

MINUTES

**MONTANA SENATE
59th LEGISLATURE - REGULAR SESSION**

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN MIKE WHEAT**, on March 17, 2005 at 8:05 A.M., in Room 303 Capitol.

ROLL CALL

Members Present:

Sen. Mike Wheat, Chairman (D)
Sen. Brent R. Cromley (D)
Sen. Aubyn Curtiss (R)
Sen. Jon Ellingson (D)
Sen. Jesse Laslovich (D)
Sen. Jeff Mangan (D)
Sen. Dan McGee (R)
Sen. Lynda Moss (D)
Sen. Jerry O'Neil (R)
Sen. Gerald Pease (D)
Sen. Gary L. Perry (R)
Sen. Jim Shockley (R)

Members Excused: None.

Members Absent: None.

Staff Present: Valencia Lane, Legislative Branch
Mari Prewett, Committee Secretary

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

Committee Business Summary:

Hearing & Date Posted: None.
Executive Action: SJ 5; HB 201; HB 100; HB 46; HB
409; HB 420; HB 425; HB 473; HB
488; HB 520; HB 693

EXECUTIVE ACTION ON SJ 5

{Tape: 1; Side: A; Approx. Time Counter: 5.1 - 11.3}

Discussion: SEN. BRENT CROMLEY, SD 25, said that his concern was that the SJ 5 study of truancy seemed to be centered in Great Falls, and he saw no statewide interest in studying the issue.

SEN. AUBYN CURTISS, SD 1, agreed, saying that a lot of statistics were already in existence. She questioned whether SJ 5 would be duplicating the work that has already been done and how productive it would be even if the study were conducted.

Motion/Vote: SEN. LASLOVICH moved to RECONSIDER the Committee's action on SJ 5 and remove it from the TABLE. Motion passed on a 7 to 3 voice vote with SENATORS O'NEIL, MCGEE, and CURTISS voting nay.

Motion/Vote: SEN. WHEAT moved that SJ 5 DO PASS. Motion carried on a 6 to 4 voice vote with SENATORS CURTISS, MCGEE, MOSS, and O'NEIL voting nay.

EXECUTIVE ACTION ON HB 201

{Tape: 1; Side: A; Approx. Time Counter: 11.3 - 14.7}

Motion: SEN. JEFF MANGAN, SD 12, moved that HB 201 BE CONCURRED IN.

Discussion: SEN. WHEAT said that HB 201 would extend the 2003 appropriation from the Coal Severance Tax Permanent Fund for lawsuits related to the Clark Fork River Drainage.

SEN. DANIEL MCGEE, SD 29, said that in 1995, he was assigned to a Committee that oversaw the Clark Fork River Drainage lawsuit. The Committee was told that the total amount of dollars that the state stood to gain was \$750 million. That amount remained the same, session after session, until the 2005 Session, when the figure decreased to \$215 million. The lawsuit has been ongoing for 22 years, and it is not settled yet. He felt enough was enough.

{Tape: 1; Side: A; Approx. Time Counter: 14.7 - 17.9}

SEN. MANGAN said that the Department could have spent the \$650,000 appropriation in the last biennium and ask for more. It has been good stewards of the money, and it has always been

repaid. He felt that if HB 201 is not passed, the state may lose the \$220,000 that the Department has spent to date. It sounds as if the lawsuit is close to an end, and there is a good amount of money to be regained. He saw no drawbacks to passing HB 201.

SEN. JESSE LASLOVICH, SD 43, said that HB 201 is very important to the people in his area. The area east of Anaconda and all of the area surrounding the Anaconda Smelter is completely devastated. Anaconda's goal is to try to clean it up in hopes of seeing green on the hills one day. As a result of the appropriation in HB 201 for litigation, the money is cleaning up the Anaconda area. The extension is needed, and it would be a terrible injustice by not going forward with HB 201.

{Tape: 1; Side: A; Approx. Time Counter: 17.9 - 20.6}

According to a report from the Department, **SEN. CURTIS** said that in 1983, the state filed a natural resource damage lawsuit. In 1999, the state settled several portions of the lawsuit receiving \$215 million. About \$130 million is earmarked to restore or replace the injured natural resources between Butte and Milltown Dam near Missoula. She felt that the concerns that **SEN. LASLOVICH** raised were being addressed. She stated further that in early 2000, the state finalized the criteria and procedures for spending \$130 million of the settlement funds and have established a grant process. To date, the Department has only awarded \$29 million of restoration funds to 42 projects, leaving a lot of money in the pot. The Department is not lacking in money, and it is drawing a significant amount of interest on it that could be used for litigation purposes.

