponents were unwilling to have the case decided by a court conducting itself as described in the affidavit.

Shortly after filing the motion, Justice Sheehy removed the motion from the Clerk's file. He claimed that the Court wanted to review the motion before it was made public. On December 12th, Chief Justice Haswell summoned Graybill and me to his office. During the meeting, Justice Haswell admitted that Bellingham had engaged in a hallway

conversation with Justice Harrison inquiring about "how the money was coming in" in relation to Harrison's campaign.

The Associated Press obtained a copy of the motion and asked Chief Haswell whether it had merit. The Chief told the AP reporter that he investigated the matter and found no merit in them. Nonetheless, the ultimate ruling of the Court on the Colstrip appeal bore witness to the merits of the motion. Justice Harrison should not have participated in the decision on the appeal.

In January 1979, the 46th Legislative Assembly convened and several bills amending the Siting Act were introduced. The Democratic majority was now down to 54, with 45 Republicans and one former Republican who had been elected as an Independent. Fueled by the extended controversy over the permitting of Colstrip Units 3 and 4, Rep. Tom Conroy, a conservative Democrat from Hardin, introduced HB 452 which retroactively exempted Units 3 and 4 from the Act. As introduced, the bill operated to nullify any court or administrative decision involving Units 3 and 4. The bill was amended in committee to permit the Supreme Court to decide the appeal of Judge Bennett's ruling, but forbade the Court from rejecting the plants based on "procedural irregularities." The House passed the Bill on a 53–47 vote.

In response to the vote, House Majority Leader Dussault charged that control of Montana was bound to revert to out-of-state industrial interests when the Legislature "sits back while the corporations make an end run around the law." She continued:

> House Bill 452 is one of the ugliest moves I have ever seen by a utility or corporation to circumvent the law and influence the passage of special interest legislation. It takes us back to the days when the companies not only controlled the press, but the legislature, too. For years King Copper governed this state from the Anaconda boardroom in New York. And now King Coal, led by the Montana Power Company and a band of out-of-state energy companies, has moved on our state like a vulture. Montana's history reeks of exploitation by outsiders who profit at our expense. I resent these impacts on Montana's history and I resent their actions in this Legislature.

When the Bill was heard in the Senate, Wally McCrae, one of the founders of NPRC, opposed the Bill: "We've fought long, and we've fought hard and we've fought fairly. This legislation has been touted as an end to the struggle. If it is, it's a slick, quick solution. It isn't a fair

solution." The Bill passed the Senate and was sent to Governor Judge for approval. The Golden Age was ending.

The very last day the Governor could veto the Bill or let it take effect was April 10, 1979. That same afternoon, by a 3–2 majority, led by Justice Harrison, the Supreme Court issued a ruling remanding the case back to the administrative agencies to cure certain procedural irregularities. The agencies were ordered to determine whether the type of coal to be burned in the plants would cause the least environmental impact, and whether it was better from an environmental standpoint to burn coal at the mine mouth or ship it to the place where the power is needed. On the same day Governor Judge vetoed House Bill 452. The next day, the House voted to uphold the veto.

Justice Shea issued a vituperative dissent to the substance of the ruling and the way the issuance of the decision was handled. He wrote:

> Just today, I learned the opinion was going down—today. Only yesterday, one of the members of the Court, at the expense of the state, chartered a plane to take the opinion to each of the district judges so that their signatures could be obtained. The politics behind the urgency of putting this opinion down in this fashion are not something that any court should be proud of. I know approximately a month to a month and a half ago the governor and or one of his agents talked to a member of this court involved in this case and expressed concern about the political bind in which the governor was being placed. The obvious intent was that it would sure be nice if this court could somehow get the governor off the hot seat by speeding up our decision. Undoubtedly putting our opinion down today will help considerably in helping the governor reach the "right political decision." To me this entire process is shocking.

As to his substantive criticism, Judge Shea said:

> Where in the law may I ask does it give this court the power to exercise continuing jurisdiction over governmental agencies once we have remanded the case to them for further determination. There is nothing in the

> Administrative Procedure Act which authorizes this court to tell any agency how soon it may act after a remand from this court….Here we have told the agency to act and get the results back to us within 90 days. This is judicial usurpation at its worst.

Reading the proverbial "hand-writing on the wall," NPRC and the Tribe filed a motion for rehearing. Picking up on Justice Shea's dissent the opponents argued that the court acted unconstitutionally in maintaining continuing jurisdiction. The ruling was contrary to proper judicial review and cut the district court out of its proper role in consideration of the administrative agency decisions.

While the motion for rehearing was pending, the EPA approved the Colstrip operating plans determining that the new pollution control equipment could meet present federal air-quality standards. The EPA decision cautioned, however, that the new scrubbers would not permit the plants to meet the revisions of the standard not in effect when the applications started. On May 23rd, 1979, the Montana Court denied the request for rehearing with Justice Shea the lone dissenter.

On June 1st, 1979, the Board of Natural Resources issued new findings, again approving the application to build the plants. On June 15th, the Supreme Court scheduled a hearing for June 25th, to hear the parties argue whether the amended decision of the Board complied with the Court's remand order. At the June 25th hearing Bellingham, noting the date the original application was filed in 1973, said: "Somewhere along the line there has to be an end to the litigation." Graybill and I argued that we should have been permitted to present new evidence since the construction plans had significantly changed during Bellingham's "six years of litigation." I argued that we should have been given the opportunity to comment on the adequacy of the new findings. Judge Shea, from the bench, agreed, noting that it would be a denial of due process to consider these new findings without giving us the opportunity to challenge them.