SEN. LYNDA MOSS, SD 26, said that it is critical that people understand the issues surrounding the lawsuits as the state considers its natural resources and the environmental impacts on the development of them. Lawsuits take time and resources, and it is important that the state send a message to people that it is dedicated to ensuring the wise use of those resources for future generations.

SEN. WHEAT said that litigation such as this is extremely complex, and big companies do not roll over and give states a lot of money simply because they file a complaint. The money that the state settled for was deposited into a restoration trust fund, and it could not be used for litigation expenses. Having gone this far, the Legislature needs to give the state the opportunity to complete the settlement process.

Vote: SEN. MANGAN'S motion that HB 201 BE CONCURRED IN carried on an 11 to 1 voice vote with SEN. CURTISS voting nay. SEN. LASLOVICH will carry the bill.

EXECUTIVE ACTION ON HB 100

{Tape: 2; Side: B; Approx. Time Counter: 0.5 - 5.2}

Motion/Vote: SEN. CURTISS moved that HB 100 BE CONCURRED IN. Motion carried on a 7 to 5 roll call vote. SENATORS PEASE, MANGAN, MCGEE, ELLINGSON, and WHEAT voted nay. SEN. LASLOVICH will carry the bill.

EXECUTIVE ACTION ON HB 46

{Tape: 2; Side: B; Approx. Time Counter: 5.2 - 7.5}

Motion/Vote: SEN. MCGEE moved that HB 46 BE CONCURRED IN. Motion carried unanimously by voice vote. SEN. WHEAT will carry the bill.

EXECUTIVE ACTION ON HB 409

{Tape: 2; Side: B; Approx. Time Counter: 7.5 - 13.8}

Motion: SEN. PERRY moved that HB 409 BE CONCURRED IN.

Discussion: SEN. MANGAN said that HB 409 does not affect federal jobs where the Department of Transportation still requires urine samples for over-the-road truckers. Even if the companies wanted to use oral swabs, they could not because federal regulations do not allow that. He supported HB 409.

SEN. WHEAT asked if the bill would reduce costs. SEN. MANGAN said that it will reduce costs somewhat. If a test is sent to a laboratory, the costs are commensurate with a urine test, but the procedure is much simpler.

Vote: SEN. PERRY'S motion that HB 409 BE CONCURRED IN carried unanimously by voice vote. SEN. MANGAN will carry the bill.

EXECUTIVE ACTION ON HB 420

{Tape: 2; Side: B; Approx. Time Counter: 13.8 - 15.1}

Motion: SEN. MCGEE moved that HB 420 BE CONCURRED IN.

Discussion: SEN. MCGEE provided a letter from Shirley Brown, Administrator, Child and Family Services Division, Department of Public Health and Human Services (DPHHS), regarding the withdrawal of REP. PAT WAGMAN'S, HD 62, amendments to HB 420.

EXHIBIT (jus59a01)

{Tape: 2; Side: B; Approx. Time Counter: 15.6 - 15.7}

SEN. O'NEIL asked why the amendments were disliked. Ms. Brown said that the amendments expand the scope of HB 420. Currently, there is a placement priority for extended family members if children are adjudicated based upon abandonment. The amendments extended the placement priority to children who are adjudicated, abused, and neglected, expanding the placement priority to all children within the system.

Ms. Brown added that there are multiple reasons why the Department does not feel it is a good idea. First, placement with extended family members is addressed in multiple places in statute. Second, it may increase the workload. Currently, when a social worker is working with a family and places with one extended family member, if the child is doing well, the Department does not look for more extended family members. The families that the Department works with are, generally speaking, not the most harmonious families in the world to begin with. The Department believes that when there is already dissension and conflict within a family, the amendments would increase that conflict because it would put the Department in the position of dueling relatives.

SEN. PERRY pointed out what he considered inconsistent language within HB 420. He said that he was trying to sort out the language "a" member, "the" member, "any" denied family member, and "that" family member. For consistency and privacy reasons, the language should not be "any".