On June 27th, the Court issued an order giving the opponents ten days to file written arguments against the new findings—but to the Court, not the Board. Justice Shea again dissented calling the utility consortium's arguments that the Court could review the findings without the opponents' participation disingenuous: "This is hardly an admirable position for such huge corporations which are always interested in due process of law—their brand of due process." Shea also issued an ominous prediction. He said the entire handling of the case indicates to him that the Supreme Court's majority decision to eventually approve the Colstrip project is a "forgone conclusion."

On September 17th, 1979, the Court, in a 3–2 decision, authored by Justice Harrison, ruled that the state Boards had cured their procedural defects and the opponents' arguments to the contrary were, without merit. Accordingly, the decisions of the Boards of Natural Resources and Health were affirmed. As to the substantive findings on the critical need question, the Court accepted the Board's wholly unsupported conclusion that it would be better to generate the electricity at the coal fields than shipping the coal to the place of use of the energy. Nonetheless, this ruling concluded the first, and, as it turned out, the only major facility approval contest under Bardanouve's Siting Act.

The political stars aligned themselves to produce an unprecedented array of environmental protection measures enacted between 1971–1979, but how did the citizens of Montana benefit from these laws? How did the passage of MEPA improve the lives of our children and their children? Did the Siting Act fulfill Bardanouve's dream, and was anything positive derived from the Colstrip proceeding? Did we, in fact, protect Montana's natural resources from the ravages of corporate exploitation? There is no easy, straightforward answer to these questions.

Although George Darrow's MEPA provided a framework by which citizens could resist the consequences of the resource extraction industry, the judicial interpretation of the Act failed to provide a substantive handle for controlling environmental degradation. Francis Bardanouve's Siting Act was an idealized experiment in controlling economic development of coal reserves, which would have minimized air and water quality pollution and instituted a basis for sending coal and not energy out of Montana. But the cost and length of the administrative process generated by the approval of Units 3 and 4 at Colstrip fueled the arguments of those who believe industry should be left to its own devices unfettered by government regulation.

As Francis intended, the staff of the Departments of Natural Resources and Health performed a fact-based investigation to determine whether the environmental risks associated with constructing a large energy production facility in Montana were worth taking. And the utilities paid the costs of this investigation. The hearing process gave all interested parties an opportunity to weigh in on the siting decision, which was previously made in the boardrooms of the investor-owned utilities. Three hundred and nine witnesses testified during the hearings.

But in the long run, the Siting Act did not serve to stop the construction of the plants. As politics produced these environmental protections, so too did politics thwart the effective administration of the laws. In one catastrophic decision, all the substantive and procedural defects noted in Judge Bennett's Colstrip ruling were for naught. By a narrow,

politically motivated decision, the construction of the plants was given the green light. The plants were built, the cost was reflected in the Power Company's rate base, the plumes of carbon-dioxide caused long-term climatological events, and utility investors gained enormous profits from the sale of power to our neighbors. So, in the long term, the stated purpose of the Siting Act—to determine, based on facts, whether Montana needed to suffer the effects of burning coal at the mine mouth—failed. It failed because governmental decisions are rarely based on facts, but Francis knew that to be true, and never had any regrets about the efficacy of the most important bill of his career.

Atmospheric warming was not a commonly recognized phenomenon in 1973. Scientists knew, however, of the dangers of carbon dioxide emissions, and knew that the burning of fossil fuels to make electricity produced tons of heat-trapping pollution. Francis Bardanouve was unaware of the implications of burning Montana coal on a world-wide basis, but he had the prescience to understand that the impact in Montana would be enormous. His Siting Act armed state policy makers with the ability to limit the in-state impact of energy production from fossil fuels. As the foregoing discussion reveals, state policy makers opted not to use those tools.

Forty-five years later, the cumulative effect of carbon-dioxide emissions has caused the average global temperature to increase at the fastest rate in recorded history. All but one of the eighteen hottest years in the record books have occurred since 2000. The Earth's rising temperatures have caused more frequent droughts and accompanying forest fires, heavier rainfall and more powerful hurricanes. States served by the Colstrip generation facilities, finally recognizing the consequences of burning fossil fuels, have imposed restrictions on utilities in an attempt to end reliance on burning coal. Four of the five partners in the Colstrip project have either gone bankrupt or divested themselves of their interest in the Colstrip plants. Northwestern Energy, the successor to the Montana Power Company, was left scrambling to find the capital to continue operating the plants and deal with the impending clean-up that follows closure.

The hottest piece of legislation to come before the 2019 legislature was a bill to bail out the owners of the Colstrip facilities for the financial disaster they experienced as their original partners left the consortium. Northwestern Energy proposed a plan to purchase outstanding shares in the plant and place the costs of the purchase in its rate base. But the authorizing legislation failed: One of the most conservative legislative bodies in the recent history of the State refused to provide relief to

the Colstrip owners. Francis was not a "told-you-so" kind of guy, but his spirit is out there somewhere enjoying the moment.