Motion: SEN. PERRY moved a CONCEPTUAL AMENDMENT to strike "any" and insert "that" in two places.

SEN. MCGEE opposed the motion because "any" family member is an appropriate word to use as a concluding modifier in the sentence. The proposed amendment may make the language uniform, but it does not lend itself to clarity the law.

SEN. PERRY said that there could be multiple denied family members. In that case, "any" could refer to any previous or

subsequent denied family members. For each specific instance, HB 420 is applying to "that" family member, at this moment, that has been denied, not previous or subsequent denied family members.

Ms. Lane was of the opinion that the way HB 420 was drafted works adequately and does not need to be changed.

Vote: SEN. PERRY'S CONCEPTUAL AMENDMENT failed on a 5 to 7 roll call vote with SENATORS O'NEIL, SHOCKLEY, PERRY, LASLOVICH, and CURTISS voting aye.

Vote: SEN. MCGEE'S motion that HB 420 BE CONCURRED IN carried on an 11 to 1 voice vote with SEN. MANGAN voting nay. SEN. MOSS will carry the bill.

EXECUTIVE ACTION ON HB 425

{Tape: 2; Side: B; Approx. Time Counter: 2.8 - 15.3}

Motion: SEN. SHOCKLEY moved that HB 425 BE CONCURRED IN.

Motion: SEN. SHOCKLEY moved the approval of amendment #HB042501.apm.

Discussion: **Ms. Lane** said that HB 425 currently provides that the governmental entity can receive an award of attorney fees. HB042501.apm amends the bill to state that the prevailing party would receive the attorney fees.

SEN. LASLOVICH said that although his name is on the amendment, it was not his idea. He was approached by someone who said that it should be the prevailing party receiving the attorney fees, and he agreed. There was some concern that, with the amendments, HB 425 will go back to the House, and the House would reject the amendments and not vote for the bill. He did not think that would happen.

SEN. ELLINGSON said that under different circumstances, he would vote for the amendment. However, he was concerned with what was going on in the House. HB 425 is very important consumer protection legislation, and it needs to be passed.

SENATORS PERRY and **O'NEIL** felt that the bill would not have a problem in the House, while **SEN. MANGAN** agreed with **SEN.**

ELLINGSON.

EXHIBIT (jus59a02)

Vote: SEN. SHOCKLEY'S motion to approve amendment #HB042501.apm carried on a 9 to 3 voice vote. SENATORS ELLINGSON, WHEAT, and MANGAN voted nay.

Motion: SEN. LASLOVICH moved that HB 425 BE CONCURRED IN AS AMENDED.

Discussion: SEN. PERRY asked, if someone sues the state and the state wins, can the state collect attorney fees. SEN. WHEAT understood that under HB 425, it would be the state or county attorneys who are bringing the claims for violation of unfair trade practices and consumer protection laws who would recover attorney fees. However, with the amendment, if they sue someone and lose, they may have to pay attorney fees to the other side because the fees go to the prevailing party.

SEN. MCGEE asked if the Attorney General's Office could be awarded attorney fees. Ms. Lane said, generally, attorney fees are not awarded except when the statute says that they can be. She was unsure but assumed that if a statute states that, in a particular kind of action, attorney fees can be awarded, they could be awarded to the state. In addition, she would not separate the Attorney General's Office apart from any other state agency. SEN. CROMLEY agreed with the assessment.

SEN. ELLINGSON added that attorney fees are not going to individual attorneys who are being paid by the state, therefore, they are not padding their salaries with fees that were awarded to the state. The money would go into the general fund unless the payment of the attorney fees came out of a special account.

Vote: SEN. LASLOVICH'S motion that HB 425 BE CONCURRED IN AS AMENDED passed unanimously on a voice vote. SEN. ELLINGSON will carry the bill.

EXECUTIVE ACTION ON HB 473

{Tape: 2; Side: B; Approx. Time Counter: 15.3 - 30.1}

Motion: SEN. MANGAN moved that HB 473 BE CONCURRED IN.

Discussion: SEN. CURTISS said that she has empathy for the people having to administer permits. However, with the potential for a really bad fire season, allowing recreational fires measuring less than 48 inches without a permit is a bad thing for the Legislature to do. There are, not only fire control laws, but also air quality provisions. Different jurisdictions have different regulations relative to air quality. She felt that HB 473 was sending a bad message.

SEN. MANGAN said that, according to testimony from people between Helena and Great Falls, permits are not needed for recreational fires in residential areas. In those areas, by the time anyone gets there to investigate, they only find out that manpower and time was wasted because the fire was simply a campfire in someone's back yard. HB 473 clarifies that if a person is going to burn weeds out of ditches that are located on residential land, the person needs a permit so that if smoke is seen, the county knows that it is a fire on residential land.

SEN. CROMLEY said that he had concerns about HB 473 during the hearing because it extends the restrictive zone to residential/commercial property, and there was no testimony from the counties or the state. He opposed HB 473.

SEN. PERRY asked under what conditions are people allowed to set forest fires, as provided for in HB 473. **SEN. WHEAT** said that it is existing law. A person can set a forest fire, but only if the person has a permit to do so. Forest fire is a general term.

Vote: **SEN. MANGAN'S** motion that HB 473 BE CONCURRED IN carried on a 10 to 2 voice vote. **SENATORS CROMLEY** and **CURTISS** voted nay. **SEN. LASLOVICH** voted aye by proxy. **SEN. MANGAN** will carry the bill.

EXECUTIVE ACTION ON HB 488

{Tape: 3; Side: A; Approx. Time Counter: 0.5 - 2.8}

Motion: **SEN. SHOCKLEY** moved that HB 488 BE CONCURRED IN.

Discussion: **SEN. CROMLEY** said that there were no proponents or opponents at the hearing, and there was indication that the penalty for political or civil liability has never been assessed.

Motion: **SEN. O'NEIL** moved the **SUBSTITUTE MOTION** that HB 488 BE TABLED. Motion passed on an 11 to 1 voice vote. **SEN. WHEAT** voted nay.

EXECUTIVE ACTION ON HB 520

{Tape: 3; Side: A; Approx. Time Counter: 2.8 - 10.2}

Motion: **SEN. SHOCKLEY** moved that HB 520 BE CONCURRED IN.

Discussion: **SEN. SHOCKLEY** explained that HB 520 encourages reporting of a serious sexual offense without the fear of being prosecuted for the lesser offense of minor in possession (MIP).

{Tape: 3; Side: A; Approx. Time Counter: 4.5 - 7.3}

SEN. MCGEE said that currently, the state has a minor in possession (MIP) law that says do not drink if a person is a minor. Testimony indicated that people go to parties, they drink, and then someone gets raped. HB 520 now wants to make someone safe from prosecution from the MIP so that the person can report the rape. He said that the Committee would be allowing that person to violate one law in order to report the second offense which was a consequence of the actions taken for violating the first law. **SEN. MCGEE** added that when a law is passed, he has a reasonable expectation that the law will be followed. He felt it unfair and ridiculous to say that it is okay to get drunk, and if the person gets raped, the person would be able to report it without having the penalty of the MIP.

SEN. CROMLEY said that HB 520 does not prevent the prosecution of the crime of MIP. It only indicates that the statements made by that person in reporting the more serious offense cannot be used against that person. If, in fact, the prosecuting authority wants to prosecute the MIP, there will be substantial ability for them to obtain evidence to prosecute the MIP.

{Tape: 3; Side: A; Approx. Time Counter: 7.3 - 10.6}

SEN. MANGAN said there is a drinking age of 21 because the state feels that children are not mature enough to handle alcohol. The Legislature passed a graduated driver's license because children do not make the best decisions. A number of laws were passed because the Legislature did not think that children have the abilities to make many decisions. Now, the penalty for MIP--a status offense--is rape. Because the person does not want to get into trouble for drinking, the person does not seek attention for the horrible offense of rape. Why would the Legislature want to discourage its young people from reporting heinous acts because they are afraid that they will get into trouble for drinking? Rape is too big a penalty for a status offense.

SEN. SHOCKLEY said that there are two types of immunity-- transactional and testimonial. Transactional immunity is, if a person did it and tells about it, the person is saved. Testimonial immunity says that any testimony given by a person cannot be used against the person to convict the person of the transaction at issue. If testimonial immunity leads to evidence

against a person, the evidence it leads to can also not be used against the person.

{Tape: 3; Side: A; Approx. Time Counter: 10.6 - 23/2}

SEN. LASLOVICH said that during the 2003 Session, he carried a bill that stated that if a person under age was not drinking, the person could not be issued an MIP, which, to him, was very logical. He hated underage drinking, but people do not live in a bubble. Children drink, period. His concern with HB 520 is that the underlying problem is that alcohol is the starting point. He is torn because he believes that the people should be reporting, but at the same time, he hates underage drinking.

SEN. CURTISS felt that the passage of HB 520 would simply grant immunity to people, and it would not prevent further rapes. She also felt that relieving people of the responsibility for their actions may contribute to many more rapes. She opposed HB 520.

SEN. MOSS felt that the testimony in support of HB 520 was very compelling in that young women, in particular, could come forward with a serious charge of rape--date rape being a significant problem among young people--and they would not have the fear of being prosecuted for a MIP.

SEN. SHOCKLEY said that the downside to HB 520 is that the child who is the subject of the rape is not going to worry about the \$50 MIP fine. They are going to worry about their parents knowing that they were drinking. He did not feel that HB 520 would do anything.

Vote: **SEN. SHOCKLEY'S** motion that HB 520 BE CONCURRED IN carried on a 7 to 5 roll call vote. **SENATORS O'NEIL, SHOCKLEY, MCGEE, PERRY,** and **CURTISS** voted nay. **SEN. MOSS** will carry the bill.

EXECUTIVE ACTION ON HB 693

{Tape: 3; Side: B; Approx. Time Counter: 6.3 - 29.8}

Motion: **SEN. CURTISS** moved that HB 693 BE CONCURRED IN.

Discussion: **SEN. CURTISS** provided information from **Gary Marbut, President, MT Shooting Sports Association,** and several press releases from the Violence Policy Center illustrating the deterrent effects of gun ownership.

[EXHIBIT\(jus59a03\)](#)

[EXHIBIT\(jus59a04\)](#)

[EXHIBIT \(jus59a05\)](#)

[EXHIBIT \(jus59a06\)](#)

Motion: SEN. O'NEIL moved to SEGREGATE amendment #2 from amendment #HB069301.apm.

[EXHIBIT \(jus59a07\)](#)

SEN. O'NEIL said that the language "but is not limited to" makes Section 3 of HB 693 broad, undefined, and unconstitutionally vague. He wanted to strike the language to show what displaying or showing includes.

SEN. SHOCKLEY was unsure whether the language made the section unconstitutionally vague and opposed the motion.

Vote: SEN. O'NEIL'S motion to SEGREGATE amendment #2 of amendment #HB069301.apm failed on a 5 to 7 roll call vote. SENATORS O'NEIL, MANGAN, WHEAT, LASLOVICH, and CURTISS voted aye. SEN. MANGAN voted aye by proxy.

Motion: SEN. O'NEIL moved to SEGREGATE amendment #3 from amendment #HB069301.apm.

Discussion: SEN. O'NEIL said HB 693 without the amendments states that a gun would have to be pointed directly at a person in order for the act to be wrongful. He felt that if a gun is pointed in his direction, it is wrongful.

Vote: SEN. O'NEIL'S motion to SEGREGATE amendment #3 from amendment #HB069301.apm failed on a 4 to 8 voice vote. SENATORS CURTISS, LASLOVICH, MANGAN, and O'NEIL voted aye. SEN. MANGAN voted aye by proxy.

Motion: SEN. O'NEIL moved to SEGREGATE amendment #4 from amendment #HB069301.apm.

Discussion: SEN. O'NEIL said if a person gets picked up and the person's firearm is confiscated and, through trial, they find out that the person was not guilty of the charge, amendment #4 would ensure that the person gets the firearm back.

Vote: SEN. O'NEIL'S motion to SEGREGATE amendment #4 from amendment #HB069301.apm failed on a 5 to 7 voice vote. SENATORS O'NEIL, CURTISS, PERRY, WHEAT and LASLOVICH voted aye. SEN. MANGAN voted nay by proxy.

Motion: SEN. O'NEIL moved to SEGREGATE amendment #5 from amendment #HB069301.apm.

Discussion: SEN. O'NEIL said that amendment #5 was written to address the concerns of those who had questions about private property. Amendment #5 states that an employer, except by written policy, may not prohibit an employee from keeping a firearm in a vehicle owned by the employee that is parked at the employee's place of work.

Vote: SEN. O'NEIL'S motion to SEGREGATE amendment #5 from amendment #HB069301.apm carried on a 9 to 3 voice vote. SENATORS MOSS, SHOCKLEY, and CROMLEY voted nay. SEN. MANGAN voted aye by proxy.

Motion: SEN. O'NEIL moved to SEGREGATE amendment #6 from amendment #HB069301.apm.

Discussion: SEN. O'NEIL said that currently, people are allowed to carry concealed weapons outside of the city limits. Amendment #6 would expand that law to state that a person has the right to carry the weapon but not the right to carry it to commit a criminal offense.

SEN. SHOCKLEY said that Section (2) of amendment #6 states that a felon can carry a concealed weapon.

Motion: SEN. O'NEIL withdrew his motion and moved to SEGREGATE and approve Section (1) of amendment #6.

Discussion: SEN. SHOCKLEY said that honest people should be able to carry a weapon without a permit. He supported Section (1) but not Section (2). SEN. WHEAT felt that if the state starts encouraging everyone to carry arms in self defense, then it will start having shootouts everywhere. He did not favor carrying a concealed weapon without a permit. SEN. SHOCKLEY believed that there was no correlation between honest law-abiding citizens carrying weapons and crime.

{Tape: 4; Side: A; Approx. Time Counter: 0.3 - 1.1}

SEN. PERRY said that HB 693 is, generally, a gun rights bill of which he is a supporter. However, the definitions of firearm and weapon is different. Weapons are used for military or police purposes, while firearms are totally different. If the amendment passes, the Committee is saying that anyone can carry weapons at any time which he finds to be troublesome because it deviates from a gun rights bill. SEN. SHOCKLEY said that SEN. O'NEIL was

working with existing language which was, no doubt, drafted by law enforcement. The language is designed to not protect the perpetrator of a crime by allowing the perpetrator to conceal a weapon. It is designed to repeal the concealed weapons statute.

Vote: SEN. O'NEIL'S motion to SEGREGATE and approve Section (1) of amendment #6 failed on a 6 to 6 tie vote. SENATORS O'NEIL, SHOCKLEY, LASLOVICH, PERRY, MCGEE, and CURTISS voting aye.

{Tape: 4; Side: A; Approx. Time Counter: 8.2 - 17.5}

Motion: SEN. CURTISS moved that HB 693 BE CONCURRED IN AS AMENDED.

Discussion:

Motion: SEN. PERRY moved to further amend HB 693 by striking "wrongful" from Page 1, line 21.

SEN. O'NEIL resisted the amendment because if a person shoves another person and the other person shoves back, the person who shoves back is assaulting the other person. But, because the person shoved first, he was unsure whether it was wrongful.

SEN. SHOCKLEY said that assault encompasses the malice necessary to make the assault a crime. Although wrongful assault is redundant, the Committee cannot be expected to correct all of the bad language.

Vote: SEN. PERRY'S motion to further amend HB 693 failed on a 3 to 9 roll call vote. SENATORS SHOCKLEY, PERRY, and LASLOVICH voted aye.

Discussion: SEN. MOSS said that almost 70% of the people in Montana live in urban communities. She felt it important to maintain legislation that requires people to have permits for concealed weapons.

{Tape: 4; Side: A; Approx. Time Counter: 17.5 - 17.6}

SEN. LASLOVICH said that, currently, people have the right to defend themselves. He said, if HB 693 is terribly written, the Committee should fix it not vote for it.

Motion: SEN. LASLOVICH made a SUBSTITUTE MOTION that HB 693 BE TABLED. Motion passed on a 7 to 5 roll call vote. SENATORS O'NEIL, SHOCKLEY, MCGEE, PERRY, and CURTISS voted nay.

ADJOURNMENT

Adjournment: 11:08 A.M.

SEN. MIKE WHEAT, Chairman

MARI PREWETT, Secretary

Transcribed by LOIS O'CONNOR

MW/mp

Additional Exhibits:

EXHIBIT ([jus59aad0.PDF](#))